

Approved

A. W. Douville - 3-28-89
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry

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

9:10 a.m./~~p.m.~~ on March 1, 1989 in room 526-S of the Capitol.

All members were present except:

Representative Hensley - Excused
Representative Patrick - Excused

Committee staff present:

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

Conferees appearing before the committee:

Chairman Douville called the meeting to order at 9:10 a.m.

HB 2474 - employment security law; services performed by free lance pilots does not constitute employment.

Representative Schauf made a motion to report the bill favorably out of committee. Representative Roper seconded the motion. Chairman Douville asked for discussion. Representative Webb stated his concern over adding more exemptions. If groups of people are going to continue being exempted, then he feels an interim study should be made to determine the status of independent contractors. The motion carried.

HB 2506 - workers' compensation, group-funded pools, reimbursement of payments made pending appeal.

Jim Wilson explained the drafting of proposed Substitute HB 2506, attachment #1. Due to the re-written language, he said a substitute bill would create less confusion than adding amendments. Sub-section (f) references group-funded pools and puts them in the same status as other workers' compensation pools, as outlined in written testimony from the Kansas Association of School Boards, attachment #2. Sub-section (e) sets up the mechanism for reimbursement of compensation erroneously paid by the employer, the employer's insurance carrier or the workers' compensation fund during the pendency of review or appeal. Chairman Douville stated that this was done to correct the problem that was raised in the court decision of Clouston vs. Board of Johnson County Commissioners, in which the court held that one party was not entitled to reimbursement from another party, attachment #3. Mr. Wilson explained that the language makes it clear that no worker will be required to make reimbursement. Chairman Douville asked if there should be something in the law to provide for fraud by an employee. Mr. Wilson said that would probably be covered by other statutes.

Mr. Wilson explained the proposed amendment to K.S.A. 44-532, attachment #4, referencing group-funded pools. This is a technical change that was not made to the Workers' Compensation Act in 1987.

Chairman Douville asked if Robert Anderson, Director, Division of Workers' Compensation, had any comments. He responded that he had no objections to either amendment.

Representative O'Neal moved to adopt the amendments as part of Substitute HB 2506 and to report it favorably for passage. Representative Roper seconded the motion. The motion carried.

No objections having been heard, the minutes of February 8, 20 and 22, 1989 stand approved.

The meeting adjourned at 9:25 a.m. The next meeting of the committee will be on call of the Chairman on Wednesday, March 8, 1989 at 9:00 a.m. in room 526-S.

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.

Proposed Substitute for HOUSE BILL NO. 2506
For Consideration by Committee on Labor and Industry

AN ACT concerning workers compensation; relating to payment of compensation pending appeal and review; requiring reimbursement in certain cases; amending K.S.A. 1988 Supp. 44-556 and repealing the existing section.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1988 Supp. 44-556 is hereby amended to read as follows: 44-556. (a) Any action of the director pursuant to the ~~workmen's~~ workers compensation act shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions. Such review shall be upon questions of law and fact as presented and shown by a transcript of the evidence and proceedings as presented, had and introduced before the director. The venue of the action shall be the county where the cause of action arose or the county mutually agreed upon by all of the parties. Any such action shall have precedence over all other hearings except those of like character, and shall be heard not later than the first term of the district court after the appeal has been perfected, ~~and~~. The court shall decide all such cases within 60 days after submission. The appealing party shall notify the director when judgment is issued by the court. If judgment is not issued within 60 days of submission, the appealing party shall notify the director to that effect. The director will advise the judge to whom the case was submitted that 60 days has elapsed since submission of the case and request that a decision be rendered. If no decision is forthcoming within 30 days of such request by the director, the director will advise the supreme court justice having jurisdiction over such judge of all of the facts in regard to the review and the failure of the judge to render a decision as required by this section.

(b) On any such review the district court shall have jurisdiction to grant or refuse compensation, or to increase or diminish any award of the director as justice may require. No compensation shall be due or payable until the expiration of the time for commencing an action for review and then the payment of past due compensation awarded by the director shall not be payable if, within such time ~~notice of appeal to the district court~~ a petition for review, has been filed in accordance with the act for judicial review and civil enforcement of agency actions. The right of review shall include the right to make no payments of such compensation until the review has been decided by the district court if the employer is insured for ~~workmen's~~ workers compensation liability with an insurance company authorized to do business in this state, if the employer is maintaining membership in a qualified group-funded workers compensation pool under K.S.A. 44-581 through 44-591 and amendments thereto, if the employer is maintaining membership in a group-funded pool under the Kansas municipal group-funded pool act which includes workers compensation and employers' liability under the workers compensation act, or if the employer is currently approved by the director as a self-insurer and has filed a bond with the district court in accordance with K.S.A. 44-530 and amendments thereto. Commencement of an action for review shall not stay the payment of compensation due for the ten-week period next preceding the director's decision and for the period of time after the director's decision and prior to the decision of the district court on review.

