

Approved: January 27, 1998
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on January 23, 1998 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Barone, Brownlee, Donovan, Feleciano, Gooch, Ranson, Steffes, Steineger and Umbarger.

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Philip S. Harness, Director, Division of Workers Compensation
Terry Leatherman, Executive Director, Kansas Industrial Council, Kansas Chamber of Commerce and Industry
Wayne Maichel, AFL-CIO
Jonathan Small, Koch Industries

Others attending: See attached list

Upon motion by Senator Steineger, seconded by Senator Steffes, the Minutes of the January 22, 1998 Meeting were unanimously approved.

Philip S. Harness, Director, Division of Workers Compensation, submitted recommendations of the Workers Compensation Act. Mr. Harness advised the Committee the recommendations were unanimously approved by the Workers Compensation Advisory Council, comprised of five member from industry and five members from labor. (Attachment 1)

Mr. Harness requested introduction of legislation to address the following recommendations:

- 1) Amend K.S.A. 44-513a authorize the administrative law judge to direct compensation be paid in accordance with the section of the probate code dealing with conservatorship when minor persons are entitled to compensation. Presently the Workers Compensation Act provides for the setting up of conservatorship in a manner differing from the probate code. This amendment also increases the amount of an award requiring the establishment of a conservatorship from \$2,000 to \$5,000.
- 2) Amends K.S.A. 44-532a, 44-551 and 44-556, dealing with employer insolvency and where compensability is not an issue, to provide that medial payments and temporary total disability payments payable by the Workers Compensation Fund shall not be stayed pending review to the Workers Compensation Board.
- 3) Amends K.S.A. 44-534, 44-520a and 44-557(c), which gives the workers compensation fund party status, to provide that an application for hearing must be filed within 2 years if an accident report is filed, and requires an application for hearing within 3 years of the accident if no accident report is filed by the employer.
- 4) Amends K.S.A. 44-5,227 to allow for videoconferencing in cases of mediation. The Council endorsed this recommendation as a cost effective measure.
- 5) Establish a new procedure for post-award medical treatment requests, allowing for an evidentiary hearing, as well as dealing with attorneys fees and appeals.
- 6) Amend K.S.A. 44,5120, administrative penalty statute for fraud and abuse, which will include among prohibited conduct, a health care provider submitting a charge for health care which was not furnished. The amendment also increases the maximum penalty from \$1,000 per act to \$2,000 and changes the

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on January 23, 1998.

aggregate penalty from \$2,500 in a 6 month period to \$20,000 in a 12 month period.

- 7) Amend K.S.A. 44,5125 to provide penalties when an employee enters into employment while receiving temporary total disability benefits or permanent total disability benefits to which the claimant is not entitled. This amendment will provide clear and concise language for courts when confronted by instances where an employee is committing fraud or abuse and bring such acts under the Workers Compensation Act to the misdemeanor and felony levels.
- 8) Five amendments dealing with utilization and peer review .

Terry Leatherman, Executive Director, Kansas Industrial Council, Kansas Chamber of Commerce and Industry, and a member of the Workers Compensation Advisory Council, affirmed the Director's presentation as to the requests of the Council. Additionally, the Advisory Council discussed the bill that would repeal a requirement that the self-employed subcontractor who is working for a principle contractor purchase workers compensation insurance. The Council support the legislation enacted in 1997, believes everyone should come under the Workers Compensation Act, and opposes the house bill which would repeal the requirement. (Attachment 2)

Mr. Leatherman stated workers compensation insurance rates have dropped 13.2% as of January 1, 1998, a decrease of nearly 35% during the past 5 years, saving Kansas employers \$111 million in workers compensation insurance premiums. The reason for this turnaround is due largely to the reforms made in 1993 to the Kansas Workers Compensation Act.

Mr. Leatherman stated the Kansas Chamber renews its support of **SB 289** introduced last year and remains in this Committee.

Wayne Maichel, AFL-CIO, appeared in favor of the recommendations of the Workers Compensation Advisory Council. Mr. Maichel stated AFL-CIO is opposed to **SB 289**. Mr. Maichel testified that the Advisory Council considered the problems sub-contractors are experiencing due to the increase in their workers compensation insurance premiums and the requirement of their need to pay. The Advisory Council determined it was more a pricing problem than a policy issue and have referred the matter back to NCCI and the Insurance Department.

A representation of National Council on Compensation Insurance, Andrew Sobolic, responded to committee questioning that NCCI and the Insurance Commissioner are addressing the pricing issue.

