

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 6, 2004 in Room 241-N of the Capitol.

All members were present except:

Representative Bob Grant- excused
Representative Broderick Henderson- excused
Representative Don Hill- excused
Representative Kevin Yoder- excused

Committee staff present:

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

Conferees appearing before the committee: Larry Karns, Attorney
Beth Foerster, Adjunct Professor, Washburn Law School and
Attorney at Law

Others attending:

See Attached List.

The Chairman stated this meeting was designed to help all of the committee members get up to speed on workers compensation. This is an information session and two attorneys that may have different views of workers compensation have been invited to speak. The two conferees will speak approximately 20 to 25 minutes each and then they will have the opportunity to make additional comments or rebuttals. Questions will follow.

Larry Karns, presented his views on reform regarding the definition of "work disability." For many decades, Kansas Workers' Compensation Law has provided two statutory methods in regard to compensating injured workers. The first approach provides compensation based on an injury to a "scheduled" member of the worker's body. Thus, for example, an injury to the arm is allocated so many weeks of permanent partial disability compensation, and a different number of weeks is allocated for a leg injury. "Scheduled" injury compensation awards are determined by applying the percent of physical impairment of function to the appropriate statutory number of weeks allowed.

In 1987, the Kansas legislature made significant revisions to "work disability." K.S.A. 44-510e(a) was modified to read as follows: "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation..."

Because of the high expenses involved in the vocational rehabilitation that was also attempted under the 1987 legislation, the Kansas legislature again revamped the Workers Compensation Act in 1993. For accidents occurring on July 1, 1993 and thereafter, the definition of "work disability" was changed pursuant to K.S.A. 44-510e(a) to provide as follows: "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Unfortunately, the current work-disability scheme is such that the burden of proof is unfairly weighted in favor of the claimant. Anytime legislation to resolve conflict results in the burden of proof not being fairly apportioned, abuse can and in fact will result.

The second aspect of work disability under the current law is also tilted to an extreme in favor of the claimant. The claimant is rewarded for not returning to work (whether it is with the same or a different employer). This is because the amount of permanent partial disability compensation the claimant can

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receive is increased if he or she is not working.

With the current system, there is a partial backward-looking scheme to determine work disability, where vocational experts and physicians have to testify, and a present-time test of whether or not the claimant is currently working. The future is ignored as we look at what the claimant is actually earning at the particular time the award is rendered by the administrative law judge. This very light burden of proof on the claimant under the current workers' compensation system makes recovery of significant work disability much easier than would otherwise be the case (Attachments 1, 2, 3 & 4).

Beth Regier Foerster, Adjunct Professor, Washburn University Law School and Attorney at Law, stated she attempted to give "neutral testimony" regarding Kansas workers compensation during the legislative interim committee. This broad overview is more from the perspective of the injured worker.

The interim committee heard, and this committee will hear testimony, that there is no "crisis" in workers compensation. As such, there is simply no need for "reform". It seems overwhelmingly correct that all statistical data from the NCCI and other sources indicates Kansas premiums are very low both nationally and within the geographic area. Indemnity payments to injured workers were approximately equal in 2003 to those paid in 1993. The Insurance Department has approved a decrease of 35.2% for combined premiums between June 1, 1994 and January 1, 2003.

The Insurance Commissioner has approved a 1.9% rate increase for the upcoming year. It is clear that the upturn is due to the ever accelerated rising costs of medical care, the cyclical nature of the insurance industry and general inflationary pressures.

From the injured workers perspective the picture changes from "stable" or "as anticipated" to "bleak." In all five categories of monetary benefits paid to injured workers (i.e. indemnities), there is a huge deficiency. There are two very favorable components of the current workers compensation system, i.e., preliminary hearings and return to work incentive.

When a worker is completely unable to return to substantial and gainful employment following injury, they are entitled to permanent total disability not to exceed \$125,000. Kansas is only one of four states in the Union which caps permanent total disability rather than providing lifetime benefits. Not only does Kansas institute this cap, but it also pays the lowest amount of the four capped states. The nearest state pays double what Kansas pays or \$250,000.

In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent total disability was raised from \$100,000 to \$125,000. Since 1987, this cap has never been raised.

Regardless of what a worker makes while working, they are only allowed to currently receive \$440 per week when off work and unable to work because they are healing/recovering from injury.

In July 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent partial disability was raised from \$75,000 to \$100,000. Since 1987, this cap has never been raised.

In July of 1987, death benefits were increased to \$200,000. That cap remained in effect until July of 2000, when benefits were increased by \$50,000. The increase was brought about by the tragedy from DeBruce Grain. Again, it is easily shown that Kansas' death benefits are meager compared to other states and what it would take to allow for an adjustment period following the death of a breadwinner (Attachment 5).

The meeting adjourned at 10:30 a.m. and the next meeting will be February 10, 2004.