Approved A W Douville 3-1-89
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

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

9:03 a.m./~~p.m.~~ on February 8, 1989 in room 526-S of the Capitol.

All members were present except:

Representative Lane - Excused

Committee staff present:

Jerry Donaldson - Legislative Research Department
Jim Wilson - Revisor of Statutes' Office
Kay Johnson - Committee Secretary

Conferees appearing before the committee:

Tom Hammond - Attorney, International Association of Machinists & Aerospace Workers

Chairman Douville called the meeting to order at 9:03 a.m..

Tom Hammond addressed the committee regarding vocational rehabilitation issues under the Kansas Workers' Compensation Act, attachment #1. He stated that the new law was a compromise where the injured workers were trading their rights to high monetary disability awards for rights insuring they would be returned to work at comparable wages if possible. He stated that what has actually occurred is that the injured worker's rights to disability compensations has been reduced and the Division of Workers' Compensation has not given injured workers the rights they traded for.

Chairman Douville asked Mr. Hammond if he could explain why that is happening. Mr. Hammond explained that with the interpretation that has come out of the Division of Workers' Compensation office since October 1988, the incentive for employers to put workers back to work is gone and any penalty for not doing so is also gone.

Representative Webb asked Mr. Hammond about the paragraph on page 2, attachment #1. Mr. Hammond said it was the interpretation from the Division of Workers' Compensation. If the physician's report indicates the worker has the ability to return to work then that's it, whether he/she actually has a job or not. If the worker has the ability to work then he/she is not entitled to vocational rehabilitation.

Chairman Douville asked if the intent of vocational rehabilitation was to restore the worker to the same ability as before, and the worker does indeed have that same ability, how can you ask for additional disability? Mr. Hammond responded that it doesn't do any good to give someone the theoretical ability to work if that person doesn't have a job. But, now employers are using this new interpretation to not give the worker a job back.

Representative Cribbs, citing his work experience at Boeing, explained the problem of workers getting hung up between two doctors and said this is an issue he would like to see addressed.

Representative Buehler asked if the physician says the worker has the ability to work and the employer does not take him/her back, doesn't that mean the employer has terminated the worker? Why does the employer do this, because then the worker is eligible for unemployment? Is this a benefit to the employer? Mr. Hammond explained that he couldn't answer that, but some employers are doing it.

John Ostrowski, lobbyist for the Kansas AFL-CIO, responding from the audience, stated that he has no problem with workers who are released with the same abilities but, workers released with some impairment who cannot return to their same job but can do another job at the same employer are not being offered jobs. That worker may not be entitled to vocational rehabilitation but now has no job. To the employer, the cost of unemployment is nothing compared to vocational rehabilitation.

Chairman Douville said that if the worker cannot return to the same type of employment then he/she is entitled to work disability. Mr. Ostrowski said no, the Division of Workers' Compensation has said it doesn't matter if the worker is back at work,

but rather, does the worker have the ability to perform work.

Chairman Douville said if the worker is returned to work at a different job with restrictions, then the worker is not able to return to the same or similar work, so he/she is entitled to work disability. Mr. Hammond said if the law was being interpreted that way he would be happy.

Representative Buehler asked if Mr. Hammond was saying that it is of greater benefit to the employer to terminate someone than to let that worker be injured on the job. Yes, responded Mr. Hammond, that is true.

Representative Whiteman said the committee could verify Mr. Hammond's testimony by asking the Division of Workers' Compensation to give the number of cases that have been filed under the new law and how many workers have been taken back to work.

Chairman Douville said what Mr. Hammond is saying is that under all circumstances the employer must guarantee an employee his/her job back. Mr. Hammond said he was not saying that, but rather, if the worker is released without restrictions the employer should take the worker back. And, if the employer can take the worker back with accomodations the employer should.

Representative Lawrence asked how to differentiate between large employers who can accomodate and small employers who cannot accomodate. Mr. Hammond responded that the small employer does not have to guarantee a job back, but when the employer can accomodate the worker then it should.

Representative Schauf said that if a worker is ready to return to work and the employer is taking applications for work comparable to the employees', what Mr. Hammond is finding is that the employer does not have to take the employee back.

Mr. Hammond indicated that he agreed with previous testimony from Bud Langston concerning the need for more control of vocational rehabilitation vendors.

Chairman Douville asked Mr. Hammond what he thought was the goal of vocational rehabilitation. Is it more than restoring to the employee the ability to return to a comparable wage? Mr. Hammond agreed, but said it is not working that way. Chairman Douville said if the worker is not taken back to work, then the worker can claim work disability. Mr. Hammond said that is not true, according to the interpretation from the Division of Workers' Compensation.

Representative Hensley, referring to a copy of the law, asked how the first rehabilitation goal (to return the employee to the same work for the same employer) relates to the interpretation from the Division of Workers' Compensation. Mr. Hammond said if the employee is released to return to work, with or without restrictions, and the employer does not take the worker back, the Division of Worker's Compensation is taking the position that the goal has been satisfied by showing the ability to perform work. This has been more prevalent in the last 3 (three) or 4 (four) months.