Jonathan Small, Koch Industries, requested a committee bill be introduced amending K.S.A. 44-501(c) before the period at the end of the paragraph by inserting "the date of accident". Mr. Small stated this request was the result of a decision in Berry v. Boeing. (Attachment 3)

Senator Barone moved, seconded by Senator Donovan, that the recommendations of the Workers Compensation Advisory Council be introduced as a Committee bill. The voice vote was in favor of the motion.

Senator Ranson moved, seconded by Senator Donovan, that a bill amending K.S.A. 44-501(c) as requested by Koch Industries, be introduced as a Committee bill. The voice vote was in favor of the motion.

The Committee adjourned at 8:45 a.m.

The next meeting is scheduled for Tuesday, January 27, 1998.

TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE

**By Philip S. Harness, Director
Division of Workers Compensation
January 23, 1998**

The Workers Compensation Advisory Council is pleased to request the committee to consider introduction of legislation which would include the following items:

1. An amendment to K.S.A. 44-513a which, when dealing with minor persons entitled to compensation under the Workers Compensation Act, would authorize the administrative law judge to direct such compensation to be paid in accordance with the section of the probate code dealing with conservatorships. Presently, the Workers Compensation Act contains provisions for the setting up of conservatorships; it was felt that referring to the pertinent sections of the probate code would cause less confusion.

2. Amendments to K.S.A. 44-532a, 44-551, and 44-556 all dealing with the scenario of a case of an employer insolvency, and where compensability is not an issue, then medical payments and temporary total disability payments payable by the Workers Compensation Fund shall not be stayed pending review to the Workers Compensation Board.

3. Amendments to K.S.A. 44-534, 44-520a and 44-557(c), which will give the workers compensation fund party status, as well as eliminating the necessity for a separate written claim. If

an accident report is filed pursuant to statute, then an application for hearing must be filed within two years of the accident or the last payment of compensation. If no accident report is filed by the employer, then an application for hearing must be on file with the division within three years of the accident or the date of last payment of compensation.

4. An amendment to K.S.A. 44-5,117 which would allow for videoconferencing in mediation.

5. A new K.S.A. 44-528a (proposed) setting forth a new proposed procedure for post-award medical treatment requests, allowing for an evidentiary hearing, as well as dealing with attorneys fees and appeals therefrom. Should there be a post-award application for additional medical expenses there would be a separate opportunity for hearing and such request would move to a second priority position, following preliminary hearings (which are at the top of the trial docket).

6. Amendments to K.S.A. 44-5,120, the administrative penalty statute for fraud and abuse, which will include, among prohibited conduct, a health care provider submitting a charge for health care which was not furnished. The proposal also increases the maximum penalty from the present \$1,000 per act to \$2,000 and changes the aggregate penalty from the present \$2,500 in a 6 month period to \$20,000 in a 12 month period. The proposal also allows for qualified immunity from civil or criminal liability for those individuals referring possible fraudulent or abusive workers compensation practices to the division.

7. Amendments to K.S.A. 44-5,125 (criminal fraud and abuse statute) to **clearly** include employment while receiving temporary total disability benefits or permanent total disability benefits to which the claimant is not entitled. The penalty provisions also somewhat parallel the theft provisions to specify misdemeanor or felonies depending upon the amount of money in issue. There are new sections dealing with felonies for knowingly and intentionally presenting false certificates of insurance and false charges for health care that was not furnished. In addition, proposed new subsection (d) maintains that knowing and intentionally (a) making a false or misleading statement, (b) misrepresenting, concealing, or failing to disclose a material fact, (c) fabricating, concealing, or destroying a document, (d) conspiring with another person to commit (a) through (b) adds a level nine nonperson felony. New proposed subsection (e) requires repayment of any benefits illegally received, with statutory interest thereon. New proposed subsection (f) provides a civil cause of action to recover monies erroneously paid. New proposed subsection (g) clarifies that these rights are not exclusive and that an employer may exercise other rights of reimbursement.

8. Five (5) proposed amendments to K.S.A. 44-510, dealing with utilization and peer review, setting forth the following:

(a) A proposed amendment to K.S.A. 44-510(a)(7) which clarifies that a hearing is necessary before any sanctions become operative.

(b) An amendment to K.S.A. 44-510(a)(11) would authorize the release of peer review reports to parties other than the health care provider upon the initiation of a hearing (including the employee). If the peer and utilization

review reports shows the treatment was ineffective, it recognizes the right of the employee to initiate a preliminary hearing before the administrative law judge.

