Approved March 5, 1992
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry

The meeting was called to order by Representative Anthony Hensley
Chairperson
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9:05 a.m./p~~m~~. on February 27 19 92 in room 526-S of the Capitol

All members were present except:
Rep. Webb - excused

Committee staff present:
Jerry Donaldson, Principal Analyst
Jim Wilson, Revisor of Statutes
Barbara Dudney, Committee Secretary

Conferees appearing before the committee:
Jerry Dilley, a state employee
John Ostrowski, Kansas AFL-CIO

The meeting was called to order at 9:05 a.m., by the chairman, Rep. Anthony Hensley.

Chairman Hensley stated that the purpose of the meeting was to hear testimony by the opponents of House Bill No. 3023, and if time permits, to hear conferees on House Bill No. 3039.

The chairman introduced Jerry Dilley, a state employee, who described several problems he has experienced in resolving his workers' compensation claim.

The chairman then introduced John M. Ostrowski, representing the Kansas AFL-CIO. Mr. Ostrowski distributed and read written testimony in opposition to House Bill No. 3023 (attachment #1). He stated that the bill proposes to decrease workers' compensation insurance costs by reducing benefits to injured workers. He expressed his concern about past "reforms" proposed to decrease costs: (1) reduction in work disability benefits, (2) removal of "liberal construction" on behalf of the claimant, and (3) catering to special interests in repetitive use syndrome cases.

Mr. Ostrowski cited various reasons why more claims are being filed: general lack of safety, poor economic times, inability to shift losses, and attorney advertising. He stated that the insurance industry has failed to "act in a fiduciary capacity to the injured worker." He said that before the Legislature attempts to "reform" the system there should be a consensus reached on the defined goals of "whom the system is suppose to serve, and in what capacity." In addition, he said reform should not be carried out until the Legislature has reliable data on which to base its decisions. He listed several areas in which the system should be improved: (1) medical and vocational rehabilitation costs should be contained through the Director's office, (2) establish a "safety czar" in state government to issue warnings, levy fines, shut down unsafe workplaces, implement ergonomics, educate employers, and issue certificates of safety compliance, (3) stop insurance carriers and defense attorneys from "dragging out the litigation process", (4) require the claimant to make an undisclosed offer of settlement prior to a regular hearing and if the final claim exceeds the offer, the claimant's expenses are paid by the insurance carrier, (5) mandate statistical data from NCCI, and (6) adequately fund and staff the Kansas Division of Workers' Compensation. He pointed out that attached to his testimony was a proposed draft of legislation to establish the office of Workers' compensation safety director. He then answered questions from several committee members.

The meeting was adjourned at 9:58 a.m.

GUEST LIST

COMMITTEE: House Labor and Industry DATE: February 27, 1992

NAME	ADDRESS	COMPANY/ORGANIZATION
TERRY LEATHERMAN	Topeka	KCCI
Bill Morrissey	Topeka	DHR/Work Comp
DICK THOMAS	TOPEKA	DHR/WORK COMP
Christopher Dean	Emporia	Intern/Rep. Carmody
Bill Livingston	Topeka	KRCC
Jerry Dilley	Topeka	STATE OF KS
Gary Anderson	Topeka	AIA Kansas
LARRY MAGILL	"	IND. INS. AGENTS OF KS.
BRAD SMOOT	"	AIA
ALAN COBB	Wichita	KS Assoc. for Sm. Business
MARK BERTELS	WICHITA	FORTIS CORP.
RICHARD HUBBARD	O.P. KS	INTRACORP

SUMMARY OF KANSAS AFL-CIO'S POSITION
ON HOUSE BILL 3023

By John M. Ostrowski

February 26, 1992

Thank you Mr. Chairman. My name is John M. Ostrowski, and I appear before the Committee in basic opposition to HB 3023 on behalf of the Kansas AFL-CIO.

In essence, the Kansas AFL-CIO does not feel that this bill is insightful in solving workers' compensation problems in the State of Kansas. Rather, this bill resorts to the age old answer of "cutting benefits to the workers". It does seem that whenever the NCCI threatens us with a huge rate increase, some groups always respond that we must **"cut benefits to the workers"**! One can almost envision the authors going through the Act with a red line exiting out benefits to claimants under the auspices of reducing costs.