Mr. Ostrowski said that the efforts of rehabilitation need to go beyond saying the employee has the ability to perform work or earn a comparable wage. Rehabilitation means helping find work, helping prepare a resume, going on an interview with the worker, counseling, etc. His problem with the system is that efforts at rehabilitation have been cut off and he doesn't believe that was the intent of the law.

Unless there are objections by tomorrow afternoon, the minutes of January 26, 1989 will stand approved as presented.

Chairman Douville said comments from the Director of the Division of Workers' Compensation will be heard at a later date.

The meeting adjourned at 9:50 a.m.. The next meeting of the committee is on call of the Chairman at 9:00 a.m. in room 526-S.

GUEST LIST

COMMITTEE: HOUSE LABOR & INDUSTRY DATE: February 8, 1989

NAME	ADDRESS	COMPANY/ORGANIZATION
Richard Hiser	Topeka	KTRA
Robert A. Anderson	Topeka, Ks	Director, Div. of Workers Comp
Richard L Thomas	Topeka	Rehabilitation Div. Workers Comp
Tom Hammond	Wichita	Machinists
Tony Lathrom	Topeka	Ks Chamber of Commerce & Ind
Wayne Maichel	Top	KS. AFL-CIO
John M. Ostrowski	Topeka	Kansas AFL-CIO
BURR SIFERS	M.H. KS.	

ANALYSIS OF VOCATIONAL REHABILITATION ISSUES UNDER THE KANSAS WORKERS' COMPENSATION ACT

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The 1987 Kansas Legislature changed the workers' compensation laws in Kansas placing an emphasis on returning injured workers back to work at comparable wages. This compromise legislation was agreed to by labor knowing that injured workers were trading their rights to high monetary disability awards for rights insuring they would be returned to work at comparable wages if at all possible.

In reality, what has actually occurred is that the injured worker's rights to disability compensation has been dramatically reduced but the second half of the trade off is not occurring. The implementation and interpretation of the vocational rehabilitation law by the Division of Workers' Compensation has not given injured workers the rights that they traded for.

The major problem areas in the vocational rehabilitation statutes are:

1. The Division of Workers' Compensation's misinterpretation of the vocational rehabilitation law.
2. The need for more control and policing of vocational rehabilitation vendors.

INTERPRETATION OF VOCATIONAL REHABILITATION STATUTES

The 1987 Legislative changes were passed to encourage employers to take injured workers back to work at comparable wages with or without accommodations. The first five priorities of K.S.A. 44-510g discuss returning the injured worker back to the same employer. (See attached copy of K.S.A. 44-510g.)

The theory behind this statutory change was that the employer would be encouraged to take the injured worker back to work because by doing so he would be limiting the amount of workers' compensation benefits that would be paid to the injured worker. The Division of Workers' Compensation's interpretation of the statutes that an employer does not need to take an injured worker back to work but need only show he theoretically could do that work completely circumvents the intent of the vocational rehabilitation statutes. The position of the Division of Workers' Compensation is as follows:

> "The theme and goal of vocational rehabilitation in workers' compensation is to restore to the employee the ability to return to comparable wage work. If the physicians' reports indicate that the employee still has the ability to return to the same job and earn comparable wages, there is nothing to restore to the employee. The fact that the employer does not want to re-employ the claimant does not alter the fact that the employee has the ability perform the work without accomodation." (Division of Workers' Compensation Seminar, 1988.)"

The Division's interpretation allows the employer to limit the work disability an injured worker can obtain but does nothing to get the injured worker back to work in comparable wages. In essence, this interpretation means that injured workers have given up their rights to workers' compensation disability benefits and have received nothing in return.

The "ability" to perform work at comparable wages must be shown by the injured worker actually having a job earning comparable wages. The fact that a vocational rehabilitation vendor

says that an injured worker theoretically can do 300 jobs at comparable wage does nothing to promote the intent of the statute of returning the worker back to actual gainful employment. While there may be cases when an employer alleges that a worker is refusing to work and the theoretical ability of the worker does become an issue, generally this concept cannot be used in a system that was made to actually place injured workers back to gainful employment.

No employer is going to accommodate an injured worker back to work if there is no incentive for him doing so or no penalty for him not doing so. The large majority of injured workers that get into the vocational rehabilitation system can and should be accommodated back to work at the same employer. The Division's theoretical application of the abilities' test totally circumvents the intent of this legislation.

VOCATIONAL REHABILITATION VENDORS

This committee has already heard testimony from others, including Bud Langston, former Workers' Compensation Administrator for the state, indicating there is a definite need for more control of the vocational rehabilitation vendors under the Kansas Workers' Compensation statues. At the present time, many of the vocational rehabilitation vendors are directly or indirectly tied to insurance companies, which promotes unethical conduct and taints the reports that are provided by these voc-rehab vendors.