(c) A proposal to add new paragraphs (a)(15) and (a)(16) concerning the jurisdiction of the administrative law judges entertain applications for terminating or modifying medical care following a finding of overutilization, requiring that not all of the hearing procedures utilized in the utilization and peer review process be exhausted, but permitting an application be filed after utilization review when it is adverse to the health care provider. It is anticipated that, under concurrent utilization review, the administrative law judges may make decisions regarding the care and treatment to be provided that are consistent with the findings and recommendations of the medical services section.

(d) A proposal for the adoption of a new paragraph (a)(17) which would authorize the utilization and peer review reports and findings to be used as prima facie evidence of medical benefits, but also allows further evidence to rebut or contradict the prima facie evidence. The peer review and utilization review documents which are currently protected by a privilege from discovery, may be subject to discovery upon further order of an administrative law judge, but only for those proceedings. Currently, it is unclear whether or not these reports could be used to enhance medical treatment given to a claimant.

Thank you for your consideration of these requests.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



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January 23, 1998

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the
Senate Committee on Commerce

by
Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. Thank you for inviting the Kansas Chamber to comment today on workers compensation issues in our state.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 47% of KCCI's members having less than 25 employees, and 77% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

Attached to my testimony is a one-page report KCCI prepared for its members this month regarding the latest round of decreases in workers compensation insurance. On January 1, insurance rates dropped 13.2%. In the past five years, insurance rates have decreased nearly 35%,

Senate Commerce Committee

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sa Kansas employers \$111 million in workers compensation insurance premiums. This has a dramatic reversal of the first years of the decade, when rates soared nearly 50%, costing employers over \$150 million in higher workers compensation insurance.

Along with insurance being more affordable, Kansas employers also find insurance companies much more anxious to write their workers compensation business. The reason for this impressive turnaround is no secret. It is due to the massive reform of the Kansas workers compensation act in 1993. However, what is often less clear is what the Kansas Legislature did in 1993 which has produced this dramatic improvement. The National Council on Compensation Insurance credits the following:

- * THE PRESUMPTION THAT WORK DISABILITY DOES NOT EXIST IF AN EMPLOYEE RETURNS TO WORK AT 90% OF THEIR PRE-INJURY WAGE
- * ELIMINATION OF MANDATORY VOCATIONAL REHABILITATION
- * BENEFIT EXCESSES, SPECIFICALLY IN "WHITE COLLAR" INJURIES, ADDRESSED
 - \$50,000 cap in functional impairment only cases
 - weekly benefit cap for non-scheduled injuries
 - adding shoulder injuries to the scheduled injury list
- * IMPLEMENTATION OF THE WORKERS COMPENSATION MEDICAL FEE SCHEDULE
- * STRENGTHENING "EMPLOYER CHOICE OF HEALTH CARE PROVIDER"

Beyond these reforms noted by the NCCI, the Kansas Chamber would add that 1993 action to improve the judicial process and encourage needed change in insurance has also played a critical role in today's improved workers compensation picture.

However, KCCI would stress that the improvement was not produced from the pockets of the injured worker. The 1993 reform package, which has produced these insurance rate decreases, did not include reductions in the dollars paid when a workplace injury produced a fatality, a permanent total injury or a permanent partial injury. In fact, the maximum weekly benefit amount an injured worker may receive has increased 15% since the 1993 reform bill became the law in Kansas.

While today's workers compensation system is much improved, one of the lessons from the 1993 debate was to constantly seek to correct problems with the process, in order to avoid the need for another total overhaul. With that in mind, KCCI requested the introduction of SB 289 last year. That bill remains in this Committee. The Kansas Chamber feels it would produce a series of further improvements to the act. The key changes are outlined below.

THE DEFINITION OF WORK DISABILITY

SB 289 proposes to delete the current definition of work disability from the law and replace it with a system of supplemental compensation benefits for workers who cannot return to employment paying 90% of their pre-injury wage.

HEALTH CARE PROVIDER IN DISPUTED CASES

Kansas law grants employers the right to direct medical care in workers compensation cases. SB 289 proposes to clarify current law by declaring that if an employer claims a case is not compensable, but a judge determines that it is, the employer will retain the right to direct the medical care the worker receives from that point forward.

FRINGE BENEFITS IN WAGE CALCULATIONS

When determining financial compensation for an employee who is no longer working, fringe benefits are included in the calculations. SB 289 proposes to halt that practice in cases where an employee has voluntarily quit their job, or has been terminated for reasons unrelated to their workers compensation claim.

