

## MINUTES

### SPECIAL COMMITTEE ON COMMERCE AND LABOR

December 15-16, 2003  
Room 519-S—Statehouse

#### Members Present

Representative Donald Dahl, Chairman  
Senator Karin Brownlee, Vice Chairperson  
Representative Candy Ruff, Ranking Minority Member  
Senator Les Donovan  
Senator U. L. Rip Gooch  
Senator Larry Salmans  
Representative Terrie Huntington  
Representative Todd Novascone  
Representative Jim Ward

#### Members Absent

Representative Broderick Henderson  
Representative Stephanie Sharp

#### Staff Present

Jerry Donaldson, Kansas Legislative Research Department  
Michele Alishahi, Kansas Legislative Research Department  
Jim Wilson, Revisor of Statutes Office  
June Evans, Secretary

#### Monday, December 15 Morning Session

Chairman Dahl called the meeting to order at 9:00 a.m.

**Topic No. 3—Study the Possibility of Reforming the Workers Compensation Law, including SB 181 and the Role and Performance of the Workers Compensation Advisory Council.** The following sub-topics were reviewed:

**Workplace Safety Trends**

**Fraud and Abuse**

## **Progress of the Workers Compensation Advisory Council**

Richard Thomas, Administrator, Workers Compensation Division, Kansas Department of Human Resources (KDHR), testified that the Annual Statistical Report would be on the website soon. A summary of the 29<sup>th</sup> Annual Statistical Report for FY 2003 was then reviewed. According to the conferee, there were 42 fatalities. Of those fatalities, nine deaths resulted from heart attacks, six from car accidents, and 23 were not docketed because they have not come before an Administrative Law Judge. Mr. Thomas stated there has been a steady decline in accidents over the past six years.

During FY 2003, the Fraud and Abuse Unit performed 290 investigations of those individuals, self-insured entities, and employers who were alleged to have violated the Kansas Workers Compensation Act. Fifty-six total cases were reviewed and \$152,237.78 was collected (Attachment 1).

Mr. Thomas gave an update on the Workers Compensation Advisory Council (WCAC). There were recommendations made at the November 17, 2003 meeting, but no action was taken on the recommendations. A "super subcommittee" was appointed to further study portions of SB 181 and Sub. SB 181. This discussion primarily centered on pre-existing conditions, date of accident, and "retirement disability."

The full WCAC met on December 9 and the recommendations of the "super subcommittee" failed to pass. On another topic, the WCAC was in agreement that the salaries of Administrative Law Judges (ALJ) were low, but a consensus on whether to pursue administrative remedies or propose amendments to the current statute which requires the ALJs to be within the classified state service was not reached (Attachment 2).

## **OSHA Responsibility**

Charles Adkins, Regional Administrator, Occupational Safety and Health Administration (OSHA), stated OSHA's mission is to ensure safe and healthful workplaces in America. Since the agency was created in 1971, workplace fatalities have been cut in half and occupational injury and illness rates have declined 40 percent. At the same time, U.S. employment has doubled from 56 million workers at 3.5 million worksites to 111 million workers at 7 million sites.

The conferee stated OSHA encourages state plans. Eventually the Wichita Office would be closed if Kansas had a state plan. It is the call of the state. The Legislature would have to spell out standards. Some states have adopted federal standards for their state plans (Attachments 3 and 4).

## **Physician Choice**

Mike Snider, Attorney, Wichita, stated business groups in Wichita have used low costs for workers compensation in Kansas as a selling point, and with this strategy have enticed a new manufacturer into relocating a manufacturing plant in Wichita.

According to Mr. Snider, increases in workers compensation costs in Kansas are coming from the conflicts in our medical care delivery system, and constitutes the reason why our present workers compensation system has resulted in increased medical costs and litigation. For the best medical care an employee should have the choice of their doctor and not have the employer choosing the doctor. Insurance carriers and self-insureds are wasting lots of time and money on

medical case management. Health insurance carriers do not have medical case managers attend doctors appointments for their insureds. It must not be cost effective for the health insurance carriers to use them or health insurance carriers would have medical case managers at doctors appointments. A lot of doctors do not want to work with workers compensation patients as they do not want to deal with the medical case manager (Attachments 5 and 6).