I have practiced workers' compensation on behalf of injured workers for approximately 14 years. In that period of time, the benefits to the injured worker have not improved. However, throughout that time, we have seen many so-called "reforms". For example, we have seen:

a) reduction in the amount of work disability afforded to claimants;

b) the removal of "liberal construction" on behalf of the claimant; and

c) the catering to special interests in repetitive use syndrome cases.

However, we in Kansas still are unable to solve some of the basic problems which materially affect workers, such as:

a) capping benefits to the permanently totally disabled;

b) allowing the employer protection when he is grossly and wantonly negligent; and

c) not providing true wage replacement with our capped payments of temporary total disability.

We believe that it is clear that these so-called "reforms" have failed the workers <u>and employers</u> of this State.

It is apparently true that we are faced with higher costs in workers' compensation. In part, we believe these costs are due to more claims being filed. The fact that more claims are being filed, and therefore the costs are rising, is <u>not necessarily</u> an

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attachment #1

indication that this system needs "reform". I would suggest to the Committee that if the NCCI came in and indicated they did not need a rate increase this year, everyone would agree that our workers' compensation system works great. I am suggesting that the system cannot **solely** be judged by the cost increase requested by the NCCI.

Why are more claims being filed? I might suggest to this Committee that more claims are being filed for the following reasons:

a) **General lack of safety.** This bill does not address safety in the workplace in any manner, and most of the conferees who have appeared in favor of the bill have openly admitted that limited efforts have been taken to enforce safety.

   Marketplace response has obviously been ineffectual in reducing claims (since no one has a safety program), and it also punishes employers who are safety conscious. Unfortunately, it still appears cheaper in this State to injure the worker than correct the problem.

b) **Poor economic times.** In harsh economic times, there is no worker loyalty to the employer. His job is in jeopardy, he is receiving low wages, and when he has an injury, he reports it. Many workers have not reported claims over the years in order to avoid antagonizing their employer.

c) **Inability to shift losses.** Many workers who suffered on-the-job injuries would not report them, and would shift the losses to other systems. Since employers have now reduced or eliminated fringe benefits, the workers have nowhere to shift the loss. The employer has either no health insurance, or a very high deductible, such that the claimant must report the on-the-job injury, or file bankruptcy over his medical bills. Furthermore, the elimination of short-term disability policies means that the workers must report the injury to collect temporary total disability, or have no income at all.

d) **Advertising.** There is no question that TV and radio advertising has made people more aware of their rights. There may be philosophy differences on whether that is good or bad. However, when you couple TV and radio advertising with uncooperative and/or overworked claims adjuster, you will have less people simply willing to accept what the insurance carrier offers. Statistics show that with attorney involvement and attorney representation, workers will receive more money in settlement of their claims. To me, this is a comment on the insurance carrier's failure to act in a fiduciary

capacity to the injured worker. It is an indicator that the insurance company will always attempt to pay the minimum on a claim, whether that minimum amount is correct, or incorrect. Furthermore, it boils down to poor claims adjusting.

I do agree that it is very difficult to write a reform bill in Kansas. In the first instance, there is no consensus on what the **defined goals** are of a workers' compensation system. As suggested by the "blue ribbon" national experts, without a clear definition of goals, and whom the system is suppose to serve, and in what capacity, it is illogical to make so-called reform. Furthermore, and perhaps most importantly, **we do not have the data,** and the statistics, that will enable us to identify the problem. Again, this was highlighted by the blue ribbon panel, and it disturbs the Kansas AFL-CIO that we are again lashing out and slashing out without knowing the target. It strikes the AFL-CIO as illogical to rely on the NCCI for projections based on their past performance in accumulating appropriate information.

It is the basic position of the Kansas AFL-CIO that we who are involved in workers' compensation should be **concentrating our efforts** on areas that we can agree upon. I would suggest to the Committee that the following are areas that we can indeed agree on:

1) **Medical costs.** I do not have to point out to the Committee the severe problem that we have with medical costs in workers' compensation. Maybe, just maybe, it is time to rethink the system that we have. That system allows **exclusive, unbridled authority,** to the insurance carrier. They have held the reins on medical care and medical treatment for years and years in Kansas. They have had the safety net of the Director's office to only pay what is "reasonable and necessary". Since they have apparently done such a horrid job in this area, maybe we need a new "system".