(c) If review of the decision of the district court is sought pursuant to K.S.A. 77-623 and amendments thereto, the compensation payable under the decision of the district court shall not be stayed pending such review. Review of the decision of the district court shall take precedence over other cases except cases of the same character.

(d) If compensation has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review by the district court or by appellate courts and the

amount of compensation awarded by the director or the district court is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, shall be reimbursed from the workers compensation fund established in K.S.A. 44-566a and amendments thereto for all amounts of compensation so paid which are in excess of the amount of compensation that the worker is entitled to as determined by the final decision on review. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

(e) If compensation has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review by the district court or by appellate courts, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the director or the district court, is held not liable by the final decision on the appeal or review for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such appeal or review to pay the amount of compensation to the worker that was erroneously ordered paid by the director or district court. The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement. Upon receipt of such certification, the party

required to make the reimbursement shall pay the amount or amounts required to be paid in accordance with such certification. No worker shall be required to make reimbursement under this subsection or subsection (d).

(f) As used in subsections (d) and (e), "employers' insurance carrier" includes any qualified group-funded workers compensation pool under K.S.A. 44-581 through 44-591 and amendments thereto or a group-funded pool under the Kansas municipal group-funded pool act which includes workers compensation liability.

Sec. 2. K.S.A. 1988 Supp. 44-556 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.



TESTIMONY ON HOUSE BILL No. 2506
BEFORE THE HOUSE LABOR AND INDUSTRY COMMITTEE

BY

NORMAN D. WILKS, DIRECTOR OF LABOR RELATIONS
Kansas Association of School Boards

February 28, 1989

Mr. Chairman and members of the committee, on behalf of the three hundred one unified school boards of education which are members of the Kansas Association of School Boards, we wish to express our concern to the committee of the changes made by House Bill 2506 and wish to open an amendment we believe is technical in nature.

Current law allows various payors of Workers' Compensation Benefits to make no payment of benefits during pendency of appeal. Over 100 school boards provide benefits through the Kansas Municipal Group-Funded Pool Act (K.S.A. 1988, Supp. 12-2616 et seq.). The pool is not included in current law. We therefore ask the committee to add the following language to line 59 of the bill, to wit: "If the employer is maintaining membership in a Kansas Municipal Group-Funded Pool under K.S.A. 1988, Supp. 12-2616 through 12-2629."

In addition we are concerned that striking the current law in lines 75 to line 90 is a material change in state policy. We believe payors of benefits should continue to seek a refund for overpayment from the Commissioner of Insurance. If a change is justified, the change may be accomplished by allowing

the Insurance Commissioner to seek reimbursement from the party receiving the amount that was erroneously ordered paid by the director or the district court.

We appreciate your consideration of our suggested changes for House Bill 2506. I would be happy to answer any questions you may have regarding the suggested changes.

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(715 P.2d 29)

No. 58,060

JUDY JONES CLOUSTON, *Claimant-Appellee*, v. BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY, *Respondent-Appellee*, and MILLERS MUTUAL INSURANCE COMPANY, *Insurance Carrier-Appellee*, and STATE EMPLOYEES' SELF-INSURANCE FUND, *Insurance Carrier-Appellant*.

 SYLLABUS BY THE COURT

WORKERS' COMPENSATION—*Exclusive Remedy*—“*Recovery Back*” *Payments to Insurance Carrier after Appeal Determines Nonliability of Carrier*—*Application of Common Law Restitution Doctrine*—*Jurisdiction to Determine Reimbursement Dispute between Two Insurance Carriers*. The record in an action filed pursuant to K.S.A. 44-501 *et seq.* is examined and it is held: (1) The Workmen's Compensation Act establishes a complete and exclusive remedy covering every phase of the right to compensation and of the procedure for obtaining and enforcing it; (2) the Act contains no provision for “recovery back” of payments made by an insurance carrier during the pendency of an appeal after that appeal has determined nonliability; (3) common-law rules relative to the doctrine of restitution are inapplicable under the Act; and (4) the district court did not err in concluding the Administrative Law Judge and the Director of Workers' Compensation were without jurisdiction to determine a dispute between two insurance carriers for reimbursement of monies paid during the pendency of an appeal under the Workmen's Compensation Act.

Appeal from Johnson District Court; MARION W. CHIPMAN, judge. Opinion filed March 6, 1986. Affirmed.

Robert D. Beall, of Leavenworth, for appellant.

Jeffrey L. Lauersdorf and *Leonard J. Schapker*, of Wallace, Saunders, Austin, Brown and Enochs, Chartered, of Overland Park, for insurance carrier-appellee.