Terry Leatherman, Kansas Chamber of Commerce and Industry, testified the selection of a physician should remain with the party that pays the bill. Workers compensation is a state-mandated program where an employer pays all the costs to ensure their worker receives medical care and compensation if they suffer a workplace injury. Employees make no contribution to workers compensation insurance premiums, pay no deductible, or pay a co-payment for medical care they receive. Since Kansas requires employers to pay all the cost for a system for employees, it is essential that employers provide the best coverage at the best price. One of the ways an employer can control the costs in workers compensation is employer choice of the treating health care provider.

According to Mr. Leatherman, employee choice of health care provider would significantly increase workers compensation costs. The National Council on Compensation Insurance was asked to estimate the cost impact of changing to employee choice of health care provider in Kansas and they indicated the change would produce significant insurance premium increases. The 1997 estimate suggests workers compensation medical costs would increase 10 to 12 percent, while indemnity costs would soar 10 to 20 percent. That would prompt insurance premium increases in excess of \$40 million, with tens of millions more spent by employers who self-insure their workers compensation exposure (Attachment 7).

## **Case Law**

Bruce Moore, Administrative Law Judge, testified regarding Mr. Kenneth Hansen, a high school football coach who stepped off a school bus and twisted a knee. Mr. Hansen developed some problems and went in for treatment. Everyone agrees on that. During treatment, it was discovered that Mr. Hansen had a significant pre-existing condition in his knee and had been treated extensively for that condition in his knee. Ten years earlier, he was told he needed knee replacement and it was just a question of when. Mr. Moore referred Mr. Hansen to Dr. Kenneth Jansen, a knee specialist in Wichita. Dr. Jansen was of the opinion that stepping from the bus had little, if any, significance in terms of aggravating the condition in his knee or creating the need for additional treatment. Dr. Jansen did leave a window open, however, saying perhaps 5 percent of the knee needing knee replacement was attributable to stepping off the school bus and 95 percent was because of the pre-existing condition of a bone-on-bone situation in the knee. When Mr. Moore crafted his original award, he said he was mindful of KSA 44-501c. Because the original condition was not a workers compensation condition, there was no rating assessed by the treating physician ten years earlier. Even if there had been a rating, it would have been prior to the adoption of the AMA guidelines as an official standard for measuring permanent impairment. By the time the case came to Mr. Moore's attention for an award, the AMA, 4<sup>th</sup> Edition Guidelines, were in use. Each of the doctors that testified in the original proceeding agreed there was a significant pre-existing impairment. Only one doctor, Dr. Jansen, was willing to give numbers. He felt 90 percent was attributable to pre-existing conditions. Others agreed there was a significant previous impairment, but would not put numbers on the assessment. Since the only numbers were from Dr. Jansen, Mr. Moore used a variation of his numbers in crafting the original award. The award was appealed to the Appeals Board, which did not accept Dr. Jansen's qualitative allotment of fault. The Appeals Board said, without a number, claimant has established a significant ultimate impairment and there has been no qualitative demonstration of a pre-existing impairment so the Board was not going to reduce the award by any pre-existing impairment. The case was then appealed to the Kansas Court of Appeals, which went a step further and distinguished between a pre-existing condition and

a pre-existing impairment. The Court of Appeals made a couple of comments regarding a lack of proof of a pre-existing impairment where there is nothing to deduct from the ultimate award and therefore there should be no reduction. The Workers Compensation Appeals Board has interpreted *Hansen* to mean that there has to be some evidence of a pre-existing impairment. It does not have to be a contemporaneous rating, as long as you have medical facts on which a doctor can attribute an impairment rating from that pre-existing condition, the requirements of KSA44-501c can be satisfied.

### **Afternoon Session**

The Chairman reconvened the meeting at 1:15 p.m.

Robert Martin, Attorney, Wichita, testified regarding employer concerns with current Kansas Workers Compensation law and proposed reform. Kansas agreed a long time ago they would have a no-fault system. The employee would not point a finger at the employer and the employer would not point a finger at the employee. 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 receive is increased if he or she is not working. Work disability could be expressed as a percentage of lost ability to perform the essential work tasks the worker performed in the job held at the time of the injury, averaged with the claimant's capacity to earn wages post-injury versus pre-injury. Benefits are needed for both employees and employers. The pre-existing condition needs to be fixed. People are getting older and there are not enough youngsters coming into the workforce, so workers compensation will go up. Judges need accountability. It is hard to get three qualified doctors from different practices (Attachment 8).