REVIEW AND MODIFICATION

In the 1993 reform of the workers compensation act, one of the key amendments changed the method for paying claims. Instead of receiving a small check for 415 weeks, the injured worker receives much larger compensation checks for a smaller window of weeks. Typically, all compensation checks are paid out in less than a year.

When this change occurred, nothing was done to shorten the window available for "review and modification," a workers compensation procedure where consideration is given to changing an original award. As a result, all compensation owed an employee may have been paid, but the window for review and modification remains open. SB 289 proposes that the review and modification window be closed when all compensation has been paid.

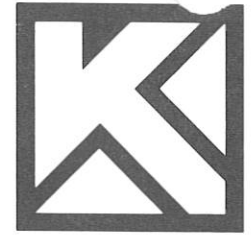
SELECTION OF ADMINISTRATIVE LAW JUDGES

SB 289 proposes Kansas employ the same method currently used to select members of the Workers Compensation Board of Appeals in the selection of Administrative Law Judges (ALJs). That process would lead to an ALJ serving a four-year term in office. Currently, ALJs are classified employees of the state. Choosing ALJs would begin with applicants being considered by a Nominating Committee, made up of representatives of the Kansas Chamber and the Kansas AFL-CIO. The Nominating Committee must unanimously agree on all ALJ nominees. Their nominees would go to the Secretary of Human Resources, who would have the final appointment authority.

Madam Chairperson, thank you for the opportunity to comment on today's workers compensation process in Kansas. I would be happy to answer any questions.

SPECIAL REPORT

Kansas Chamber of Commerce and Industry



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January 1998

Workers Compensation Insurance Rates Continue to Tumble

On January 1, 1998, workers compensation insurance rates became a little more affordable for Kansas employers to purchase. On that date, a 13.2% reduction in overall workers compensation insurance rates went into effect, continuing the remarkable turnaround in the cost business bears to provide workers compensation coverage to their workers.

The latest rate decrease is estimated to save the 46,000 employers in our state who purchase workers compensation insurance \$39.4 million in the premiums they pay. The Kansas Insurance Department is charged with approving insurance rates which are adequate for insurance companies to recoup their workers compensation claims costs. In announcing the new rate structure, Kansas Insurance Commissioner Kathleen Sebelius said, "The new rates represent our continued commitment to reduce costs for Kansas employers while maintaining a healthy, solvent and competitive workers compensation market."

July 1, 1993 was the day when the workers compensation insurance climate in Kansas dramatically reversed. That was the day that workers compensation reform legislation became the law of the land. KCCI was the driving force behind the legislative initiative which has produced the dramatic results shown below.

Date of W.C. Rate Change	Overall Increase/Decrease	Overall Change in Insurance Costs
June 1, 1991	+24.0%	+\$66.8 million
June 1, 1992	+21.7%	+\$72.8 million
June 1, 1993	+ 3.9%	+\$13.0 million
June 1, 1994	- 2.0%	-\$ 7.0 million
June 1, 1995	- 7.5%	-\$25.5 million
June 1, 1996	-11.5%	-\$39.2 million
January 1, 1998	-13.2%	-\$39.4 million

In Kansas, workers compensation insurance rates are built to reflect injury risks for over 600 different job classifications. The 13.2% rate decrease reflects the overall average change in rates for all of the job classifications. Approximately 85% of those classifications will experience some decrease in rates in 1998. That means there will be rate increases in 15% of the job classifications. The rate decrease below is broken down by industry type.

Industry Type	Rate Decrease by Percentage	Rate Decrease by Dollars
Manufacturing	-14.7%	-\$11.0 million
Contracting	- 8.8%	-\$ 5.2 million
Office and Clerical	-12.6%	-\$ 3.4 million
Goods and Services	-13.8%	-\$ 9.7 million
Miscellaneous	-12.3%	-\$ 5.0 million
Voluntary Insurance Market	-12.7%	-\$34.3 million
Kansas Assigned Risk Plan	-17.2%	-\$ 5.2 million

The workers compensation insurance rate change was proposed by the National Council on Compensation Insurance in October. The proposed rates were reviewed by an independent actuary and a series of public hearings were held around the state before the new rate structure was approved by the Kansas Insurance Commissioner.

(a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(b) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any 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.

(c) Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed. The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting,

the date of accident

(d) (1) If 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, any compensation in respect to that injury shall be disallowed.

(2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are