Approved: April 1, 2004
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 a.m. on March 17, 2004 in Room 241-N of the Capitol.

All members were present.

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Norm Furse, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Bruce Moore, Administrative Law Judge
Roy Artman, Kansas Building Industry Association Workers Compensation Fund
Terry Leatherman, Kansas Chamber of Commerce and Industry
Michael Helbert, Kansas Trial Lawyers
John Ostrowski, AFL/CIO
David Wilson, AARP Executive Council Member

Others attending:
See Attached List.

The Chairman opened the hearing on **SB 441 - Workers compensation; defining date of accident**.

Staff gave a briefing on **SB 441**. The bill would add three dates to be considered as the date of the accident. The earliest of the three dates would be considered the date of the accident.

The Senate amended on page 3, lines 21 through 29 to read, "In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or micro traumas, the date of accident shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; (2) the date the condition is diagnosed as work-related, providing such fact is communicated in writing to the injured worker; or (3) the first day the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition." The Senate amended by requesting "in writing".

The Honorable Bruce Moore, Administrative Law Judge, briefed the committee regarding contemplated workers compensation legislation: date of accident. The date on which an accident occurs is one of the three primary variables in determining the amount of benefits that are or may be payable. Generally speaking the right to monetary benefits accrues on the date of accident, and the wage in effect on that date determines the benefit rate at which workers compensation benefits are paid.

Where there is a specific, identifiable traumatic event, such as a fall, a motor vehicle collision, a laceration, or a crush injury, the date of accident is readily identifiable. Where the injury is suffered as a result of a series of repetitive mini-traumas, however, a specific "date of accident" may be difficult or impossible to discern. Without a specific traumatic event, an employee may also be unaware that the discomfort being experienced is work-related, as opposed to "just getting old" or some other non-work-related disease process. Whether a treating physician relates a patient's physical complaints of pain to the performance of work duties may depend on the quality and quantity of information shared with, or perceived by, the medical provider. The causal connection between physical complaints and work duties may not even be made until a diagnosis is reached, which may be several months after onset of symptoms. Because the onset of symptoms is generally gradual, the employee may not realize that work duties are causing or contributing to that discomfort.

The determination of an appropriate date of accident in a repetitive mini-trauma claim is crucial to computation of benefits to which the employee may be entitled. From the perspective of the courts, no one approach is better than the others. The computation of a "work disability" award is detailed and complicated. Many variables affect the determination of "task loss" including the number of jobs held by the employee prior to the injury in question; the ability to establish with any reliability the job tasks performed in a job five, ten or fifteen years before; the physical requirements of each of those tasks; and the perspectives of the

vocational consultants who interpret that information for the benefits of the physicians whose opinions ultimately control. Many variables also affect the determination of "wage loss" particularly where the reason for and amount of the "wage loss" is disputed (Attachment 1).

Roy T. Artman, general legal counsel, Kansas Building Industry Workers Compensation Fund, testified as a proponent to **SB 441**. In the majority of the workers compensation claims it is relatively simple to determine the date of the accident. Claims are generally dealing with a very specific traumatic event, be it a fall off a ladder, laceration by power tools, or a lifting injury, etc. There is an increasing trend in the filing of claims that involve repetitive or micro trauma injuries. Carpal tunnel are not the only repetitive injuries, but can also involve the upper and lower extremities as well as the body as a whole.

In workers compensation claims, the date of the accident directly impacts the award for the claimant as it determines the level of benefits they would receive for their injuries. For insurance carriers it all to often determines which party would be held responsible for the payment of the award.

Since 1994 attorneys, administrative law judges, the Appeals Board and the appellate courts have struggled with the date of accident in repetitive and micro trauma cases. Since 1994, attorneys, administrative law judges, the Appeals Board and the appellate courts have struggled with the date of accident in repetitive and micro trauma cases. Since that time there have been no less than eight (8) appellate cases decided regarding the date of accident in repetitive trauma claims.

An insurance company typically writes workers compensation coverage for a set term, subject to renewal. When an insurance company is called upon to defend a claim, the potential exists for a manipulation of the date of accident which can result in the shifting of the claim's liability from one carrier to another. If the last day worked before the regular hearing is the date of the accident, an insurance carrier can simply request continuances or cause delays which push that date beyond the limits of their coverage. A new insurance carrier or group funded pool can unknowingly write coverage for an employer only to find they have just inherited a previously existing claim. Further complicating this is the fact that the new insurance carrier or group funded pool has not participated in any way in the litigation of the claim leading up to the regular hearing.

The language proposed in **SB 441** would eliminate the potential inequities described while providing safeguards for injured workers to ensure their claims are timely reported and benefits provided (Attachment 2).

Terry Leatherman, Vice President–Public Affairs, Kansas Chamber of Commerce, testified as a proponent to **SB 441**, stating the bill proposes a clarifying change to the Kansas workers compensation system which the Kansas Chamber has advocated in support of for many years. The bill would establish a date of accident in workers compensation cases where an injury develops over time rather than in a sudden accident. Establishing a date of accident is useful in these cases because it "starts the clock" on the workers compensation process. Through a Senate amendment two of the three events for establishing a date of accident were amended by requiring the communication be in writing. The Senate action now requires an employee to notify their employer "in writing" or a diagnosis that a condition is work related by "in writing" in order for the action to establish a date of accident. The Kansas Chamber would respectfully request removal of this amendment to require notice "be in writing" (Attachment 3).

Michael C. Helbert, Attorney, Emporia, Kansas, testified as an opponent to **SB 441**. Notice of an accident must be given to the employer within 10 days of the date of the accident. Notice may be extended due to "just cause" to 75 days; however, past 75 days no proceeding may be maintained. No proceeding for workers compensation shall be maintainable under the Workers Compensation Act unless written claim for compensation is served on the employer within 200 days after the date of accident.

As worded without additional changes to the statutes of limitation noted previously, the effect would be to exclude otherwise valid claims due to technical time limits. Without changes to the statutes of limitation, the date of accident language contained in **SB 441** would serve to inadvertently, or purposely, set a trap for hardworking Kansas, and otherwise valid claims would be barred based upon the statutes of limitation (Attachment 4).

John M. Ostrowski, Kansas AFL-CIO, testified as an opponent to **SB 441**. Fixing a date of accident is very important because it determines such items as the claimant's average weekly wage, when oral notice must be given, when written claim must be made, who is the proper insurance carrier, what constitutes a preexisting condition, etc. Many, many issues are determined by the proper date. The subcommittee of the Advisory Council suggested striking the written claim requirement in all cases. In reality, the written claim requirement is an outdated invention which no longer is useful based on the way business is done; i.e., faxes, e-mails and the handling of claims on a regional level (Attachment 5).

David Wilson, AARP Kansas Executive Council, testified as an opponent to **SB 441**, stating AARP believes that the proposed changes in **SB 441** would create potential traps and would have a harmful impact not only on older workers, but workers of all ages, who suffer an injury whose onset is gradual and cumulative (Attachment 6).

The meeting adjourned at 10:45 a.m. The next meeting will be March 18.

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