

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 your 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.)

CONTINUATION SHEET

The minutes of the Senate Commerce Committee at 8:15 a.m. on March 8, 2011, in Room 548-S of the Capitol.

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 it 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

CONTINUATION SHEET

The minutes of the Senate Commerce Committee at 8:15 a.m. on March 8, 2011, in Room 548-S of the Capitol.

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.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: March 8, 2011

NAME	REPRESENTING
Kevin McFarland	Ks Homes & Services for the Aging
Janet Stubbs	Ks. Bldg. Ind. W. C. Fund
Eric Stafford	KS Chamber
Daniel Munzer	KDOL
Carol Cast	KDOL
Anne Haught	KDOL
Kathie Sparks	KDOL
Phyllis Browne	KDOL
Christina Greenbaum	visitor
Bernie Koch	KEPK
Kathleen Outlan	KSNA
Natalie S. Bruford	KS-STR
John A. Donley	KS Lusk. Ass'n
Ron Secher	CA FA
Calvin Reid	sen. Pte
Paje Routhier	Hein law Firm
Susan Allen	Legis
NIRIK HANSON	BO ILET EXAMINERS-

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: 3-8-11

NAME	REPRESENTING
STEVE WASSOM	KS SECURITIES COMM.
Miranda Breen	Intern - Schodorf
Caleb Reid	Intern Sen. Pitz
Dani Onions	Intern Kultala
Brenna Duffy	Intern Morris
Bernie Koch	KEPC
John Foran	SSB LLC
Kathleen Selzer Hippert	ICSBHA
Justin Stow	Post Audit
Bethany Chegwidden	Page for Sen. McGinn
Hannah Chegwidden	" "
Sonja Ambruster	Parent of Pages.
Ethan Erickson	KSDE
Dale Dennis	KSDE
Marya Blubrecht	KSBN
Adrian Guerrero	KSBN
Sean Miller	CAPITOL STRATEGIES

Comparison

- Substitute for HB 2134 as Passed by House
- HB 2134 Compromise
- Current Law

*Senate Commerce Committee
date March 8, 2011
Attachment 1*



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	<u>Substitute for House Bill No. 2134 As Passed by House</u>	<u>Substitute for House Bill No. 2134- Original Compromise</u>	<u>Current Law</u>
1. Fraud and Abuse:	1. Insurer or self insured employer can issue warning on temporary total disability checks that acceptance of employment with a different employer that requires performance of activities that you have stated that you cannot perform could constitute fraud and result in loss of future benefits and restitution of prior workers' compensation awards and benefits paid.	1. Nothing written.	1. Covered generally under Kansas workers' compensation fraud and abuse sections.
2. Fighting and Horseplay:	2. Compensation for an injury shall be disallowed if such injury to the employee results from the employee's voluntary participation in fighting or horseplay for any reason, work-related or otherwise.	2. Nothing written.	2. Workers injured in fights which are work-related receive benefits. Injuries received by voluntary participants in horseplay are not compensable (case law: <u>Springston v. IML</u>).

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<p>3. Undocumented Workers:</p>	<p>3. No compensation except for medical benefits will be allowed for any employee who is unlawfully present in the United States or who did not have the legal right to work in the United States except that compensation shall be allowed if the employer hired such employee with the knowledge that such employee was unlawfully present in the United States or did not have the legal right to work in the United States.</p>	<p>3. 44-510e(E)(i) To establish post injury wage loss, the employee must have the legal capacity to enter into the valid contract of employment.</p>	<p>3. Board decision <u>Fernandez</u> allows all benefits.</p>
<p>4. Drug and Alcohol:</p>	<p>4. When an injured employee seeks medical care following an accident without sufficient notice to the employer that the employer can timely request a chemical test, compensation under the Workers' Compensation Act shall be disallowed unless the employee demonstrates just cause for failing to provide timely notification to the employer.</p>	<p>4. Nothing written.</p>	<p>4. Nothing written.</p>

