

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY.

The meeting was called to order by Chairman David Heinemann at 9:00 a.m. on March 22, 1994, in Room 526-S of the Capitol.

All members were present except:

Committee staff present: Jerry Ann Donaldson, Legislative Research Department
Jim Wilson, Revisor of Statutes
Kay Scarlett, Committee Secretary

Conferees appearing before the committee:

George Gomez, Director, Division of Workers Compensation
Jill Grant, Kansas Insurance Department

Others attending: See attached list

Hearing on SB 830 - Workers compensation fund, extending period for fund liability of covered deaths and injuries.

George Gomez, Director, Division of Workers Compensation, and member of the Workers Compensation Fund Oversight Committee, testified in support of SB 830. This bill extends the date to phase out the workers compensation second injury fund from July 1, 1994, to April 1, 1995. He referred to a technical amendment to include the new date on Page 3, Line 32, also.

Jill Grant with the Kansas Insurance Department, also a member of the Workers Compensation Fund Oversight Committee, addressed the committee in support of SB 830. The 1993 workers compensation legislation created the Workers Compensation Fund Oversight Committee. It is the committee's obligation to address issues affecting the Fund and to report annually to the legislative coordinating council. Due to the fact that a number of appointments to the committee were not made in a timely manner, the committee did not meet until February of 1993. At their most recent meeting, it was decided to recommend that the Fund "phase out" date be extended until April 1, 1995, to allow the committee time to research and formulate sound, fact-supported recommendations. (Attachment 1)

This concluded the hearing on SB 830.

Representative Webb moved and Representative Pauls seconded to amend SB 830 to include the language "which occurs prior to April 1, 1995" following the word "injury" on Page 3, Line 32. Motion adopted.

Representative Nichols offered a conceptual amendment to SB 830 to prohibit the Insurance Commissioner from hiring private attorneys and require him to use in-house attorneys to defend the workers compensation second injury fund following the July 1, 1994, date. Representative Smith seconded, motion failed.

Representative Pauls suggested a conceptual amendment to require the Workers Compensation Fund Oversight Committee to research and estimate the cost of both in-house attorneys and hired attorneys if the fund were continued. Such language to be included on Page 3, Line 4, of SB 830. Representative Carmody seconded the motion. Motion adopted.

Representative Packer moved and Representative Mayans seconded to favorably recommend SB 830 be passed as amended. Motion carried.

Representative Packer moved to pass SB 767 favorably, Representative Mayans seconded. Chairman Heinemann offered a substitute motion to amend SB 767. Representative Packer withdrew his motion.

CONTINUATION SHEET

MINUTES OF THE HOUSE COMMITTEE ON LABOR AND INDUSTRY, Room 526-S Statehouse, at 9:00 a.m. on March 22, 1994.

Chairman Heinemann prefaced his amendment by stating the workers compensation legislation passed last session provided for the Advisory Council to look at all new proposed workers compensation legislation. He emphasized the need to use the Council; however, this was a problem that needed to be addressed.

Chairman Heinemann moved to insert language on Page 2, Line 8, following the word "that" which would require the owner-operator that has secured the payment of compensation for himself and his employees to be evidenced by a certificate of workers compensation. Also, on Page 2, Line 22, to change "and" to "or." The motion was seconded by Representative Carmody. Motion adopted.

Representative Packer moved and Representative Cornfield seconded to favorably pass SB 767 as amended. Motion passed. Representatives Webb, Edlund, Garner, Grant, Lynch, Nichols, Pauls, Smith, and Standifer requested their "No" votes be recorded.

The meeting adjourned at 10:05 a.m. The next meeting is On Call of the Chair.

GUEST LIST

COMMITTEE: HOUSE LABOR AND INDUSTRY

DATE: 3-22-94

[illegible]

HOUSE COMMITTEE ON LABOR AND INDUSTRY
Senate Bill 830
March 22, 1994

Testimony of Jill Grant

Workers Compensation Fund Oversight Committee

Chairman and Members of the Committee:

My name is Jill Grant, I am a member of the Workers Compensation Fund Oversight Committee, and I am here to testify in favor of the passage of S.B. 830.