   We would suggest, as a point of discussion, a statewide system of approved providers similar to Blue Cross/Blue Shield. The approved providers would agree to charges fixed by the Director's office, and rules and regulations fixed by the Director's office relative to second opinions. The claimant is permitted to go to any of the approved providers.

2) **Safety.** You have heard excellent testimony relative to self-insureds, and cost control. Insurance carriers in the State of Kansas do little, if anything, to promote safety in the workplace. Maybe with another huge cost increase from the NCCI, it will become apparent that we need <u>less</u> injuries, i.e. <u>more</u> safety.

OSHA has done a poor job in bringing about safe working conditions. As a point of discussion, we propose the creation of a "safety czar" with the broadest possible police powers. The safety of its citizens in the workplace should be of significant enough concern to withstand any constitutional challenge to this vital issue. The safety czar should have, among other things, the following authority and obligations:

*** issue warnings, levy fines, and close businesses who operate in violation of the czar's mandates on both public and private property with or without warning

*** implement ergonomics within the workplace and compel compliance

*** educate employers on safety matters, and issue certificates of compliance as a prerequisite for obtaining workers' compensation insurance annually (we issue driver's licenses, marriage licenses, dog and cat licenses; surely we can issue safety licenses)

*** confidentially respond to complaints of employees reporting safety violations

The mechanics of appointing/selecting a czar who will respond to the needs of safety, without destroying businesses are achievable. The Kansas AFL-CIO does not make many guarantees. We do **guarantee** that if you have fewer injuries, costs will fall.

3) **Defense costs.** Trial attorneys are often under attack as driving up the costs of claims and forcing litigation within the system. Why would an attorney working on a contingency fee contract want anything except a "quick and equitable resolution" to the claim? In other words, if a case is valued at $10,000, the first hour the claimant's attorney puts in the file is worth $2,500. Every hour after that reduces the recovery to the client and the attorney.

Conversely, insurance carriers and defense attorneys have motivation for dragging out the litigation process. When the system does not work properly, claimants become frustrated and will do anything to "settle their claim" and get out of the system. There are virtually no penalties for making unreasonable and unfair proposals of settlement. Similarly, defense attorneys are paid by the hour and end up litigating issues which simply should not be litigated. This is a true cost driver within the system, and I could give the Committee hundreds of "war stories".

We propose a system wherein the claimant is required to make an offer of settlement prior to a regular hearing. The offer of settlement is not disclosed to the trier-of-fact. If the ultimate decision equals or exceeds the offer of settlement, claimant's expenses are paid by the insurance company (including expert witness fees), and the claimant is awarded "reasonable attorney's fees" which are then deducted from the contingency fee charge, representing a direct benefit to the claimant. These costs will not be considered a loss or a loss adjustment expense by the insurance carrier for the promulgation of rates for workers' compensation insurance.

Additionally, liability against the Workers' Compensation Fund should be only allowed in broad increments (e.g. zero, one-third, two-thirds, one hundred percent). This will effectuate agreements. The Fund should be forced to propose a level of Fund contribution prior to trial. If the Fund "makes or beats" the offer, additional costs are assessed against the respondent, which costs shall not be part of rate promulgation. At any time that an agreement between respondent and Fund is reached a method should be instituted for one of the attorneys to withdraw from the case.

4) **Vocational rehabilitation.** It does not appear that the worker or the employer is getting many "bangs for the buck" in the area of vocational rehabilitation. Vocational rehabilitation needs to be overhauled, or eliminated. Again, this seems to be an area that has consensus, and does not pit employer against employee. It would seem logical to concentrate on this area by collective action. At this point, it appears that an agreement is being reached between labor and industry with the assistance of the Director's office.

5) **Insurance responsibility.** For years and years, this legislature has <u>requested</u> statistical data from insurance companies. With statistical information, there appears to be consensus that appropriate reform can be had. For years and years we have not received statistical data from insurance companies. Since there is an apparent unwillingness to give us meaningful numbers, it would seem that for the benefit of both the employer and the employee mandatory legislation would be appropriate.

