

Approved AWG Date 2-1-90

MINUTES OF THE House COMMITTEE ON Labor and Industry

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

9:08 a.m./~~p.m.~~ on January 16, 1990 in room 526-S of the Capitol.

All members were present except:  
Representative Everhart - Excused      Representative Lawrence - Excused  
Representative Gomez - Excused      Representative O'Neal - Excused  
Representative Holmes - Excused      Representative Patrick - Excused  
Committee staff present:      Representative Schauf - Excused

Jim Wilson - Revisor of Statutes' Office  
Kay Johnson - Committee Secretary

Conferees appearing before the committee:  
Marty Snyder - Kansas Trial Lawyers Association

The meeting was called to order at 9:08 a.m. by the Chairman, Representative Arthur Douville. He stated that the purpose of the meeting was to introduce committee bills. He explained that a committee bill does not obligate a person to vote for its passage, but rather, it allows the introduction of a bill and allows the committee a chance to study it.

Marty Snyder, Kansas Trial Lawyers Association, addressed the committee regarding 7 bills for consideration as committee bills, attachment #1.

- #1 - Requires compensation payments due for the ten week period prior to the award by the administrative law judge to be paid immediately, as well as continuing weekly compensation payments until a decision by the district court.
- #2 - Allows for the availability of review within 45 days of the administrative law judge's decision.
- #3 - Allows workers the same amount of time to file a written claim in occupational disease cases as is currently permitted for accidental injuries.
- #4 - Makes permanent total disability benefits payable for life.
- #5 - Encourages responsible employer conduct in promoting safety in the workplace by increasing the penalty 25%.
- #6 - Allows injured workers access to the civil justice system in cases where the conduct of the employer goes beyond ordinary negligence.
- #7 - Provides that the weeks during which temporary total disability compensation is paid during vocational assessment shall not be deducted from the maximum number of weeks available for scheduled injuries.

Jim Wilson noted that some of the proposed bills amend the same section of law. Is there a policy reason to keep them separate or can they be incorporated into the same bill? Ms. Snyder replied that would be up to the committee. Chairman Douville asked Mr. Wilson to take care of that.

Ray Siehndel, Secretary, Department of Human Resources, clarified that the Joint Workers Advisory Committee has met several times and has some recommendations, but none of the above bills were recommendations that came out of that committee.

Representative Buehler moved that the above mentioned bills be introduced as committee bills. Representative Flottman seconded the motion. The motion carried.

The meeting adjourned at 9:24 a.m. The next meeting of the committee is on call of the Chairman.

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.





# KANSAS TRIAL LAWYERS ASSOCIATION

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(913) 232-7756 FAX (913) 232-7730

January 16, 1990

Rep. Arthur Douville  
Chair, House Labor & Industry Committee  
State Capitol  
Topeka, KS 66612

Dear Rep. Douville:

As I'm sure you are aware, a number of problems have become apparent now that the 1987 Workers Compensation Act has been fully implemented. Employers, insurance carriers and injured workers all have identified issues that should be addressed by the legislature.

In most cases our members are the legal representatives of these injured workers. Acting in their interest, we have developed a package of progressive legislation for consideration this session.

The following is a summary of our workers compensation package, with the actual bills attached:

The first bill will reduce the amount of hardship the current appellate process imposes on injured workers. Current law allows Respondents to avoid paying compensation due under an award until a ruling is made by the district court on a petition for review. The only exception is that compensation must be paid immediately, and continuing weekly compensation benefits must be paid until decision by the district court. KTLA's first proposal will require compensation payments dues for the ten week period prior to the award by the administrative law judge to be paid immediately, as well as continuing weekly compensation payments until decision by the district court. I think the passage of this bill would keep injured workers who are unable to withstand the financial pressure of a protracted appeal from accepting a less than fair, lump sum settlement.

The second bill also seeks to avoid some of the hardship suffered by injured workers during a protracted appeal. This proposal gives to either party the option of filing a petition for judicial review in the district court at any time after 45 days have elapsed since the decision by the administrative law judge.

The third proposal is a reaction to Tomlinson v. Owens-Corning Fiberglass Corp., 244 Kan. 506 (1989). While this bill would only address one of the injustices caused by Tomlinson, we think it eminently fair to allow workers the same amount of time to file a written claim in occupational disease cases as is currently permitted for accidental injuries.

