

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on February 11, 2005 in Room 241-N of the Capitol.

All members were present.

Committee staff present:

Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:

Representative Candy Ruff
Jeff Cooper, Kansas Trial Lawyers Association
Terry Leatherman, Kansas Chamber of Commerce
Hal Hudson, National Federation of Independent Businesses

Others attending:

See attached list.

The Chairman opened the hearing on **HB 2316 - Workers compensation liability of employer involving drug and alcohol use.**

Representative Candy Ruff, a proponent for **HB 2316**, testified in favor of the bill. A signal was sent to employees that those who abuse drugs and alcohol would be further punished by losing their right to probable cause. In a system termed no fault, injured workers alone bear the consequences of their actions when an injury that occurs at work is the result of their impairment. They lose their ability to access the benefits of workers compensation (Attachment 1).

Jeff K. Cooper appeared as a proponent to **HB 2316** on behalf of the Kansas Trial Lawyers Association. Employers are not required to provide workers compensation benefits when the workers' use of drugs or alcohol contributed to the workers injuries, disability or death. There are no provisions in the Kansas Workers Compensation Act that articulate the employer's liability if an employee is injured on the job as a result of the employer's use of drugs or alcohol. **HB 2316** would create an exception to the exclusive remedy provision in the Workers Compensation Act where the employer uses or consumes alcohol or drugs, and as a result of an employer's use of alcohol or drugs an employee is injured or killed and such injury, disability or death was contributed to be the employer's use or consumption of alcohol or drugs.

Employers would be held to the same standard for their use of drugs or alcohol as are injured workers under the current provisions of the Workers Compensation Act as dealing with drug and alcohol use by the employee (Attachment 2).

Terry Leatherman, Vice President-Public Affairs, Kansas Chamber of Commerce, testified as an opponent to **HB 2316**. At its core, workers compensation is a tradeoff. The worker receives first dollar medical care, compensation dollars for the lasting affects of a work-related injury, and an administrative process designed to deliver prompt and fair justice to a claim. For an employer, workers compensation provides a shield against protracted legal action that could cripple a business. There are certainly examples where the workers compensation shield is used by employers to protect them from their indefensible actions. However, that is a tradeoff. **HB 2316** rips into the exclusive remedy principle of the workers compensation law. This would increase workers compensation insurance costs. Workers compensation is no shield from criminal wrongdoing. **HB 2316** is a radical departure from efforts to promote employer/employee cooperation and return to work. Instead, it promotes open combat through litigation between boss and worker (Attachment 3).

Hal Hudson, State Director, National Federation of Independent Business, testified as an opponent to **HB 2316**. Enactment of the bill would undermine the basic concept of workers compensation. The Workers Compensation Act sets up "NO-FAULT" exclusive remedy for dealing with problems related to on-the-job injuries of workers. The Act provides that employers' insurance will pay for medical expenses and a portion

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on February 11, 2005 in Room 241-N of the Capitol.

of wages lost as a result of job-related injuries. By providing workers compensation insurance, the employer and the insurance company already accept liability for accidents that might injure an employee on the job, whether or not any action of the employer led to the injury. Our greatest concern is for the "exclusive remedy" provision of the Act to remain intact. Without this protection, employers have little justification for buying the insurance (Attachment 4).

The Chairman closed the hearing on **HB 2316**.

The Chairman asked what the committee's pleasure was on working **HB 2141**.

Representative Jack moved and Representative Ruff seconded to amend **HB 2141** by inserting "materially" between "was" and "contributed" on line 43, page 1. On page 2 strike "conclusively" in line 12, strike "(A)" and re-letter and make "B" "A" and capital "T" on line 41 and strike "establishing probable cause" on line 42 and add "causing the injury". Strike all of (3) on page 3.

Representative Novascone moved and Representative Sharp seconded a Substitute Motion to move **HB 2141** out favorable. The motion carried.

A Division was called: 10 Yeas - 9 Nays.

The following people requested being recorded as voting NO: Representatives Pauls, Garcia, Swenson, Ruff, Grant, Henderson, Burgess, Ruiz.

The meeting adjourned at 10:50 a.m. The next meeting will be February 14, 2005.