6) **Procedural reform of the Director's office.** There is apparent agreement that the Director's office is a volatile, political entity. There appears to be consensus that the office needs stability and consistency. Furthermore, there is inadequate funding of the Director's office. We call upon the Director's

office to perform many tasks, without adequate funding. With adequate funding in directed areas, the Division of Workers' Compensation could take an active role in producing the results desired by employers and employees.

In conclusion, the Kansas AFL-CIO opposes the general, underlying theme of HB 3023. Without statistical data, and clearly defined goals, labor and management should be proceeding on reasonably obtainable goals in areas of consensus.

It is our understanding that this bill will be assigned for study to a subcommittee. I would urge that the subcommittee carefully compare the language of the bill with the purported intent of the author. Quite obviously, as an opponent to the bill, it is impossible to go line by line and point out what appears to be inconsistencies. We would offer these few, brief examples.

a) Representative O'Neal indicated that under certain circumstances the employee attending a social event could be afforded recovery. Under the language of the bill (at page 11), that is impossible. The change within the bill makes it a two pronged test, one of which is impossible for the employee to satisfy, i.e. at the social event he must be performing his "normal job duties". Virtually no employees perform their "normal job duties" while attending Christmas parties.

b) Representative O'Neal indicated that in his opinion the words "cure" and "relieve" are too extensive, and should be substituted with the word "treat". Although Representative O'Neal gave us his definition of what that meant, it is possible to narrowly interpret that provision and produce totally unintended results. (page 13)

c) Representative O'Neal indicated that for scheduled injuries his bill did not go as far as Senate Bill 666 because it did not provide for a health panel. However, the proposed change on page 23 establishes an irrebuttable presumption that whatever the treating physician says the impairment is, is the impairment. Recall that these are hand picked by the insurance company, and the blue ribbon panel indicated that they are not hand picked because of their surgical skills.

Again, we would simply urge that the words actually used be measured carefully against the expressed intent. I would be pleased to answer any questions.

Thank you.

kn/2/26/92/test

Topeka Capital Jrnl. 2/20/92

Workers seek talks before union vote

Debate scheduled Wednesday canceled; employees cite hazards in workplace, pay as issues

BY SHERRY PIGG
The Capital-Journal

LAWRENCE — Workers at the Davol plant took their frustrations to the street Wednesday, protesting what they say is the unwillingness of their bosses to discuss employee concerns.

About a dozen workers gathered across the street from the plant, passing out leaflets and talking among themselves. A banner calling for a debate hung on a fence behind them.

"I think the question that's going through everybody's mind is why can't we debate," said Megan Parke, an organizer for the Amalgamated Clothing and Textile Workers, which has helped set up a March 12 union election at Davol. "What have they got to hide?"

Parke said a debate that had been scheduled for 3:45 p.m. Wednesday was canceled by company officials minutes before it was to begin.

Workers taking part in the demonstration said they wanted to unionize to improve wages, worker treatment and plant safety.

> "The union knows that a debate is not the proper forum to handle these important issues."
>
> company statement

Parke and the employees said top salaries for production workers at the plant, which manufactures surgical supplies, are $5.50 an hour.

Several of the workers said safety equipment and ventilation in the plant was inadequate for the hazardous chemicals they used on the job.

Angela Freeman said that in mid-December, about a gallon of methylene chloride was spilled on the floor of the production room in which she worked. The spill stayed on the floor four days, eating the wax and buckling the tile, she said. The room was ventilated for only about an hour and then workers were sent back in. The Lawrence Fire Department wasn't contacted, Freeman said.

"The employees were putting masking tape on the tiles to keep people from tripping over them," Freeman said. "That to me is outrageous."

According to information supplied by the workers, methylenechloride is a carcinogen and exposure to high concentrations of the chemical can cause death. Chronic, long-term exposure can damage the liver and brain.

Richard Daigle, Davol's director of employee relations, declined to answer questions or respond to the allegations. He issued a prepared news release criticizing the proposed debate.

"This common trick by the Clothing Workers detracts from the very important issues we continue to discuss with employees," the statement read. "The union knows that a debate is not the proper forum to handle these important issues in a 'circus-like' atmosphere.

"This attempt to disrupt Davol and its employees does not serve the interest of anyone, especially Davol's employees."