Pursuant to legislation enacted during the 1993 Session (S.B. 307), the Kansas Workers Compensation Fund is currently scheduled to "phase out" as of July 1, 1994. See attached copy of K.S.A. 44-567(a)(1). At the same time that the legislature addressed the issue of a fund "phase out", it was determined that there were a number of very important and complex issues regarding the Fund that had yet to be resolved. Therefore, S.B. 307 also created the Workers Compensation Fund Oversight Committee.

This oversight committee is statutorily obligated to address these issues and to report annually to the legislative coordinating council. This annual report is to include recommendations to the legislature on the advisability of the continuation or termination of the Fund. See attached copy of K.S.A. 46-2401(b). Unfortunately, due to the fact that a number of appointments to the oversight committee were not made in a timely manner, the committee was unable to meet until February of this year.

As of today's date, it is my understanding that the final appointment has now been made. The oversight committee has currently held two meetings and has committed itself to addressing the very important and numerous issues regarding the Fund, and the role the Fund plays in the State of Kansas. At the most recent meeting, the oversight committee voted unanimously (with the exception of two

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members who were not present for the vote) to recommend that the Fund "phase out" date be extended for a period of at least nine months, in order that the oversight committee may complete the tasks that it has been constituted to perform. It should be understood that this recommendation is not a recommendation that the Fund should continue to exist for an unlimited period of time in its existing form. Rather, this is a recommendation based upon the oversight committee's commitment to research and formulate sound, fact-supported recommendations to the legislature regarding the future of the Fund. Enactment of S.B. 830 is needed to facilitate the implementation of the extension recommended by the oversight committee.

Therefore, I request that S.B. 830 be passed favorably from this committee.

JG:sl
Attchments

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(4) payment of the actual expenses of the commissioner of insurance which are incurred for administering the workers compensation fund, subject to the provisions of appropriations acts; and

(5) any other payments or disbursements provided by law.

(f) If it is determined that the workers compensation fund is not liable as described in subsection (e), attorney fees incurred by the workers compensation fund may be assessed against the party who has impleaded the workers compensation fund other than impleadings pursuant to K.S.A. 44-532a and amendments thereto.

(g) The commissioner of insurance shall provide for the implementation of the workers compensation fund as provided in this section and shall be responsible for ensuring the fund's adequacy to meet and pay claims awarded against it.

History: L. 1974, ch. 203, § 46; L. 1975, ch. 260, § 3; L. 1977, ch. 179, § 1; L. 1979, ch. 156, § 14; L. 1980, ch. 146, § 14; L. 1982, ch. 213, § 6; L. 1983, ch. 166, § 15; L. 1984, ch. 182, § 1; L. 1988, ch. 380, § 1; L. 1990, ch. 28, § 16; L. 1993, ch. 286, § 61; July 1.

Revisor's Note:

Section was amended twice in 1990 session, see also 44-566b.

Cross References to Related Sections:

Attorney fees in other workers' compensation cases, see 44-504, 44-512a, 44-536.

Law Review and Bar Journal References:

"Potential Federalization of State Workmen's Compensation Law—The Kansas Response," James C. Wright and James P. Rankin, 15 W.L.J. 244, 257, 258 (1976).

"Workmen's Compensation—Major Changes in Employments Covered, Benefits, Defenses, Offsets, and Other Changes," Alvin D. Herrington, 24 K.L.R. 611, 616 (1976).

"Workmen's Compensation—The Preliminary Hearing, the Workmen's Compensation Fund, and Civil Penalties for Failure to Pay Compensation When Due," Albert M. Ross, 24 K.L.R. 623, 624, 625 (1976).

"Workmen's Compensation—The Workmen's Compensation Fund," Charles J. Woodin, 24 K.L.R. 641, 642, 643 (1976).

"Survey of Kansas Law: Workers' Compensation," William A. Kelly, 27 K.L.R. 377, 386 (1979).

"Major Legislative Changes in Workers' Compensation Law," Gary L. Jordan, 3 J.K.T.L.A. No. 1, 14, 16 (1979).

"Worker Compensation: Attorney's Fees Under K.S.A. 44-536," Gary L. Jordan, Vol. 6, No. 6, J.K.T.L.A. 21 (1983).