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 HOUSE OF
 REPRESENTATIVES

COMMITTEE ASSIGNMENTS
 RANKING MINORITY MEMBER: COMMERCE & LABOR
 MEMBER: FEDERAL AND STATE
 AFFAIRS
 WILDLIFE, PARKS &
 TOURISM

Feb. 11, 2005

House Commerce and Labor Committee
 Rep. L. Candy Ruff

Testifying in support of HB 2316

With the introduction of HB 2141, a signal was sent to employees that those who abuse drugs and alcohol will be further punished by losing their right to probable cause. In a system termed no fault, injured workers alone bear the consequences of their actions when an injury that occurs at work is the result of their impairment. They lose their ability to access the benefits of workers compensation.

During the historic and prescient-setting 1993 reforms that occurred to our state's workers compensation system, an important compromise was accomplished between KCCI and AFL-CIO. In exchange for lowering by considerable amounts the levels at which alcohol and/or drugs would be identified in an injured worker's system, that workers would have the protection of probable cause. With the provisions carried in HB 2141 that compromise was forever broken.

You heard from Mr. Hobbs, the employer attorney, how circumstances in the Foss case disallowed blood test results from being entered as evidence to ultimately prove impairment. The state Chamber of Commerce could have easily asked in this legislation that blood test results used in the criminal prosecution of cases be automatically allowed in worker compensation proceedings. The anomaly found in that case could have been corrected. But more important the 1993 compromise and the principal of first providing probable cause would have held.

Testimony regarding the Frakes case pointed to another need for tweaking the law. By asking that alcohol and drug tests ordered by federal law in cases of injury accidents be automatically used in worker compensation hearings, a fix would have been achieved and the 1993 compromise upheld. That makes sense to me. It did not, however, to KCCI.

Not gaining Worker Compensation Advisory Council approval, nor even a hearing before that group, the legislation eliminating probable cause arrived before our committee. Emphasizing the need to establish a toughen drug-free work place, the state chamber broke the 1993 deal.

Commerce and Labor Committee members I am sure none of you want to show any tolerance or favorable treatment to those who would hold their fellow workers in such disdain. I know from testimony you have given in other committees or on the floor of the House or from personal conversations, there are those among us who have suffered grievously from accidents involving impaired drivers. Your hearts have been broken forever.

And from that type grief, we as state policy makers have tightened drunk driving laws and other statutes that punish those who abuse alcohol and drugs, especially when impairment results in someone's injury or death. KCCI makes the case once again that injured workers in this no-fault workers compensation system should suffer the most brutal of consequences by losing the right to have their medical expenses paid and a cash settlement awarded for their disability rating.

But its righteous indignation toward drug and alcohol-impaired workers is called into question when they insist that impaired employers suffer no civil consequences. In the name of upholding exclusive remedy, KCCI argues for the continuation of this shameful double standard.

Mind you, other states have carved out of their exclusive remedy provisions exceptions for employer impairment from alcohol and drugs. Other states have refused to uphold this egregious policy. Other states have taken the intentions of a Drug Free Workplace and applied it across the board. And yet Kansas refuses to do so.

Holding impaired employers civilly liable when they consequently cause an employee's injury or death will end the hypocrisy in our worker compensation system. It will remove from our state statutes the shameful double standard we endorse by allowing worker compensation's exclusive remedy to shield employers who abuse alcohol and drugs.

Imagine the outrage those of you who have lost loved ones to drunk drivers would feel if those causing you all this pain were allowed to never skirt the consequences of their horrible actions. Can you look into the faces of injured workers or their surviving family members and justify the protection you give those offending employers?

Carving out an exception to exclusive remedy in this instance is a state policy I urge you to adopt. The height of hypocrisy lives in a policy that uses exclusive remedy to devalue our drug free work place initiative.

HB 2316 gives you the courage to tell those victims that Kansas lawmakers are serious about punishing those who hurt or kill others with their abuse of alcohol and drugs. To chose to do otherwise is like opening the car door for that drunk driver who caused your heart to be forever broken.

<i>Funeral Services for a loved one:</i>	<i>Cost</i>	<i>\$9,000</i>
<i>Engraved Headstone for a loved one:</i>	<i>Cost</i>	<i>\$6,000</i>
<i>Cost to a corporation for gross negligence:</i>		<i>\$25,000</i>
<i>The loss of a loved one:</i>		<i>is PRICELESS</i>

\$25,000 to prevent corporate negligence is not enough.

We can no longer allow Corporate negligence to claim the lives of our loved ones while hiding under the "exclusive remedy clause" that our current work comp law allows. It is up to each of you as an elected official to protect Kansas's workers.