Many of the members of this committee are aware of the Howard case in Wichita concerning a vocational rehabilitation

vendor and the employer's attorneys. Although what appeared to happen in that case hopefully is not widespread throughout the state, varying degrees of unacceptable conduct is happening throughout the system. It is apparent that many vocational rehabilitation vendors are catering to the insurance companies that hire them and pay their bills and not properly evaluating the injured worker's needs.

The present situation of having the insurance company select the vocational rehabilitation vendor is similar to having the wolf guard the henhouse. This situation must be alleviated with their being no ties directly or indirectly between the insurance company and the vocational rehabilitation vendor. The look of impropriety or the chance of impropriety allowed by the system is completely unacceptable.

At the present time, vocational rehabilitation reports are prepared and sent to the respondent's attorneys and apparently corrected or changed without the claimant having any knowledge of the process. If vocational rehabilitation vendors are to have such great powers and control over the injured workers and their future, they must be like judges and not be influenced or tainted in any way by any party in the process. This is why it would appear that the best way to alleviate these improprieties would be to have direct appointment and control over the vendors by the Director's office.

Vocational rehabilitation vendors must be separated from insurance companies so that neither the insurance company, the

employer, the respondent's attorney or the claimant's attorney is able to have unfair advantage because of who the vocational rehabilitation vendor is. It would seem that the best way to alleviate this problem would be to have the vendors appointed by the Division of Workers' Compensation on some type of rotational basis so that insurance companies and their attorneys are not in a position to shop for a vocational rehabilitation vendor who will give them the report that they want.

CONCLUSION

Labor is ready to continue to stand behind the 1987 workers' compensation legislative changes if the bargained-for trade off of work disability benefits for work at comparable wages occur. The only thing needed to fulfill the legislative intent is for the Director's office to correctly interpret and implement the vocational rehabilitation statutes.

The vocational rehabilitation vendors must be policed and controlled by the Director's office so there is not even a hint of any impropriety. The Director decides who can be a vendor and obviously has the authority to control those working as vendors and to revoke the privileges of those vendors who misact.

All of these problems can be alleviated by actions in the Director's office. If the Director refuses to act or feels that he cannot, then legislative changes are needed. Labor cannot and will not accept half of what they bargained for in 1987.

the rehabilitation administrator shall have the duties of directing and auditing medical, physical and vocational rehabilitation of employees in accordance with the provisions of this section.

(c) An employee who has suffered an injury shall be entitled to prompt medical and physical rehabilitation services as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, and as provided in this section.

(d) When as a result of an injury or occupational disease which is compensable under the workers compensation act, the employee is unable to perform work for the same employer with or without accommodation or for which such employee has previous training, education, qualifications or experience, such employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, and as provided in this section.

(e) (1) If the employee has remained off work for 90 days or if it is apparent to the director the employee requires vocational rehabilitation services and, in either case, if approved rehabilitation services are not voluntarily furnished to the employee by the employer, the director, on such director's own motion or upon application of any party, may refer the employee to a qualified public agency, if the employee is eligible, or private agency or facility, or the employer's rehabilitation service program, if qualified, for evaluation and for a report of the practicability of, need for, and kind of service, treatment, training or rehabilitation which is or may be necessary and appropriate to render such employee able to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto. The costs of such evaluation and report shall be at the expense of the employer. Each report shall contain a rehabilitation plan which shall adhere to the following priority listing of rehabilitation goals:

(A) The first priority is to return the employee to the same work for the same employer;

(B) the second priority is to return the employee to the same work, with accommodation, for the same employer;

(C) the third priority is to return the employee to other work, with or without accommodation, for the same employer;

(D) the fourth priority is to return the employee to the same work for another employer;

(E) the fifth priority is to return the employee to other work for another employer; and

(F) the sixth priority is to provide vocational rehabilitation, reeducation and training.

(2) Within 50 days after such referral, the report shall be submitted to and reviewed by the rehabilitation administrator and copies shall be furnished to each party. If all parties do not agree with the report, the rehabilitation administrator shall confer with the rehabilitation service provider, the employee and the employer to review the evaluation and the proposed rehabilitation plan in the report. The rehabilitation administrator shall ensure the evaluation and the rehabilitation plan are objective and reasonable and the rehabilitation goal is reasonably obtainable. Within 20 days after the initial review of the report, the rehabilitation administrator shall deliver copies of the report, together with the rehabilitation administrator's recommendations and any revisions of or objections to the rehabilitation plan, to each party, to the director and to the assigned administrative law judge, if there is one. Within 10 days after receipt of such report, any party may request a hearing before the director on any matter contained in the report or any such recommendations or revisions. After affording the parties an opportunity to be heard and present evidence, the director:

(A) May order any treatment, or medical and physical rehabilitation, as recommended in the report or as the director may deem necessary, be provided at the expense of the employer;

(B) may order the employer to pay temporary total disability compensation, com-