

CORRECTED
SESSION OF 2013

**CONFERENCE COMMITTEE REPORT BRIEF
SENATE BILL NO. 187**

As Agreed to April 3, 2013

Brief*

SB 187 would replace the Workers Compensation Administrative Law Judge (ALJ) Nominating and Review Committee and the Workers Compensation Board Nominating Committee with a new entity that would be named the Workers Compensation and Employment Security Boards Nominating Committee. The new Committee would make nominations pertaining to positions in the Workers Compensation Division, the Workers Compensation Review Board, and the Employment Security (Unemployment Insurance or UI) Board of Review. Under current law, the Division and the two boards are organized within the Department of Labor. The bill also would revise provisions of the Workers Compensation Act regarding qualifications for injury compensation claims, the appeals process pertaining to the recusal of an ALJ, the evaluation of physical impairment, and administrative responsibility for the State Workers Compensation Self-insurance Program.

***Workers Compensation and Employment Security
Boards Nominating Committee***

The new Nominating Committee would have seven members. The following state official and groups would nominate members for the Governor to consider:

*Conference committee report briefs are prepared by the Legislative Research Department and do not express legislative intent. No summary is prepared when the report is an agreement to disagree. Conference committee report briefs may be accessed on the Internet at <http://www.kslegislature.org/kldr>

- Secretary of Labor (Secretary);
- Kansas Chamber of Commerce;
- National Federation of Independent Businesses;
- Kansas AFL-CIO;
- Kansas State Council of the Society for Human Resource Management;
- Kansas Self-Insurers Association; and
- The Secretary would nominate one member from either an employee organization, as defined by KSA 75-4322, or a professional employees' organization, as defined by KSA 72-5413.

From the persons first nominated, the Governor would appoint three members to two-year terms and four members to four-year terms. The Governor would appoint subsequent members to four-year terms. No member would serve longer than two consecutive terms. If the Governor chose not to appoint a person, the same nominating source would replace the selection by the same process. If a vacancy were to occur on the new Nominating Committee, the respective nominating source would have 30 days to nominate another person.

The new Nominating Committee would meet as needed. A two-thirds majority of the new Nominating Committee would be required to approve an action.

Workers Compensation Administrative Law Judges

The bill would increase the annual salary for unclassified ALJ positions, from 75 percent to 85 percent of the annual salary paid to a district judge.

If there was a vacant ALJ position, the new Nominating Committee would nominate a person from a list of qualified

applicants provided by the Director of the Workers Compensation Division. The Secretary would have the discretion to appoint or reject a nomination. In the latter case, the new Nominating Committee would nominate another person for the vacancy.

The reappointment process for an ALJ who has served a four-year term would be revised by the bill. An incumbent ALJ would submit an application to the Director of Workers Compensation. The application would be forwarded to the Secretary unless the new Nominating Committee decided, by a two-thirds majority vote, to not forward the application. Under current law, an incumbent ALJ wishing to be reappointed is considered directly by the ALJ Nominating and Review Committee.

The current ALJ Nominating and Review Committee is comprised of two members. The Secretary is required to appoint one person nominated by the Kansas AFL-CIO and the other nominated by the Kansas Chamber of Commerce. Using a list of qualified applicants provided by the Director of Workers Compensation, the Nominating and Review Committee makes a unanimous nomination to the Secretary. The Secretary has the discretion to accept or reject the applicant.

Worker Compensation Appeals Board

Under current law, the Workers Compensation Board reviews the decisions, findings, orders, and awards made by the ALJs. The five members of the Workers Compensation Board are required by statute to have a minimum of seven years' experience practicing law in Kansas. The bill would rename the Board, calling it the Worker Compensation Appeals Board.

The current Nominating Committee for the Workers Compensation Board is comprised of two members. The Secretary of Labor is required to appoint one person

nominated by the Kansas AFL-CIO and the other nominated by the Kansas Chamber of Commerce.

UI Board of Review

With regard to a vacancy on the UI Board of Review, the new Nominating Committee would submit nominees for the Governor's consideration. The Governor could choose not to appoint any of the nominees; in that case, the new Nominating Committee would nominate another person for the vacancy. Appointees would continue to require confirmation by the Senate. Board members would be limited to serving two consecutive terms.

Under current law, the UI Board of Review hears appeals arising from disputed UI claims. The Board is comprised of three members appointed to four-year terms. The Kansas AFL-CIO and the Kansas Chamber of Commerce each nominate three persons to the Governor. The Governor then appoints one from each list. After Senate confirmation, the two Board members agree upon the selection of the third member, who represents the general public.

Qualifications for Workers Compensation

Under the bill, a qualified, injured worker could seek payment from the Workers Compensation Fund if the employer was self-insured with an insufficient letter of credit.

In order to be eligible for workers compensation, the bill would shorten certain time periods for employees to give notice to the employer of the accident or injury:

- From 30 days to 20 days, starting from the date of the accident or injury due to repetitive trauma; and

- From 20 days to 10 days, starting after the employee's last day of work for the employer.