A fatal accident occurred on April 21st, 2003 in Marion, Kansas when a company pickup operated by the plant manager struck the scale house in which my mother, Georgie Vogel was working. "The plant manager had suffered a seizure at the time of the accident and failed to control the truck he was operating. Since 1995, the plant manager had been under a doctor's care regarding prescribed medications for seizures. During the 5-month span prior to this accident, the plant manager had been involved in two motor vehicle incidents while taking this medication and experiencing seizures. The employer had knowledge of these prior incidents and continued to permit the plant manager to drive this vehicle, endangering himself and others." These are direct quotes from the MSHA investigation conducted after my mother was run over while sitting at her desk working. MSHA has deemed this to be of high negligence and has issued a Class D1 citation to the employer. A "D1" citation is an "unwarrantable failure that could significantly and substantially contribute to a health or safety hazard." The Marion County Police Department has turned this case over to the Attorney General for consideration of charges against the employee and the employer.

An employer should be held accountable for the safety of their employees while they are at work and I believe that most Kansan's trust that an employer is taking measures to keep them safe. Very few workers are aware of the "Exclusive Remedy" clause under Kansas Workers Comp. This statue entitles any non-financially dependent dependents to collect a total death benefit of \$25,000 and a funeral benefit of \$5,000 regardless of the negligence on the part of the employer. In 1999 HB2287 and HB2493 were introduced that would exclude gross negligence from the exclusive remedy net. Both of these bills died in the House Business, Commerce and Labor Committee. It is our plea that you revisit these bills and change this law. It is apparent with the many lives lost due to gross negligence that the current law does not provide any incentive to corporations to keep their employees safe. Gross Negligence on the part of both the plant manager and his employer is the very reason my mother is no longer with us today.

In closing, I would like to leave you with the following:

As I stand here today, my sister and I are without a mother and our children without their grandmother because our mother's co-worker continually made irresponsible decisions. While he should be held accountable for his actions, his employer should also be held responsible to ensure their workers safety. Our mother's coworker suffered two seizures in the five months prior to her accident. Both of these seizures involved the company vehicle that he was driving the day our mother was killed. If the penalty for this type of gross negligence were unrestricted, an employer would be more inclined to ensure their workers safety. You will hear from large corporations and small business' that this type of penalty would be prohibitive and would encourage fraud and abuse. However, if they were not negligent, a change to the current work comp law would not affect them. I'm told that for every sorrowful circumstance that happens in life, something good will come of it. We would like to think that our mother's death could prevent future unnecessary accidents from occurring. Kansas Workers deserve more than the current law gives. This is a true change for the people that have elected you to represent them. Please help us in getting this law changed.

TESTIMONY ON BEHALF OF
THE KANSAS TRIAL LAWYERS ASSOCIATION
REGARDING HB 2316

By

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February 11, 2005

Thank you Chairman Dahl and Members of the Committee. My name is Jeff Cooper, and I appear on behalf of the Kansas Trial Lawyers Association. I am an attorney, adjunct law professor at Washburn School of Law teaching workers compensation, and have been involved in workers compensation for 20 years. In the work comp field I represent injured workers, self-insured employers, workers compensation insurance companies, and the Kansas Workers Compensation Fund. I am also a member of the Attorneys Advisory Committee founded by Director Greathouse to study work comp issues, and also serve as a Pro Tem on the Appeals Board for Workers Compensation in Kansas.

I want to thank the Chairman and the Committee for allowing me to appear and testify in support of HB 2316. As you know, the Kansas Trial Lawyers is a state-wide nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present testimony on HB 2316.

On behalf of the Kansas Trial Lawyers Association, we would like to express our appreciation for this Committee's efforts in taking steps to insure that Kansas work places are safe and drug-free for all workers.

We have discussed other Bills proposed concerning the workers' use of drugs or alcohol and the effect those activities can have on a workers compensation claim. As all of you know, employers are not required to provide workers compensation benefits when the workers' use of drugs or alcohol contributed to the workers' injuries, disability, or death. However, there are no provisions in the Kansas Workers Compensation Act that articulate the employers' liability if an employee is injured on the job as a result of the employers' use of drugs or alcohol. HB 2316 would create an exception to the exclusive remedy provision in the Workers Compensation Act where the employer uses or consumes alcohol or drugs, and as a result of an

Comm Labor
2-11-05
Atch # 2

employer's use of alcohol or drugs an employee is injured or killed and such injury, disability or death was contributed to by the employer's use or consumption of alcohol or drugs.

Essentially, HB 2316 would make an employer responsible for their actions to the same extent that an employee would become responsible for their own actions. The employer would not be able to use the exclusive remedy provision as a shield to protect them from their own acts and assuming they are using alcohol or drugs.