K.S.A. 44-507. An amendment to the Kansas Workers' Compensation Act creating a safety director and deputies, and bestowing upon said safety director and deputies broad powers for the purposes of education and enforcement of safety in the workplace.

K.S.A. 44-507. Workers' compensation safety director; powers of safety director; creation of deputies; duties and obligations of safety director and deputies; employer's right to hearing and procedure therefor. (a) A primary purpose of the workers' compensation act shall be to promote safety within the workplace; it being specifically understood that prevention of injuries accrues to the benefit of employees, employers, insurance carriers, self-insureds, and the workers' compensation fund. Pursuant to this end, there is hereby created a safety director and deputies pursuant to K.S.A. 75-5708 as amended. The safety director and his deputies shall:

(1) Continuously study all issues of safety in the workplace with particular emphasis on the prevention of injuries and the practice of ergonomics. Said director shall be familiar with OSHA regulations and EPA regulations; although the director shall not be limited to those regulations in enforcement of safety for the state.

(2) The safety director and his deputies shall have broad police powers in the enforcement of actual safety violations. The safety director is hereby granted authority to enter onto any employer's premises, announced or unannounced, for the purposes of observing actual safety violations, and upon the observation of the same, shall have authority to issue warnings, levy fines, or prohibit said employer from continued operations pending correction of the safety violation. Whether or not a safety violation is occurring shall be determined within the sole discretion of the safety director or the deputies. In the event a warning is issued, a time certain shall be determined for correction of the violation. In the event a fine is levied, said fine shall not exceed one hundred thousand dollars ($100,000.00) for each occurrence. In the event the employer is ordered to cease doing business, a violation of said order shall constitute an irrebuttable presumption that said employer is in contempt of court in Shawnee County unless directed otherwise by the safety director. The safety director shall implement rules and regulations governing the provisions of this section with the intent that the provisions of this section be applied uniformly to employers. Said rules and regulations shall be approved by the secretary of human resources. Nothing herein shall be construed to prevent the assessment of multiple fines for repeated occurrences.

(3) In the event the safety director issues a warning, levies a fine, or orders an employer to cease doing business, said employer shall comply with the safety director's directions. The employer shall have the right to appeal said order to the district court of Shawnee County unless directed otherwise by the safety

director. In the event said employer does not comply, the employer shall lose the right to appeal. The district court shall, within three (3) days of the safety director's action, set the matter for a summary hearing to determine whether the order of the safety director should stand, be modified, or be reversed. By request of either party, following the district court's order, the matter shall be set for a full evidentiary hearing. Further appeals shall be taken pursuant to the code of civil procedure to the appellate courts of Kansas.

(4) The safety director shall have broad authority to implement ergonomics and job modifications for the prevention of injuries in the workplace. In each such instance, the safety director shall consider the cost of the job modification or ergonomic implementation against the harm being caused, or likely to be caused, to the employee. If it is determined, within the sole discretion of the safety director, that the safety recommendation should be implemented, it shall be ordered to be complied with in a reasonable amount of time, but not more than thirty (30) days except for highly unusual circumstances. If the employer disputes said determination, the employer shall have the right to appeal to the district court of Shawnee County unless directed otherwise by the safety director. The employer shall have the right to stay the recommendation of the safety director by the posting of a bond in an amount determined by the district court.

(5) The safety director shall respond to and investigate complaints made by employees of the State of Kansas as to safety violations or safety concerns of any nature. Said complaints shall be treated with the utmost confidentiality by the safety director. No employer shall retaliate in any way against an employee for filing a complaint with the safety director. Nothing stated herein shall be construed as limiting the safety director's jurisdiction to responding to complaints by employees.

(6) It shall be the duty of the safety director to educate employers and workers as to safety matters. The safety director shall implement mandatory annual educational programs for all employers. The safety director shall establish by rules and regulations the minimum requirements which after July of 1993 shall be a prerequisite for the employer obtaining insurance under the Kansas workers' compensation act.

(7) Any employer within the State of Kansas who is subject to the jurisdiction of the Kansas Workers' Compensation Act is subject to the jurisdiction of the workers' compensation safety director and deputies.

(8) The authority vested in the safety director is specifically vested to the deputies created pursuant to K.S.A. 75-5708.

kn/2/26/92/safety