CASE ANNOTATIONS

1. Substantial evidence to support award for disability resulting from second accident; liability of second injury fund. *Day and Zimmerman, Inc. v. George*, 218 K. 189, 190, 542 P.2d 313.

2. Appeal from award apportioning percentage to second injury fund; award upheld. *Blevins v. Buildex, Inc.*, 219 K. 485, 548 P.2d 765.

3. Sufficient competent evidence; apportionment of award to workmen's compensation fund proper. *Cody v. Jayhawk Pipeline Corporation*, 222 K. 491, 565 P.2d 264.

4. Section 44-567 construed and applied; failure of district court to apply "but for" rule requiring full payment from fund. *Barke v. Archer Daniels Midland Co.*, 223 K. 313, 317, 573 P.2d 1025.

5. Award of attorney fees is at discretion of court. *Baum v. Greyhound Corp.*, 3 K.A.2d 456, 458, 601 P.2d 6.

6. Liability of workmen's compensation fund derives from that of employer; settlement between claimant and employer precludes action against fund by claimant. *Arduer v. Daniel International Corp.*, 7 K.A.2d 225, 229, 230, 640 P.2d 329 (1982).

7. Second injury fund assessments exacted of Kansas companies by other states appropriately included in computation of retaliatory tax due under 40-253. *Twin City Fire Ins. Co. v. Bell*, 232 K. 813, 814, 658 P.2d 1038 (1983).

8. Cited; allowance of attorney fees within discretion of trial court; finding of frivolous joinder unnecessary. *Simmons v. Security National Bank*, 11 K.A.2d 1, 3, 711 P.2d 757 (1985).

9. Interplay of 44-503 and 44-532a examined and applied concerning fund liability for certain employers. *Workers Compensation Fund v. Silicone Distributing, Inc.*, 248 K. 551, 558, 809 P.2d 1199 (1991).

10. Insolvent employer's obligation under Kansas workers compensation act was nontax in nature; not entitled to tax priority in bankruptcy. *In Re Payne*, 27 B.R. 809, 810, 812 (1983).

44-566b.

History: L. 1974, ch. 203, § 46; L. 1975, ch. 260, § 3; L. 1977, ch. 179, § 1; L. 1979, ch. 156, § 14; L. 1980, ch. 146, § 14; L. 1982, ch. 213, § 6; L. 1983, ch. 166, § 15; L. 1984, ch. 182, § 1; L. 1988, ch. 380, § 1; L. 1990, ch. 28, § 16; L. 1990, ch. 350, § 6; Repealed, L. 1993, ch. 286, § 77; July 1.

44-567. Same; employment or retention of handicapped workers; relief from or apportionment of liability for subsequent injuries; knowledge of impairment; presumptions; commissioner of insurance to be impleaded. (a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and

the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund; and

(2) subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the administrative law judge finds the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the administrative law judge shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workers compensation fund.

(b) In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment. If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee.

(c) Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in

employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation.

(d) An employer shall not be relieved of liability for compensation awarded nor shall an employer be entitled to an apportionment of the costs thereof as provided in this section, unless the employer shall cause the commissioner of insurance, in the capacity of administrator of the workers compensation fund, to be impleaded, as provided in K.S.A. 44-566a and amendments thereto, in any proceedings to determine the compensation to be awarded a handicapped employee who is injured or disabled or has died, by giving written notice of the employee's claim to the commissioner of insurance prior to the first full hearing where any evidence is presented on the claim.

(e) Amendments to this section shall apply only to cases where a handicapped employee, or the employee's dependents, claims compensation as a result of an injury occurring after the effective date of such amendments.

(f) The total amount of compensation due the employee shall be the amount for disability computed as provided in K.S.A. 44-503a, 44-510 through 44-510g and 44-511, and amendments thereto, and in no case shall the payments be less nor more than the amounts provided in K.S.A. 44-510c and amendments thereto.

History: L. 1945, ch. 221, § 2; L. 1947, ch. 290, § 1; L. 1955, ch. 250, § 12; L. 1957, ch. 293, § 8; L. 1961, ch. 243, § 9; L. 1967, ch. 280, § 13; L. 1970, ch. 190, § 11; L. 1974, ch. 203, § 47; L. 1977, ch. 179, § 2; L. 1979,

(h) The joint committee on gaming compacts may introduce such legislation as it considers necessary in performing its functions.