Appeals Process for ALJ Recusal

In instances where an ALJ declines a request to recuse the ALJ from hearing a workers compensation case, a party to the hearing would be permitted by the bill to appeal to the Workers Compensation Board. Currently, appeals of this sort are made to county district court. If a majority of the Workers Compensation Board found sufficient grounds, the Board would direct the Director of the Workers Compensation Division to assign another ALJ. If there is no pending claim for compensation, the Board's decision could then be appealed to the Kansas Court of Appeals.

Evaluation of Physical Impairment

Starting on January 1, 2015, physicians would be required to use the *American Medical Association (AMA) Guides for Evaluation of Permanent Impairment, Sixth Edition*, when evaluating the extent of an injured employee's impairment. Currently, the AMA's fourth edition is used.

State Workers Compensation Self-insurance Program

The bill would transfer responsibility for the State Workers Compensation Self-insurance Program from the Secretary of the Department of Administration to the Secretary of the Kansas Department of Health and Environment (KDHE). The Division of Industrial Health and Safety within the Department of Labor would assist KDHE in administering the State Workplace Health and Safety Program for state agencies.

The bill would be in effect upon publication in the *Kansas Register*.

Conference Committee Action

The Conference Committee, on April 3, agreed to accept the House amendments to the bill. The Conference Committee also agreed to add the provisions of SB 73, as amended by the House Committee on Commerce, Labor, and Economic Development, pertaining to qualifications for injury compensation claims, the appeals process pertaining to the recusal of an ALJ, the evaluation of physical impairment, and administrative responsibility for the State Workers Compensation Self-insurance Program. The Conference Committee further agreed to change the effective date of the bill, from publication in the statute book to publication in the *Kansas Register*.

Background

Representatives of the Kansas Self-Insurers Association, the Kansas State Council Society for Human Resource Management, the Kansas Chamber, and the National Federation of Independent Business provided proponent testimony at the House Committee hearing. According to their testimony, SB 187 would provide for more representation for employers and employees. Proponents contend the current selection processes favor nominees who are the least objectionable and not necessarily the most qualified.

A retired ALJ, one of the original members of the Workers Compensation Board, and representatives of the Kansas Association for Justice and the Kansas AFL-CIO spoke in opposition to SB 187. Opponents noted that prior to 1993, when the current selection process was established, ALJs were political appointments. Courts of law did not defer to the ALJ decisions, and there was unnecessary litigation. Opponents contend the current system is apolitical. Opponents expressed concern that, if the hearing process becomes prejudicial against injured employees, workers may seek relief through Medicaid or other cash assistance programs.

In addition to making technical amendments, the Senate Committee on Commerce amended the bill by deleting the proposed changes to the size of the Workers Compensation Appeals Board's hearing panels, from three members to two members.

The Senate Committee of the Whole amended the bill to stagger the terms of the first seven members appointed to the new Nominating Committee.

The House Committee on Commerce, Labor and Economic Development made technical amendments to SB 187.

SB 73 was introduced at the request of the Department of Labor. Representatives of the Kansas Self-insurers Association, the Kansas Chamber, the Kansas Association of Insurance Agents, the National Federation of Independent Businesses, the Society for Human Resource Management, and the Labor Department spoke in favor of the bill before the House Committee, stating much of the legislation provided further clarification to the workers compensation reform that was approved in 2011 Sub. for HB 2134. Proponents viewed the updated AMA guidelines, changing the ALJ recusal process, and addressing self-insured employers with insufficient credit as streamlining enhancements.

Representatives of the Kansas AFL-CIO and the Kansas Association of Justice spoke as opponents, questioning the timeliness of the Court of Appeals to hear ALJ-related appeals. Opponents further noted current law requires employees to have legal capacity to enter into a valid employment contract. By adding language referring to a person's immigrant status, employers may have an incentive to hire persons who are not U.S. citizens and not authorized to work in the country. Opponents also expressed opposition to using the AMA's sixth edition, saying it could lead to more litigation.

The Senate Committee on Commerce amended SB 73 to:

- Delay use of the *AMA Guides for Evaluation of Permanent Impairment, Sixth Edition*, until January 1, 2015;
- Delete the conclusive presumption that an employee who is neither a U.S. citizen nor authorized to work in the country has no post-injury wage loss;
- Shorten the length of time, from 20 days to 10 days, for former employees to give notice to their previous employers that they were injured while at work; and
- Re-assign rule and regulating authority pertaining to the State Workers Compensation Self-insurance Fund from the Secretary of the Department of Administration to the Secretary of Department of Health and Environment.

The House Committee on Commerce, Labor, and Economic Development amended SB 73 to:

- Shorten the period of time, from 30 days to 20 days, for an employee to give notice to the employer about an accident or injury; and
- Allow the Court of Appeals to hear an interlocutory appeal pertaining to the recusal of an ALJ if certain conditions are present.

According to the fiscal notes prepared by the Division of the Budget, for the two bills, as introduced, there would be no fiscal impact.

Workers Compensation; Boards; Committees; Employment Security; Unemployment Insurance

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