

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 1, 2005 in Room 241-N of the Capitol.

All members were present except:

Broderick Henderson- excused
Patricia Kilpatrick- excused

Committee staff present:

Norman Furse, Revisor of Statutes
Renaë Jefferies, Office of Revisor or Statutes
Jerry Ann Donaldson, Kansas Legislative Research Department
June Evans, Committee Secretary

Conferees appearing before the committee:

John Ostrowski, Kansas AFL-CIO
Tim Power, Kansas Trial Lawyers
Terri Roberts, Kansas Coalition for Workplace Safety

Others attending:

See attached list.

The Chairman opened the meeting and stated the Minutes of January 27 and 28 were before the committee. They will be approved at the end of the meeting if there are no additions or corrections.

The Chairman asked what members would like to receive a copy of "Supervision - Ladder to Success - Slide to Failure" that A. J. Kotich addressed in his testimony on January 27? Fifteen copies will be requested.

The Chairman opened the hearing on **HB 2141 - Workers compensation, burden of proof for admission of chemical test result into evidence.**

Staff gave a briefing on **HB 2141**, stating the purposes of satisfying the probable cause requirements of subsection (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances in (A), (B), (C) and (D) which is new language.

John M. Ostrowski appeared in opposition of **HB 2141** on behalf of the Kansas AFL-CIO and stated the bill in essence removed the requirement that "probable cause" be part of admitting alcohol/drug results into evidence in workers compensation cases. The proposed changes create "suspicion less" or "random" testing of individuals. Drug or alcohol is not supported by anyone in the workplace. Everyone agrees that when a worker causes his own injury through intoxication or impairment, generally speaking, he should not be compensated, or should be compensated at a reduced level. The legislature in its efforts to "balance" competing interests must consider, among other things: constitutional issues, an individual's right to privacy, society's desires relative to impairment/intoxication, the evils of "warrant less" searches or searches based on suspicion, the chilling effect of legitimate workers compensation claims, the employee's presumed loss of employment, medical care which would be shifted from the employer to society as a whole if compensation is denied, the admissibility of evidence, burden of proof requirements, and the list goes on and on.

HB 2141 eliminates, for all intents and purposes, the necessity of probable cause to introduce drug testing into evidence. The issue is whether or not this is fair, and represents a balance, considering the entirety of the intoxication/impairment defense.

The Kansas Legislature last visited this issue in 1993, and modified the intoxication/impairment defense at the urging of the Kansas Chamber of Commerce and Industry. The employer's defense was strengthened, and the employee's rights severely curtailed because: a) for an injury to be deemed not compensable, the impairment merely had to "contribute" to the accident, and b) extremely low impairment levels were written into the law which produced an irrebuttable presumption of impairment (Attachment 1).

Tim Power, Kansas Trial Lawyers Association (KTLA), testified in opposition of **HB 2141**. Employers are not currently required to provide workers compensation coverage when the worker's use of drugs or alcohol

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contributed to the worker's injury, disability, or death. The law provides for the circumstances under which a worker is presumed to have been impaired by alcohol or drugs, and when the results of a chemical test that might show impairment may be used as evidence. Results of a drug test may only be used as evidence of impairment if there was probable cause to believe that the worker used, had possession of, or was impaired by the drug or alcohol while working. The current law provides appropriate rules for admissibility of drug tests and protects both the worker's rights to privacy and the state's interest in promoting drug-free workplaces.

HB 2141 establishes new standards under which employers may require that workers who are injured on the job submit to drug testing. **HB 2141** sets out new requirements for meeting the probable cause requirement. KTLA members are concerned that the new probable cause requirements are a significant erosion of the current probable cause requirement and may jeopardize an injured worker's constitutional right to privacy (Attachment 2).

Terri Roberts, Kansas Coalition for Workplace Safety, testified as an opponent to **HB 2141**. The bill amends the drug/alcohol defense in K.S.A. 44-501(d) by removing the requirement that an employer have probable cause to believe an injured worker is under the influence of alcohol or drugs before it can demand that the injured worker submit to a drug or alcohol test. A new subsection that provides the employer "shall be deemed to meet their burden of proof" to show probable cause if several items are proven (Attachment 3).

Written testimony opposing **HB 2141** was distributed by Ernest Kutzley, Advocacy Director, AARP, Kansas (Attachment 4) and Mark Desetti, Kansas National Education Association (Attachment 5).

The Chairman said that if there were no corrections to the Minutes of January 27 and 28 stand approved as presented.

The meeting adjourned at 10:15 a.m. The next meeting will be February 2, 2005.