### **Multiple Factors of Workers Compensation Costs**

Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund, a homogeneous fund formed for the residential and light commercial construction industry companies under Chapter 44 of the Kansas Statutes. Ms. Stubbs testified the employer's choice of physician works to the advantage of the injured employee as well as the employer. The goal should be to provide the best medical treatment as promptly and efficiently as possible. These doctors are chosen based upon the experience with their care of other claimants. The nurse case manager makes certain the employee is getting the best and fastest medical care.

Employers do not want their rates to increase and understand that losses equate to a higher experience modification factor which results in a higher premium for their company. That is one penalty for not providing a safe workplace. Pre-existing conditions have been killers and need to be addressed.

Ms. Stubbs stated there is a new machine used for post-hire testing and offered to demonstrate the physical capacity profile testing system to the Committee. Employees who are physically matched to the job are substantially less likely to be injured. Hiring practices are the very first step in loss control.

Ms. Stubbs provided her organization's indemnity claims data from 1993 through 2003 (Attachments 9 and 10).

## **School Cost Presentation**

Bill Curtis, Associate Executive Director, Kansas Association of School Boards (KASB), stated his major responsibility is to serve as the fund administrator for the workers compensation pool sponsored by KASB. The primary goal today is to present evidence that Kansas has a growing problem with workers compensation losses and, hence, increasing premiums. There is a difference of opinion over whether there is a crisis or how severe it is.

The KASB pool was charging code 8868, the rate for teachers and administrators, 60 cents per \$100 payroll in 1993. After the reform measures were passed, that rate gradually fell to a low of 30 cents per \$100, but began rising again in 2001 and is now back up to 46 cents per \$100. Unless there is a major turnaround in the next six months, that rate will increase significantly for the 2004-05 year. There may be a number of companies licensed to do business in Kansas, but as a practical matter, there are only two companies willing to write new school business in this state and the KASB pool is one of them. The third indicator of a problem is the loss rate which is derived by dividing the losses by the payroll. The loss rate for 1992-93 was \$.699 per \$100 payroll and the loss rate for 2002-2003 was \$.654 per \$100 of payroll.

Mr. Curtis said pools play a big role in workers compensation coverage in Kansas. Yet, there is no representative from pools on the Workers Compensation Advisory Council. Possibly the Council could help identify the cost drivers (Attachment 11).

In response to a question about a possible solution, the conferee indicated that we need to get a handle on some of these situations that were never intended to be compensable under workers compensation. We are compensating people for the aging process and cannot go down that road. More and more big claims are coming without the incidents of trauma. Workers compensation was originally intended to provide compensation for incidents of trauma at work.

## **Kansas Cooperative Cost Outlook**

Mike Schaffter, Vice President, Insurance Operations, Kansas Farmers Service Association, testified rates have escalated. Some companies have closed in areas that were not profitable, some are not hiring, some not giving raises, and there are other cutbacks in rural America. There are not many companies in the market today. Five have recently left. AIG was coming on board and told us they would not come in. One main concern is how long are these people going to stay here. There have been multiple losses over the past years. We have had to put 45 companies in the Assigned Risk Pool. Many are taking deductibles on workers compensation.

Scott Anderson, Director, Risk Management Services, Kansas Farmers Service Association, testified on loss reduction efforts. One of the most proactive things that has been going on over the past few years is that a group of organizations came to them and asked if the Association would manage their loss control as safety director. There are now have 10 employees in Kansas serving over 80 companies at 400 locations. These people have developed relationships with OSHA and the Department of Human Resources and others. They have also implemented safety programs and worked with their management teams. It has been a big benefit to many companies. The frustration of high medical costs, questionable claims, and a legal system that uses little common

sense and is skewed to favor the employee is having a major effect on our customer's bottom line. Any changes that would bring fairness to the process, protect both sides, and reduce the spiraling cost would be welcomed.

The conferees stated that the industry is a great supporter of the physical capacity profile testing system and urges the Committee to look into recommending its use. He stated he believes that the Division of Workers Compensation and the Department of Human Resources should be bringing this information to industry and encouraging the industry to use this equipment because this new technology allows for an employee to be matched to the job (Attachment 12).