5. Drug and Alcohol Testing Methods:	5. Testing methods are different relative to those required by licensed healthcare professionals or other outside laboratories versus testing performed on site by the employer.	5. Methods are the same.	5. Methods are the same.
6. Natural Consequence Language:	6. The accident is the natural consequence of a hazard connected to the employment.	6. House change is an additional sentence relative to causal connection between the conditions under which the work is required to be performed and the resulting accident.	6. Different standard. Allows compensation for any aggravation, acceleration, or exacerbation of a pre-existing condition.
7. Coming and Going:	7. An employee shall not be construed as being on the way to assuming the duties of employment or having left such duties when the worker is on the premises owned or under the exclusive control of the employer or on the only available route to or from work which is a route involving a special risk or hazard <i>connected with the nature of the employment that is not a risk or hazard to which the general public is exposed.</i>	7. Nothing written.	7. The present statute does not say that the special risk or hazard has to be connected with the nature of the employment.

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8. Recreational Activities:	8. The employee's participation in a recreational activity or social event even in the event the employer provided, promoted, sponsored, or supported the recreational activity or social event expressly or implicitly, in whole or in part the provisions of this paragraph shall not apply when: 1. the employee was directly ordered or coerced by the employer to participate in such recreational activity or social event; 2. the employee was paid wages or travel expenses while participating in such recreational activity or social event; or 3. the injury from such recreational activity or social event occurs on the employer's premises due to an unsafe condition and the employer had knowledge of the employee's participation	8. Nothing written.	8. 44-508(f): An injury does not arise out of the employment where employees engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.
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9. Accommodated Work:	9. The employer is permitted to provide work which will meet the restrictions for the employee at the employer's own company or any other for profit or not for profit organization or company (additional language).	9. Section covers this situation.	9. Law should cover this situation.
10. Calculation Scheduled Injuries and Calculation Body Injuries:	10. Language changes.	10. Language changes.	10. Language Changes.
11. Notice:	11. Attempts to revise standard to within 10 calendar days of last date of employment and 10 days after the employee seeks medical treatment.	11. Proceedings for compensation under the Workers' Compensation Act shall not be maintainable unless notice of injury by accident or repetitive trauma is given to the employer within 30 days of the date of accident or date of injury by repetitive trauma.	11. Ten days unless failure to notify employer was due to just cause, which extends the notice period to 75 days after the date of accident.
12: Court Reporter Fees:	12. The certified short hand reporters fee shall be taxed to the Division if a fee is incurred and no record is taken.	12. Nothing written.	12. Cost assessed by the Director against the employer (general rule).

13: Translator Fees:	13. Any fee charged by a language translator for services provided to the claimant during the course of pursuing the claim under the Workers' Compensation Act shall be paid by the claimant.	13. Nothing written.	13. Cost assessed against the employer (general rule).
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Karin Brownlee, Secretary

Department of Labor

Sam Brownback, Governor

Testimony before
The Senate Commerce Committee
Karin Brownlee, Secretary
Kansas Department of Labor
March 8, 2010

Chairman Wagle and Members of the Committee:

Thank you for the opportunity to appear today. I am here to speak to the provisions of Substitute for House Bill No 2134 which revises portions of the Workers Compensation Act.

First, we would like to commend both the business and labor communities on the many hours of work developing the compromise bill. The Department of Labor is in favor of the bill presented by both business and labor. I would, however, like to discuss the amendments added by the House to the underlying bill.

New Section 2 states that an employer **may** provide notice to an injured employee with a temporary disability check and that acceptance of employment from a different employer that requires the performance of activities that the employee has stated they cannot perform may constitute fraud and result in loss of future benefits. **We support this amendment but strongly suggest this notice from the employer be mandatory.**

New Section 3 allows any person who is not required to be covered under a workers compensation insurance policy or other plan for the payment of workers compensation to execute an affidavit of exempt status under the Workers Compensation Act. For instance, a subcontractor who doesn't fall under the Workers Compensation Act because he is a sole proprietor or independent contractor can execute a waiver that they will not bring a workers compensation claim against the general contractor.

