

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 8:30 a.m. on March 8, 2011, in Room 548-S of the Capitol.

All members were present.

Committee staff present:

Ms. Margaret Cianciarulo, Committee Assistant
Mr. Ken Wilke, Office of the Revisor of Statutes
Mr. Reed Holwegner, Kansas Legislative Research Department
Ms. Dorothy Noblitt, Kansas Legislative Research Department

Conferees appearing before the Committee:

Mr. Fred Greenbaum, Attorney, McAnay, Van Cleave & Phillips
Mr. Anthony Andersen, Attorney, McAnay Van Cleave & Phillips
Mrs. Karin Brownlee, Secretary, Kansas Department of Labor

Others attending:

See attached list.

+Hearing on Substitute for HB2134 – an act concerning workers compensation

Upon calling the meeting to order, Chairperson Wagle announced the Committee would be having a hearing on **Substitute for HB2134**, an act concerning workers compensation and called on Mr. Fred Greenbaum, Attorney at McAnay, VanCleave & Phillips who referred them to the booklet entitled, “Comparison **Substitute for HB2134** as Passed by House, **HB2134** Compromise, and Current Law.” He stated the booklet offered a comparison of the bill as passed by the House, the original compromise is what we did, and the third is what the current law is.

In looking at the book and referring to page 1, the Chair asked what does “Nothing written” mean in column 2? (A lot of what has been written in the House bill are issues we never really dealt with or did not think was necessary.) Mr. Greenbaum stated:

- 1.) Column one is in chronological order with the proposed act itself.
- 2.) Fraud and abuse talks about the employer or insurance carrier can put on a check that essentially says that if you work or take a job where you are doing things where you are representing things you cannot do then you could be prosecuted for fraud and abuse. It also talks about restitution for future comp awards but is not sure what that means, but does feel it would be more properly placed in the fraud and abuse section. There is nothing that prohibits this from happening now. He would suggest it be looked at in Committee and rework some of the language.

The Chair recognized Senator Schodorf who asked if these were all the House amendments, but as she understands, the bill that was brought to the House was agreed upon by both parties and there was a compromise and the House amendments added this? (Yes.) Chairperson Wagle asked if his party had a problem with this amendment? (Has a problem with the way it is written). The Chair asked, with the intent of the amendment if after it is rewritten, would you have a problem with? (No.)

- 3.) Fighting and horseplay – we did not deal with this because there is case law and we do not get that many fights between co-workers. He does not have a problem with the concept, but feels the division is they want that any fights between co-workers on the job, whether work related which does entitle them to benefits or voluntary participation which is not compensable, should be compensable.

The Chair recognized Senator Holland who asked, just so he could have a perspective, what was the background for paying compensation for workers who get into a fight over something that is worked related? (Thinks the intent is, if it is not your fault and you are not in this because you want them to be protected, you do not want them to have the right to sue the employer if they knew this other person was a bad employer) The Chair asked are you saying previous case law has really made this a non issue in the past? (Both sides do not think this is a major issue. Mr. Andersen commented about the good Samaritan, in that they have very few cases and we have a lot of case law because these cases are well defined.)

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4.) Undocumented workers – summarizing this side-by-side comparison, the House bill essentially denies benefits to undocumented workers other than medical compensation. He said their group denied undocumented workers work disability because they did not have the legal capacity to enter into a valid employment contract consequently how can you say that you have lost the ability to earn comparable wages when you did not truthfully legally have that ability in the first place. They did feel these workers had the right to medical benefits, temporary total benefits, for permanent impairment of function and physiological injury which they capped at \$75K. One concern he felt all had regarding the House version that states if you take away the permanent of function, the temporary total disability, what could happen is a civil court could say you are allowing medical benefits so they have that right under the act to sue.

The Chair stated in the interest of time, would it be safe to say that both sides are more concerned about this amendment? (Yes.)

Mr. Tony Andersen, who works with Or. Greenbaum, stated he would be covering alcohol and abuse is similar to the undocumented workers section in that if they are not covered by comp they get to go to the civil court. Also if there is an accident and the employee has sustained injury and is impaired because of drinking, it must be proven that the two go together, in other words just because a person is impaired doesn't mean it was due to his drinking. With regard to the drug and alcohol testing methods, they feel it needs to be the same consistent throughout the act.

The Chair asked if this also was a concern on both sides? (Yes.) She also feels others will be testifying as they also have concerns about wanting to have drug testing.

Regarding the natural consequence's language, the prevailing factor, they added in “that the accident is the natural consequence of a hazard connected to the employment,” and we are not sure that this means because “natural consequence” is not something that is defined the workers comp and is a new term the court would have to interpret. The same is true with “hazard.”

5.) Coming and going - essentially accidents that occur on the way to work are not compensable except under special circumstances. The House says that the special risk or hazard has to be connected with the nature of the employment which is not a risk or hazard to which the general public is exposed and right now it does not state in the statute the hazard is connected with the nature of the employment.