Employers would be held to the same standard for their use of drugs or alcohol as are injured workers under the current provisions of the Workers Compensation Act as dealing with drug and alcohol use by the employee.

As drafted, there are some issues with regard to HB 2316 as it appears from reading the language of the Bill does create some issues regarding definitions as to who would be considered an employer and who would fit said employer definition. However, those issues could be resolved with further definitions.

In summary, we applaud the Committee's commitment to provide safe and drug-free employment for all workers and believe that this Bill is a step in the right direction to protect workers and their families.

Legislative Testimony

HB 2316

February 11, 2005

Testimony before the Kansas House Committee on Business, Commerce and Labor
By Terry Leatherman, Vice President – Public Affairs

Mr. Chairman and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to explain why the Kansas Chamber opposes passage of HB 2316.

At its core, workers compensation is a tradeoff. The worker receives first dollar medical care, compensation dollars for the lasting affects of a work-related injury, and an administrative process designed to deliver prompt and fair justice to a claim. For an employer, workers compensation provides a shield against protracted legal action that could cripple a business. This is not a perfect system. Ask nearly any employer and they will tell you a tale of a workers compensation claim they were responsible to pay which they felt was grossly unfair. There are certainly examples where the workers compensation shield is used by employers to protect them from their indefensible actions. However, that is the tradeoff. Passage of HB 2316 is tantamount to saying the deal is off.

Please carefully look at the legal right being granted in HB 2316. In general, it rips into the exclusive remedy principle of the workers compensation law. In addition, the Kansas Chamber has the following concerns.

- HB 2316 will increase workers compensation insurance costs. This will happen because of the leverage of litigation, where a claimant's attorney can threaten legal action which will be dropped only if the employer succumbs to the attorney's claim demands.
- Workers compensation is no shield from criminal wrongdoing. Workers compensation does not stop OSHA penalties and fines from being levied when fault is found by that agency following a work place injury. HB 2316 is not going to produce a safer Kansas but will produce legal creativity in pursuit of the next big jury award.
- Consider for a moment the employer's obligations. HB 2316 does not remove their workers compensation responsibilities. They will be paying the injured worker's medical bills and compensation benefits, and will be attempting to return the worker to their job (for practical, financial and legal reasons). All the while, their employee will be pursuing a legal action against them.
- HB 2316 is a radical departure from efforts to promote employer/employee cooperation and return to work. Instead, it promotes open combat through litigation between boss and worker.

In all workers compensation cases, medical care and compensation is a right the injured worker will receive in a system where employers pay all insurance costs. While the system is far from perfect, a careful analysis of how the system works for all Kansas employees will show the workers compensation social experiment works. Do not alter this balance by recommending HB 2316.

Thank you for the opportunity to comment on the bill before you today.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

Commerce Labor
2-11-05
Atch # 3



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Statement By
Hal Hudson, State Director
National Federation of Independent Business
Presented to the
House Commerce and Labor Committee
Friday, February 11, 2005

Mr. Chairman and Members of the Committee:

My name is Hal Hudson, and I am State Director for NFIB – the National Federation of Independent Business.

This has been a week full of workers comp. hearings for you. Until today, I have not asked to testify, leaving the technical and legal details of workers comp to those more experienced with the impacts of the various twists and turns in the law.

However, I do fully understand the implications of HB 2316, and I am asking you to reject this bill. Enactment of HB 2316 would undermine the basic concept of workers compensation.

Some might say HB 2316 is “tit for tat;” that it just levels the playing field. “What’s good for the goose is good for the gander.” And I say, “baloney!”

The Workers Compensation Act sets up “NO-FAULT” exclusive remedy for dealing with problems related to on-the-job injuries of workers. The Act provides that employers’ insurance will pay for medical expenses and a portion of wages lost as a result of job-related injuries.

By providing workers compensation insurance, the employer and the insurance company already accept liability for accidents that might injure an employee on the job, whether or not any action of the employer led to the injury.

The Kansas Workers Compensation Act has been in effect for many decades. Kansas employers have accepted the responsibility for paying millions of dollars a year in premiums to purchase Workers Compensation Insurance, for one basic reason.

Our greatest concern is for the “exclusive remedy” provision of the Act to remain intact. Without this protection, employers have little justification for buying the insurance.

Elimination of the “no fault” provisions of the workers comp act is a trial lawyer’s dream. HB 2316 is the first step to fulfilling that dream.

I urge you to “just say NO” to HB 2316.

Thank you.