### **Small Business Cost Outlook**

Leon Lungwitz, The Print Source, Inc., Wichita, Kansas, stated his organization believes that an employee who is injured on the job should have that injury taken care of fully. By making safety important to the company and employees, his business has been able to achieve a workers compensation experience rating of .84 cents. Rates have increased drastically since January 1, 2001. Rates must remain competitive. This increase is very disturbing and affects our ability to grow our business. Kansas needs to stop this trend so that current Kansas business can remain healthy and we can attract more businesses to our state. We must continue to take care of an employee injured on the job but stop the rising cost of workers compensation insurance (Attachment 13).

### **Large Business Cost Outlook**

Mike Pendegrass, Corporate Director of Safety, Superior Industries International, Inc., testified it is very important that the climate of doing business in this state is improved. A common problem faced by all employers is the increasing impact of medical costs. In the State of Kansas, we continue to learn how easy it is to file a claim against a business, even if the claim is fraudulent. Superior Industries has attempted to prosecute employees for fraudulent claims but has not been able to prove the importance of this matter. Workers compensation fraud is not a victimless crime. Our employees suffer for the acts of a few, and those that would continue to defraud them should be held accountable for their actions. There is a fraud unit currently in place. This group should be given the power and authority to protect the business and employee interests of this state. There is a need to not only address this issue now, but to continuously improve this area in the future (Attachment 14).

Tim Rakestraw, Safety Supervisor and workers compensation coordinator, Superior Industries, Pittsburg, testified on the leniency of how easy it was to claim workers compensation in the state (Attachment 15).

### **Other Business Cost Outlook**

Hal Hudson, State Director, National Federation of Independent Business, testified on behalf of the 6,000 small business owners who are members of NFIB/Kansas, expressing concern over Kansas Works Compensation Act issues. The greatest concern is for the exclusive remedy provision of the Act to remain intact. Without this protection, employers have little justification for buying the insurance (Attachment 16).

### **Public Comment**

Mark Desetti, Director of Political Action and Government Relations for the KNEA and representative of the Kansas Coalition for Workplace Safety, testified there is no workers compensation insurance crisis in Kansas. In fact, according the conferee, Kansas is a great place to do business. Kansas pays the fourth lowest in the nation. Low rates are attracting business to our state (Attachment 17).

### **Staff Briefing on Physician Choice**

Jerry Donaldson, Legislative Research Department, gave an overview regarding the current law, KSA 44-510h, 1991 law, and 1993 law, regarding the methods of physician selection and change of physician provided by workers compensation statutes (Attachments 18, 19, 20, and 21).

The Chairman said that concluded the meeting for today and would continue tomorrow at 9:00 a.m. The minutes of September 3-4 and November 6-7, and three committee reports were distributed for review. The Chairman asked the members to review the minutes and come back with Committee recommendations (Attachments 22, 23, and 24).

The Chairman adjourned the meeting at 5:00 p.m. and said the meeting in the morning would start at 9:00 a.m. There would be a continuation of testimony from the public and committee recommendations and discussion.

### **Tuesday, December 16 Morning Session**

The Chairman called the meeting to order at 9:00 a.m.

Beth Foerster, Adjunct Professor, Washburn University School of Law and attorney practicing workers compensation, testified. One of the first things taught in her workers compensation classes is that, in order for an injury to be compensable, it must arise out of and in the course of the worker's employment. An accident arises out of the employment when there is a causal connection between the injury and the work activities. This standard test is not unique to Kansas and is virtually universal. In short, it means that if there is an injury, for it to be covered, there must be a connection to the job activity and the worker must be performing duties in furtherance of the employer's work. Stated alternatively, if the injury happens at home or at play or anywhere else other than work it is not covered by workers compensation. The claimant must meet the burden of proof. Premiums are not being driven by judges, but are being driven by rapidly rising medical costs, the stock market crash, September 11, 2001, and insurance premiums (Attachment 25). Ms. Foerster said she would look at cases that were mentioned and would present the findings to the Business and Commerce Committee during the 2004 Session.

Terri Roberts, R.N., Executive Director of the Kansas State Nurses Association and Chairperson of the Kansas Coalition for Workplace Safety, clarified questions raised in Mark Desetti's and other presentations on December 15 (Attachment 26).