HOUSE LABOR AND INDUSTRY  
Attachment #1  
01-16-90

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RICHARD H. MASON  
EXECUTIVE DIRECTOR

Rep. Douville  
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The fourth proposal would make permanent total disability benefits payable for life. Although the cap on permanent total payments was raised in 1987 from \$100,000 to \$125,000, simple mathematics proves the inadequacy of this allowance. Currently, the maximum weekly rate for permanent total disability payments is \$271. Imagine a 25-year-old breadwinner with dependent children who is rendered quadriplegic in the course of employment. He or she would receive their last disability compensation payment under the Kansas Worker's Compensation Act less than nine years later. And Social Security will not even come close to replacing the loss of those benefits. The Kansas Worker's Compensation Act was designed to burden industry with the costs of industrial accidents. For the most seriously injured workers and dependent families, the Act no longer serves this purpose. If a change is not made, a lot of these people, instead of receiving these benefits from employers, are going to be seeking assistance from the Department of Social and Rehabilitation Services. We know from recent experience how ill-equipped the SRS is to provide such assistance to those who should be provided for through other sources.

The fifth bill addresses the growing problem in the workplace of people who suffer serious injuries when their employers knowingly or recklessly subject them to hazardous machines or environments. Current law, whether state or federal, does not provide enough incentive to employers to comply with the law. The classic scenario is the construction contractor who refuses to shore-up his trench walls in compliance with OSHA. Current OSHA penalties for violating these regulations are insufficient to offset the money saved by avoiding the building of the trench supports, and the time saved on the construction schedule. Of course, no one ever thinks the wall is going to cave-in and kill someone on one of their jobs. Another example involves the industrial machine that is known to be defective because of the absence or removal of safety guards. The Kansas Workers Compensation Act could do more to promote safety in the workplace. This bill would encourage responsible conduct by employers, and compliance with the law.

The last proposal also promotes safety in the workplace. This bill will allow injured workers to pierce the civil immunity shield of employers in cases of willful misconduct, gross or wanton fault. In the event a damage recovery is obtained, the previous receipt of worker's compensation benefits will be deducted from the damage verdict or settlement. This language is patterned after the third-party action statute, K.S.A. 44-504. I am sure you understand how difficult an evidentiary standard it will be to prove willful intent, gross or wanton fault. Consequently, this statute probably will not be used that often, but, where applicable, it seems manifestly fair that the worker should not be limited to the sometimes meager benefits provided by the Act. And the employer should not be allowed to shield himself from civil liability in such situations. I understand many states already possess laws of a similar nature.

Rep. Douville  
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I realize this is a lengthy letter but simply felt it is important for me to let you know exactly what we have on our agenda this session. We look forward to working with you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Richard H. Mason".

Richard H. Mason  
Executive Director

cc: Members, House Labor & Industry Committee  
sjs

BILL

AN ACT relating to workers compensation; providing for compensation payments for the ten weeks prior to the administrative law judge's decision upon the award of the administrative law judge; providing that the filing of an appeal with the director or the district court shall not stay such payments.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-556(b) is hereby amended as follows:

K.S.A. 44-556(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, has been filed. 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 the 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, 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~~ Filing an application for review to the director or to the district court shall not stay the payment of compensation due for the ten-week period next preceding ~~the director's decision~~ the award of the administrative law judge and for the period of time after the ~~administrative law judge's~~ director's decision and prior to the decision of the district court on review.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

BILL

AN ACT concerning workers compensation; relating to available of District Court review; providing for availability of review after 45 days from administrative law judge decision.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-556(a) is hereby amended as follows:

K.S.A. 44-556(a) Forty-five (45) days after the date of any and all final decisions and final awards of the administrative law judge, whether a decision has been issued by the director or not, any party may appeal such in accordance with the act for judicial review and civil enforcement of agency actions. Any action of the director pursuant to the workmen's 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 the facts in regard to the review and the failure of the judge to render a decision as required by this section.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

BILL

AN ACT relating to workers compensation; notice of disease and filing of claim, deemed waived; when.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-5a17 is hereby amended as follows:

K.S.A. 44-5a17 Written notice of an occupational disease shall be given to the employer by the employee or ~~workman~~ worker or someone on his behalf within ninety ~~(90)~~ two hundred (200) days after disablement therefrom, and in the case of death from such an occupational disease, written notice of such death shall also be given to the employer within ninety ~~(90)~~ two hundred (200) days thereafter. Failure to give either of such notices shall be deemed waived unless objection is made at a hearing on the claim prior to any award or decision thereon. Actual knowledge of disablement, by the employer in whose employment the employee or ~~workman~~ worker was last injuriously exposed, or by the responsible superintendent or ~~foreman~~ foreperson in charge of the work, shall be deemed notice within the meaning of this section. If no claim for disability or death from an occupational disease be filed with the ~~workmen's~~ workers compensation director or served on the employer within one (1) year from the date of disablement or death, as the case may be, the right to compensation for such disease shall be forever barred: Provided, however, That the failure to file or serve a claim within the time limited herein shall be deemed waived unless objection to such failure be made at a hearing on such claim before any award or decision thereon.