- This amendment would require the Division of Workers Compensation to create a form and develop rules and regs.
- Other possible ramifications could include tracking the form and testifying as to the date of receipt and entry. In addition, it has the potential of increasing claims to be paid by the Workers Compensation Fund if the court does not uphold the waiver and the court finds an employer-employee relationship.

Section 4 of K.S.A. 44-501 further defines non-compensable activities at work. This new language does not cover violence against a non-participating employee. This section also

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Attachment 2

disallows compensation of benefits when an employee is illegally present in the country or is not authorized to work unless the employer is aware of their status.

A second amendment to K.S.A. 44-501 adds confirmatory test cutoff levels and the use of split drug test samples. It requires an employee to report an accident/injury to their employer in a timely manner to allow for a drug test if they have a drug policy in place. **This may negate the 30 day notice requirement.**

Section 6 of K.S.A. 44-508 expands the definition of 'arising out of and in the course of employment' as it pertains to recreational or social events. **This issue has already been addressed in Kansas case law and we are unsure why this language was added.**

The definition of mail was expanded to include electronic means. For example this will allow the division to transfer a final order by electronic means. **This amendment was requested by the Department of Labor.**

Section 10 of K.S.A. 44-510e rewords the calculation of disability benefits on a permanent partial disability. **The calculation remains the same and we do not have an issue with this amendment.**

Section 13 of K.S.A. 44-510k amendment to the original bill adds the language "from an authorized medical provider ". An employee must receive medical treatment from an authorized medical provider within 2 years of the date of the award or two years from the date of the last received medical treatment from an authorized medical provider to maintain future medical treatment. The original bill includes this language the amendment just adds the language **authorized medical provider.**

Section 17 of K.S.A. 44-520 refers to the notice of injury by the injured worker to their employer. This amendment limits the 30 day notice. It changes it to 10 days after the employees last day of employment or 10 days after the employee seeks medical treatment for the injury. **Point of fact, this amendment would delete the 30 day notice.**

Section 18 of K.S.A. 44-523 section 1 and 2 adds reference to the applicable statutes. I believe this might have been added by the revisor.

Section 22 of K.S.A. 44-532a would expand the use of the Workers Compensation Fund to pay for compensation benefits when a self-insured employer has insufficiently funded a surety bond or letter of credit. **The Department of Labor requested this amendment.**

Section 23 of K.S.A. 44-534a would add the words "temporary partial disability" in the list on issues that the claimant or employer can ask for during preliminary hearing. **The Department supports this amendment** because if you have a whole body injury you may not be getting temporary total benefits because it was not brought up during a preliminary hearing.

Section 25 of K.S.A. 44-552 adds two new subsections to the act. Section (d) requires that the Division of Workers Compensation be financially responsible for the cost of the court reporter if

no record is taken. (Does this really make sense?) In addition, K.S.A. 44-555 states that "the director or the administrative law judge, whoever is conducting the hearing or other proceeding is hereby authorized to assess all or a part of the certified shorthand reporter's fees to any party to the proceedings for compensation." **This new subsection will add financial expense to the Division and at a minimum the second statutes should be referenced in the amendment.**

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. The existing statutes require interpreters to be appointed in "any proceeding before a board, commission, agency, or licensing authority of the state or any of its political subdivisions, when such person is the principal party in interest." K.S.A. 75-4352(a) prohibits taxation of costs for the interpreter against the party requiring the interpreter. K.S.A. 75-4353 prohibits appointment of a direct family member, roommate, or anyone "otherwise interested in the outcome of the proceeding." Currently, K.A.R. 51-2-6 requires the fee to be paid by the respondent.

Finally, we are requesting that 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 Department of Labor.

Thank you and I'm happy to stand for questions.