Recreational activities also changed. The way the law is now, typically an injury does not arise out of the course of employment if it is at a recreational or social event where the employee is under no duty to attend. The House tried to add additional language under subsection 2 where it talks about not being covered for these types of activity injuries unless the employee was paid wages and travel expenses while participating in such event. However, a person who is salaried is essentially paid for all of their time. So the concern is how this was written in that in may actually add more people back into this type of activity than what it attempted to take out.

Recommended work – the way it is written, feels it already exists and if you can do it under the act you can do it under the compromise.

Calculation Scheduled Injuries and Calculation Body Injuries – there is some language changes that they changed to clarify the manner in which they do the calculation, more of a technical change to make sure the language reads correctly in the statute.

The Chair stated, so even if we adopted the original bill, we need some technical changes and asked Labor if they were comfortable with this? (Yes to both.) Mr. Greenbaum went on to say, they had in the compromise, changed the notice provision, this concerns how long an employee needs to give notice that they were injured on the job and there was confusion as to the time, for instance before it said 10 days and then you could go to 75 days if there was just cause, then a 30 day across the board standard. The amendment talked about 10 days after the employee seeks medical treatment or last day of work.

Chairperson Wage asked what was the compromise? (30 days after the accident.)

The last two sections are on court reporters fees. The House version changed this if there is no record taken will be taxed to the Division. He said what happens now if go to a hearing and work it out ahead of time, the court reporter still gets paid for showing up that get taxed to the employers but now this will shift to the Division, but in reality is shifting to all employers. The translator fee may be another issue. The House version said that any fee charged by a language translator for services provided to the claimant, under the Workers Comp Act, would be paid by the claimant. This may cause more litigation

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because the interpretation is not there. A copy of the comparison's (Attachment 1) attached and incorporated into the Minutes as referenced.

The Chair asked if there were questions about what is in the bill? As there were none, she called on Mrs. Karin Brownlee, Secretary, Kansas Department of Labor, who stated the DOL is in favor of the bill presented by both labor and business but she would however, like to discuss the 15 amendments added by the House to the underlying bill including:

- 1.) New Section 2, which they support but strongly suggest this notice from the employer be mandatory.
- 2.) New Section 3, would require the Division of Workers Compensation to create a form and develop rules and regs. Other ramifications could include tracking for form and testifying as to the date of receipt and entry.

The Chair wants to make sure the attorneys are following along with the testimony. (They have read this over and had concerns about this to.)

- 3.) Section 4 does not cover violence against a non-participating employee. And the second amendment in K.S.A.44-501 adds confirmatory test cutoff levels and the use of split drug test samples. She stated this may negate the 30-day notice requirement.

- 4.) The definition of mail was expanded to include electronic means stating this was requested by the DOL. An example would be to allow the division to transfer a final order by electronic means,

The Chair asked if this was part of the technical changes? (Yes.) Senator Holland asked what is the final order and who does it go to? (It would go to the Plaintiff.)

- 5.) Section 17 of K.S.A.44-520 limits the 30 day notice changing it to 10 days after employees last day or 10 days after employee seeks medical treatment for the injury, Again, this amendment would delete the 30 day notice.

- 6.) Section 25 of K.S.A. 44-552 adds two new subsections to the act. Which will add financial expense to the Division and at a minimum the second statute should be referenced in the amendment.

- 7.) New section (e) puts the financial burden on the claimant for an interpreter and is in direct conflict with K.S.A. 75-4351, et seq.

Finally, they are requesting the Committee consider adding an additional amendment which would amend K.S.A. 44-555c which would place the Workers Compensation Board under the supervision and direction of the Director of Workers Compensation. In addition, delete the Workers Compensation Board Nominating Committee from the statute and place their function in the hands of the Secretary of Kansas DOL. A copy of her testimony is (Attachment 2) attached and incorporated into the Minutes as referenced.

Questions for Secretary Brownlee came from Senators Holland, Steineger, and Emler including: what is the purpose of your last proposed amendment? (The current mechanism is that the business and union communities forward three names to the Secretary who then can nominate that person to the board. and feels it would be sufficient for the Secretary name people to the board.) You stated only about 12% of the work force in Kansas is a member of a labor union, how many businesses are in KCCI and figures it is a small percentage also? (So you are limiting it from both sides.) Maybe if we go back to the original compromise with technical adjustments we might be taking care of several of your concerns you suggest and since it appears we will be meeting tomorrow, would it be possible for your staff to take a look at the documents Mr. Stafford will be presenting tomorrow to compare with your concerns? (We would be glad to.)

Adjournment

As there was no further discussion, the meeting was adjourned. The time was 9:31 a.m. The next meeting is scheduled for March 9, 2011.

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