Notice or claim shall be deemed waived in case of disability or death where the employer or insurance carrier makes compensation payments therefor, or, within the time above limited, the employer or his insurance carrier by his or its conduct leads the employee or ~~workman~~ worker or claimant reasonably to believe that notice or claim has been waived.

The time limit prescribed by this section shall not apply in the case of an employee whose disablement or death is or was caused by latent or delayed pathological conditions, changes or malignancies due to the occupational exposure to X-rays, radium, radioactive substances or machines, or ionizing radiation: Provided, however, That no claims shall be allowed unless a claim has been filed within one year after the date upon which the employee first suffered incapacity from the exposure to radiation and either knew or in the exercise of reasonable diligence should have known that the occupational disease was caused by his present or prior employment.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.



BILL

AN ACT relating to workers compensation; repealing limitations on the maximum amount of permanent total disability compensation payable by an employer; allowing permanent total disability benefits to be paid for life.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-510f(a) is hereby amended as follows:

K.S.A. 44-510f(a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) ~~For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, \$125,000 for an injury or any aggravation thereof.~~

(2) For temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof.

(3) For permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, \$100,000 for an injury or any aggravation thereof.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

BILL

AN ACT relating to workers compensation; providing additional compensation where employer fails to provide safety appliance.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-501(d) is hereby amended as follows:

K.S.A. 44-501(d) If an injury to an employee results from the failure of the employer to comply with any statute or regulation providing for a guard or protection, or to provide a reasonable and proper guard, the temporary or permanent disability weekly rate of compensation, or weekly death benefit, due under this act shall be increased by twenty-five (25) percent, notwithstanding any limit on the total amount of compensation payable as set forth in K.S.A. 44-510f(a). If it is proved that the injury to the employee results from the employee's deliberate intention to cause such injury, or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, or substantially from the employee's intoxication, any compensation in respect to that injury shall be disallowed. The employee shall not be liable under the workers compensation act where the injury, disability or death was substantially caused by the employee's use of any drugs, chemicals or any other compounds or substances, including but not limited to, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens, except such drugs or medications which are available to the public without a prescription from a physician and which are used for the treatment of an illness, or which were obtained and used by the employee pursuant to and in accordance with such a prescription.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

BILL

AN ACT relating to workers compensation; providing a right to the employee to pursue a civil damage action against the employer when injury caused by willful, wanton or gross injury to employee.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-501(b) is hereby amended as follows:

K.S.A. 44-501(b) Except as provided in the workers compensation act, no employer, or other employee of such employer shall be liable for an injury for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for an injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer. Where the injury or death is caused by an act or omission of the employer, or other employee of such employer, of a willful, gross, or wanton nature, the injured worker or the worker's dependents or personal representative shall have the right to take compensation under the workers compensation act and pursue a civil remedy for monetary damages by proper action in a court of competent jurisdiction against the employer, or other employee of such employer. The total amount of compensation benefits paid to or on behalf of an injured worker or the dependents or personal representatives of a deceased worker shall be credited against any recovery of monetary damages from the employer, or other employee of such employer, by judgment, settlement or otherwise. Whenever any monetary damages are recovered by the injured worker or the dependents or personal representatives of a deceased worker by judgment, settlement or otherwise, prior to the completion of workers compensation payments, the amount of such judgment, settlement or recovery otherwise actually paid and recovered which is in excess of the amount of workers compensation benefits paid to the date of such recovery shall be credited against future workers compensation benefits paid to the date of such recovery shall be credited against future workers compensation benefit payments.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.

BILL

AN ACT relating to workers compensation; relating to vocational rehabilitation; providing that the weeks during which temporary total disability compensation is paid during vocational assessment, not to exceed a maximum of 26 weeks, shall not be deducted from the maximum number of weeks available for the payment of disability compensation for scheduled injuries.

BE IT ENACTED by the Legislature of the State of Kansas:

Section 1. K.S.A. 44-510g(g) is hereby amended as follows:

K.S.A. 44-510g(g) The employer shall pay temporary total disability compensation during any period of vocational rehabilitation, reeducation or training, computed as provided in K.S.A. 44-510c and amendments thereto, but the employer shall receive credit for any weekly, monthly or other monetary payments made to the employee or such employee's family by any state, federal or other public agency during any such period, exclusive of any such payments for the board, lodging and travel expenses of the employee. Subject to a maximum of 26 weeks, the number of weeks during which temporary total disability compensation is paid during vocational assessment, rehabilitation, reeducation or training shall not be deducted from the maximum number of weeks available for the payment of disability compensation under the schedule provided in K.S.A. 44-510d and amendments thereto.

Section 2. This act shall take effect and be in force from and after its publication in the statute book.