History: L. 1993, ch. 4, § 3; March 4.

46-2304. Severability. If any provision of this act or the application thereof to any person or circumstances is held invalid, the invalidity does not affect other provisions or applications of this act which can be given effect without the invalid provision or application. To this end the provisions of this act are severable.

History: L. 1993, ch. 4, § 4; March 4.

Article 24.—WORKERS COMPENSATION FUND OVERSIGHT COMMITTEE

46-2401. Workers compensation fund oversight committee; composition; chairperson and vice-chairperson; duties; annual report; actuarial services; staff assistance; meetings; expense allowances. (a) There is hereby created the workers compensation fund oversight committee to consist of eleven members as follows: (1) One member shall be the commissioner of insurance or the commissioner's designee, (2) one member shall be appointed by the president of the senate, (3) one member shall be appointed by the minority leader of the senate, (4) one member shall be appointed by the speaker of the house of representatives, (5) one member shall be appointed by the minority leader of the house of representatives, (6) two members shall be persons appointed by the legislative coordinating council, (7) three members shall be persons appointed by the governor, and (8) one member shall be the director of workers compensation or the director's designee. The four members appointed by the president and minority leader of the senate and the speaker and minority leader of the house of representatives shall be members of the legislature. The two members appointed by the legislative coordinating council shall be appointed in accordance with the following: One member shall represent employers having 25 or more employees and one member shall represent employers having 24 or less employees. The three members appointed by the governor shall be appointed in accordance with the following: One member shall represent employers having 25 or more employees, one member shall represent employers having 24 or less employees and one member shall be appointed from the public at large. None of the five members appointed by the legislative coordinating council and the governor shall be

members of the legislature. Each member serving on the workers compensation fund oversight committee shall serve at the pleasure of the officer or council that appointed the member.

(b) The legislative coordinating council shall designate a chairperson and a vice-chairperson of the workers compensation fund oversight committee from among the members thereof. The committee shall meet upon the call of the chairperson. The committee shall make an annual report to the legislative coordinating council on or before September 1 of each year and shall perform such additional duties as the legislative coordinating council shall direct. The report to the legislative coordinating council shall include recommendations to the legislature on the advisability of continuation or termination of the workers compensation fund or any provisions of the workers compensation act relating thereto, an analysis of the federal Americans with disabilities act and its effect on the workers compensation fund, recommendations on ways to reduce claim and operational costs of the workers compensation fund, and draft legislation which would implement recommendations of the committee.

(c) The commissioner of insurance, or the commissioner's designee, shall provide any consulting actuarial firm contracting with the legislative coordinating council with such information or materials pertaining to the workers compensation fund deemed necessary by the actuarial firm for performing the requirements of any actuarial reviews for the workers compensation fund oversight committee notwithstanding any confidentiality prohibition, restriction or limitation imposed on such information or materials by any other law. The consulting actuarial firm and all employees and former employees thereof shall be subject to the same duty of confidentiality imposed by law on other persons or state agencies with regard to information and materials so provided and shall be subject to any civil or criminal penalties imposed by law for violations of such duty of confidentiality. Any reports of the consulting actuarial firm shall be made in a manner in which will not reveal directly or indirectly the name of any persons or entities or individual reserve information involved in claims against the workers compensation fund. Information provided to the actuary shall not be subject to discovery, subpoena or other means of legal compulsion in any civil proceedings

and shall be returned by the actuary to the commissioner of insurance.

(d) The staff of the legislative research department, the office of the revisor of statutes and the division of legislative administrative services shall provide such assistance as may be requested by the workers compensation fund oversight committee and to the extent authorized by the legislative coordinating council.

(e) Members of the workers compensation fund oversight committee attending meetings of the committee, or attending a subcommittee meeting thereof authorized by the committee, shall be paid compensation, travel expenses and subsistence expenses or allowances as provided in K.S.A. 75-3212 and amendments thereto.

History: L. 1993, ch. 286, § 21; July 1.