Before MEYER, P.J., BRISCOE, J., and WILLIAM D. CLEMENT, District Judge, assigned.

MEYER, J.: This is a workers' compensation case on its second appeal to this court. Claimant, Judy Jones Clouston, has been paid \$7,333.34 in compensation benefits by the State Self-Insurance Fund (Fund). The Fund claims it is entitled to reimbursement for that amount from Millers Mutual Insurance Company (Millers Mutual), the insurer for Johnson County. From a decision by the Johnson County District Court holding that it had no jurisdiction to determine the dispute between the two insurance carriers, the Fund appeals.

On March 28, 1978, claimant had an accident arising out of and

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in the course of her employment. The primary issue at the trial of the matter was whether or not claimant was an employee of the Board of County Commissioners of Johnson County, Kansas, or whether she was an employee of the State of Kansas. The Administrative Law Judge and the Director of Workers' Compensation found claimant to be an employee of Johnson County. On appeal to the district court, it was determined that claimant was an employee of the State of Kansas. The State appealed the district court's determination to this court.

During the pendency of the appeal by the State, the Fund, pursuant to the statutory requirements of K.S.A. 1985 Supp. 44-556, provided claimant with compensation.

The Kansas Court of Appeals reversed the decision of the district court and concluded that claimant was an employee of Johnson County. Liability for compensation owing claimant was thus indirectly imposed upon the county's insurer, Millers Mutual.

Following the decision of the Court of Appeals, the Fund made demand upon Millers Mutual for reimbursement of the amounts it had paid claimant. Millers Mutual refused to make reimbursement.

The Fund filed a motion for reimbursement with the Administrative Law Judge on May 20, 1983. It was determined that, under principles of equity, restitution should be granted the Fund. On June 20, 1983, the Director of Workers' Compensation sustained the Administrative Law Judge's decision.

The matter was appealed to the Johnson County District Court. The district court reversed the decision of the Administrative Law Judge and the Director of Workers' Compensation, concluding that workers' compensation law did not borrow doctrines such as restitution from the common law and that, as K.S.A. 44-501 *et seq.* did not provide for "recovery back" of monies paid by an insurance carrier after an appeal has determined nonliability, it did not have jurisdiction, under the Act, to determine this dispute. The Fund appeals.

The Fund contends it has paid monies it did not owe and thus should be entitled to reimbursement. On appeal, the Fund acknowledges lack of authority under K.S.A. 44-501 *et seq.* for reimbursement in such a situation, but urges this court to find authority in "the general power and authorities of the adminis-

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trative law judge and director” The Fund also acknowledges that disallowance of reimbursement under provisions of the Act does not foreclose avenues of recovery of such reimbursement through civil litigation outside the Act, but asserts that “[t]o require the insurance carriers to resort to another forum, *i.e.*, another matter of civil litigation in the district court, to recover payments would be ludicrous and totally unnecessary based on the powers and authority granted to the director and administrative law judges to enter appropriate orders in the workmen’s compensation proceedings to cause benefits to be paid by the responsible parties.”

The Kansas Workmen’s Compensation Act, K.S.A. 44-501 *et seq.*, establishes a complete and exclusive remedy provision covering every phase of the right to compensation and makes no provision for the maintenance of common-law actions. *Tompkins v. Rinner Construction Co.*, 196 Kan. 244, 247, 409 P.2d 1001 (1966); *Anderson v. National Carriers, Inc.*, 10 Kan. App. 2d 203, 205, 695 P.2d 1293 (1985). Under K.S.A. 44-501 *et seq.*, therefore, the Fund is not entitled to reimbursement for the simple reason that the Act contains no provision which would allow such recovery.

When the Kansas legislature has desired to provide reimbursement to insurance carriers, it has done so through specific statutory authority and has not left the matter within the “general power and authorities” of the administrative law judge. See K.S.A. 1985 Supp. 44-556(d); K.S.A. 44-528(a).

As noted by counsel for Millers Mutual, a situation analogous to that of the instant case was present in *Tompkins v. Rinner Construction Co.*, 196 Kan. 244. In *Tompkins*, a workman was killed as a result of an injury in an automobile accident. The widow made claim for compensation. The district court upheld the findings and award of the Director and entered judgment in favor of the widow for the maximum death benefit. The employer and insurance carrier appealed and made various weekly payments during the pendency of the appeal. The decision of the district court was reversed on appeal with the court finding that there was no evidence that the injury arose out of the employment. The employer and its insurance carrier subsequently filed a motion in the district court for restitution of the weekly benefits paid during the pendency of the appeal. The district court

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sustained the motion for restitution. The claimant appealed contending that the district court had no jurisdiction pursuant to the Workmen's Compensation Act to award restitution of the benefits.