The Chairman closed testimony on workers compensation and opened deliberations on the Committee Recommendations. A list of the topics the Committee was to discuss during the interim was distributed.

## Committee Recommendations

**Topic 1. Unemployment Insurance Trust Fund Taxable Wage Base.** The Committee was directed to review the taxable wage base of \$8,000 a year per employee for unemployment insurance tax payment calculations. The taxable wage base has not changed since 1984.

There was a total lack of interest from the public sector, so that meeting was cancelled. No suggestions on this topic were offered.

**Topic 2. Federal Reed Act Funds.** The Committee was charged to review and make recommendations as to how available Federal Reed Act (unemployment training) funds will be utilized. The review should include the possibility of utilizing Reed Act funds in an innovative manner, such as training unemployed aviation workers.

Kansas is the only state not receiving Congressional Earmark Grants for job training purposes. Secretary Garner is to report to the Committees during the 2004 Legislative Session with information on all different types of job training grants and what we have to show for the money spent.

*Senator Brownlee moved and Senator Donovan seconded to recommend that Kansas pursue the Congressional Earmark Grants for job training. The motion carried.*

The Chairman said the federal government determines how the Reed Act moneys could be spent. This issue needs to be kept open during the 2004 Session. Secretary Garner has not yet advised the Committee as to how to spend it.

*Representative Ruff moved and Representative Novascone seconded to have Reed Act money remain in the Employment Security Trust Fund in order to shore up that ever dwindling fund that we have and not use for any other use. The motion carried.*

**Topic 4. Creation of a State Occupational Safety and Health Agency.** The Committee was directed to review the possibility of creation of a state occupational safety and health agency. The review would include the financing of the proposed agency and the impact on the state business community.

The Chairman stated he thought one of the main concerns brought up in studying a State OSHA Plan was the funding.

*Representative Brownlee moved and Representative Ruff seconded we maintain our current system of utilizing Federal OSHA as there is not a compelling reason to start a state program at this time. The motion carried.*

Senator Donovan said to enact a state OSHA would only be another layer of bureaucracy and a duplication of government. He stated if the system isn't broken, don't mess with it. He indicated that the federal OSHA is doing their job.

*Representative Ward moved and Senator Gooch seconded to recommend Secretary Garner's office promote and publicize their safety evaluation programs and plans to businesses and encourage their participation. This would not be a duplicate program with KDHE, only one program. The motion carried.*



**Topic 3. Workers Compensation.** This topic called for the Committee to study the possibility of reforming the Workers Compensation Law, including SB 181 and the role and performance of the Workers Compensation Advisory Council.

*Senator Brownlee moved and Representative Ruff seconded to recommend a bill be drafted that the Workers Compensation Advisory Council be required to meet by February 1 for reviewing proposed legislation and strongly encourage quarterly meetings thereafter as needed. The motion carried.*

*Senator Brownlee moved and Representative Ruff seconded to include in the same bill that a quorum and votes of the Workers Compensation Advisory Council be by simple majority of each side, instead of 4 of 5 of each side it would be 3 of 5 of each side. The motion carried.*

*Representative Ruff moved and Senator Donovan seconded to recommend a follow-up on the 1999 Post Audit on Fraud and Abuse to see whether the problems that existed have been resolved. Post Audit should also conduct a statewide review of workers compensation cases to study statistics on the number of cases, investigations conducted, prosecutions involved, and settlement of cases. The Audit should also include a look at how many cases are settled in favor of the claimant as opposed to the employer. Included in the audit will be an examination of the pay scale and retirement plans for Administrative Law Judges. The motion carried.*

Richard Thomas, Administrator, KDHR Workers Compensation, stated he would look at all cases regarding Superior Industries to see whether they were settled or it was the Judge's decision.

*Senator Brownlee moved and Representative Novascone seconded to encourage the Legislature deal with the issues of pre-existing conditions, date of injury, work disability based on a 15 year review, level of benefits for injured employees and the issue of drug or alcohol abuse on the part of either the employee or the employer. The motion carried.*

The Committee will have a short meeting on January 12 to approve the minutes and recommendations.

The Chairman thanked the staff and Committee members.

The meeting adjourned at 11:10 a.m.

Prepared by June Evans  
Edited by Jerry Ann Donaldson

Approved by Committee on:

January 20, 2004  
(date)