The Kansas Supreme Court reversed the order of restitution holding that the Workmen's Compensation Act did not provide any procedure for the "recovery back" of benefits paid during the pendency of an appeal. The court stated:

"We believe . . . that in view of the provisions of the compensation act general rules relating to 'restitution' have no application and that 'recovery back' is not to be permitted. Nowhere in the act is there any provision authorizing a 'recovery back.' If the anomalous situation presented here is to be corrected it is within the power of the legislature to do so." *Tompkins*, 196 Kan. at 249.

Similar holdings have been enunciated in numerous cases since *Tompkins*. See *Johnston v. Tony's Pizza Service*, 232 Kan. 848, 658 P.2d 1047 (1983); *Brown v. Goodyear Tire & Rubber Co.*, 211 Kan. 742, 508 P.2d 492 (1973); and *Casebeer v. Alliance Mutual Casualty Co.*, 203 Kan. 425, 454 P.2d 511 (1969). In none of these cases has our supreme court allowed "recovery back" of compensation benefits paid during the pendency of an appeal.

We realize the above cases involve situations which, had they been decided otherwise, would have required a claimant to pay back monies received, while the instant case is between insurance carriers. The instant case thus lacks the appeal found in the others of favoring a claimant. However, the above cases were decided upon general jurisdictional principles relative to the Workmen's Compensation Act, and thus are applicable in the case at bar. Therefore, based upon the rules present in *Tompkins*, we conclude the district court in this case was correct in determining the administrative law judge was without jurisdiction to determine this dispute. Our supreme court has left the problem of "recovery back" to the legislature and has chosen not to allow the maintenance of common-law actions under the Workmen's Compensation Act. The result in this case, although a harsh one, is correct.

Affirmed.

PROPOSED AMENDMENT TO K.S.A. 44-532

Section 1. K.S.A. 44-532 is hereby amended to read as follows: 44-532. (a) Where the payment of compensation of the employee or the employee's dependents is insured by a policy or policies, at the expense of the employer, or the employer is a member of a qualified group-funded workers compensation pool, the insurer or the qualified group-funded workers compensation pool shall be subrogated to the rights and duties under the workmen's workers compensation act of the employer so far as appropriate, including the immunities provided by K.S.A. 44-501 and amendments thereto.

(b) Every employer shall secure the payment of compensation to the employer's employees by insuring in one of the following ways: (1) By insuring and keeping insured the payment of such compensation with an insurance carrier authorized to transact the business of workers compensation insurance in the state of Kansas; (2) by showing to the director that the employer carries such employer's own risk and is what is known as a self-insurer and by furnishing proof to the director of the employer's financial ability to pay such compensation for the employer's self; or (3) by maintaining a membership in a qualified group-funded workers compensation pool ~~as provided by K.S.A. 44-581 to 44-591, inclusive, and amendments thereto~~. The cost of carrying such insurance or risk shall be paid by the employer and not the employee.

(c) The knowing and intentional failure of an employer to secure the payment of workers' compensation to the employer's employees as required in subsection (b) of this section is a class C misdemeanor.

(d) (1) Every insurance carrier writing workers' compensation insurance for any employment covered under the workmen's workers compensation act shall file, with the director, written notice of the issuance, nonrenewal or cancellation of a

policy or contract of insurance, or any endorsement, providing workers compensation coverage, within 10 days after such issuance, nonrenewal or cancellation. Every such insurance carrier shall file, with the director, written notice of all such policies, contracts and endorsements in force on the effective date of this act.

(2) Every employer covered by the ~~workmen's~~ workers compensation act who is a qualified self-insurer shall give written notice to the director if such employer changes from a self-insurer status to insuring through an insurance carrier or by maintaining a membership in a qualified group-funded workers compensation pool, such notice to be given within 10 days after the effective date of such change. Every self-insurer shall file with the director annually a report verifying the employer's continuing ability to pay compensation to the employer's employees.

(3) Every employer covered by the ~~workmen's~~ workers compensation act who is a member of a qualified group-funded workers compensation pool shall give written notice to the director if such employer changes from a group-funded workers compensation pool to insuring through an insurance carrier or becoming a self-insurer, such notice to be given within 10 days after the effective date of such change.

(4) The mailing of any written notice or report required by this subsection (d) in a stamped envelope within the prescribed time shall comply with the requirements of this subsection.

(5) The director shall provide by regulation for the forms of written notices and reports required by this subsection (d).

(e) As used in this section, "qualified group-funded workers compensation pool" means any qualified group-funded workers compensation pool under K.S.A. 44-581 through 44-591 and amendments thereto or any group-funded pool under the Kansas municipal group-fund pool act which includes workers compensation and employers' liability under the workers compensation act.