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 February 10, 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
Renae Jefferies, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Larry McGill, Kansas Association of Insurance Agents
Bruce Moore, Administrative Law Judge
Dr. Tom Trigg, Deputy Supt., Adm Svcs, Blue Valley Schools
Janet Stubbs, Kansas Building Industry Association
Scott Anderson, Kansas Farmers Service Association, Hutchinson

Others attending:
See Attached List.

The Chairman opened the meeting stating this was an informational type agenda on workers compensation. In the interest of time the Chairman asked the conferees to not duplicate testimony given by others. Many questions are anticipated so he requested that the conferees keep there testimony short and concise but also thorough. Lengthen the testimony if needed. The first topic will be on Administrative Law Judges (ALJ's) and how they fit into workers compensation.

Larry McGill, Kansas Association of Insurance Agents, testified in support of changes in the way workers compensation administrative law judges are appointed, reviewed and compensated. One area of the workers compensation act that was not reformed in 1993 was the process for selecting and reviewing ALJ's. That was not because there weren't concerns expressed by management and members of the insurance industry that the judges tended to always side with the injured workers, but because no one could come up with a better system to replace the current one. Under the present arrangement, ALJ's are in the classified service.

Everyone agreed in the past that it made no sense to replace the current process with one that had the ALJ's serving at the pleasure of the Governor for fear that decisions would swing like a pendulum with every changing of the guard in the Governor's office. However, in the 1993 reforms the legislature created an Appeals Panel composed of judges nominated by labor and business. Each nominee has to be approved by both sides, guaranteeing in theory, that they would be impartial. The Appeals Judges serve a term of four years and then must be re-nominated. That gives both sides an opportunity to evaluate performance and weigh the known, the incumbent, against the unknown, any possible successor. The Appeals Panel judges are compensated the same as District Court judges. This process seems to be working quite well.

The ALJ's appealed to the Workers Compensation Council this fall to recommend a substantial raise in pay. The current salary is approximately $56,000 and the proposal was to raise that to $80,000 or 80% of a District Court judge's pay. The salaries are paid with an assessment on business through their workers compensation claims expense. It is part of the budget of the Division of Workers Compensation which is funded by an assessment (2%) on all paid workers compensation claims each year. Business would be footing the bill for the salary increase.

There must be greater accountability and an option to review performance and not reappoint those that are not balanced in their approach to the system. A balloon has been drafted that would replace all the existing ALJ's through a process identical to the one that has worked successfully for Appeals Panel Judges for ten years. The current ALJ's would be automatically qualified to re-apply for the new

positions. They would serve four year terms and then be subject to reappointment. The balloon does not specify how the performance of the ALJ's would be measured but that is presumed. In addition, the balloon would pay the new ALJ's at 80% of the District Court Judge level. It is believed this is a way to bring balance and accountability to the ALJ process and attract highly talented people in the bargain (Attachment 1).

Bruce E. Moore, Administrative Law Judge, Salina, addressed the committee regarding contemplated workers compensation legislation. There are 10 ALJ's in Kansas and they are charged with the responsibility of applying whatever changes the legislature enacts. This is in the area of to what extent the 1993 amendments to the worker's compensation act have been implemented or diluted by recent court decisions.

Workers compensation legislation had its roots in the Industrial Revolution of the late 18th and 19th centuries, when the focus of production moved from small family farms and shops to more centralized factories with complex machinery. Previously, if someone was injured in the context of their employment, they could rely on extended family and neighbors for support and sustenance as they worked through their disability. With factory work, families were often geographically separated from their extended families. If a factory worker was injured, he was without income, unable to pay for his housing or food for his family, and unable to pay for medical care.

The tort remedy was available for these injured urban factory workers and the potential for a large recovery existed, but that potential was undermined and diluted by the lengthy delays and costs of litigation. In addition an injured worker had to prove that his injury resulted from his employer's negligence and was not contributed to by his own negligence. Add into the mix the employer defenses of assumption of risk and fellow-servant doctrine and making a viable claim for work-related injuries became daunting. Nonetheless, there was the potential for substantial recovery, for lost wages, past and future, for medical expenses, past and future, and for pain and suffering.

Too many significant jury verdicts in favor of injured workers had the potential for slowing or stopping entirely the move toward industrialization and mechanization. The first workers compensation acts were described as "social" or "remedial" legislation to both bring some prompt relief to injured workers but also to protect business and industry. From the very beginning there has been the attempt to balance the worker's right to some measure of compensation with a limitation on the employer's liability. Some of the first trade-offs included paying the injured worker only a portion of lost wages; i.e., not paying for the first week off work, and thereafter, only paying two-thirds of the pre-injury gross average weekly wage, and capping the lost wage claim at an arbitrary maximum. In exchange, however, the injured worker received relatively prompt medical care, at no cost, and without having to prove fault. The injured worker only had to establish that the injury was suffered while performing duties for the employer.

The employer, on the other hand, had to pay for medical care and lost wages even if the injured worker was negligent and solely responsible for the injuries suffered and the liability for medical care was unlimited in dollar amount or time. The employer enjoyed an absolute shield, however, from tort liability for injuries to his employees.

One of the major elements of the 1993 revisions was contained in K.S.A. 44-501(c) which was the employee shall not be entitled to recover for the aggravation of a pre-existing condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be pre-existing. The inferred intent of this provision was to provide that an injured worker would only receive monetary compensation for permanent partial disability if and only if a pre-existing condition was permanently aggravated and then only to the extent of the aggravation. Prior to the enactment of this provision, an injured worker could recover several times for the same impairment or disability. For example, if Hanson had previously injured his knee and suffered a 15% impairment of function to the knee, he presumably would have received an award of compensation premised upon that impairment of function. If he later re-injured the same knee and now had a 25% impairment of function to the same knee, he could recover an award of compensation for the entire 25% impairment, even though he had already previously received compensation for the first 15% of impairment.

The term "disability" has a different meaning under the act than does the term "functional impairment". "Impairment" is determined by reference to the AMA Guides to the evaluation of permanent impairment, while the term "disability" refers to "work disability" or "permanent partial disability in excess of functional impairment."

After the 1993 revisions came into play it became routine for some doctors, when rating patients in workers compensation cases, to deduct for "pre-existing impairment" based upon degenerative conditions discovered in the course of treating a work-related injury.

In the Hanson case Mr. Hanson was a track coach for Logan U.S.D. 326. On May 19, 1995, he "tweaked" his right knee alighting from a school bus at a track meet. Some thirty years before Hanson had been injured and had his right medial meniscus surgically removed. He was later diagnosed with degenerative joint disease in his right knee and had been told he needed a knee replacement. He did not have the knee replacement surgery at the time but was told to put it off as long as he could. He also officiated at basketball games and was treated occasionally for knee pain particularly after officiating a game. He had arthroscopic surgery in 1989 for on-going complaints and was told he had "bone on bone" contact in his knee; that the cartilage was completely worn away. After "tweaking" his knee on May 19, 1995, he was treated and a knee replacement was again recommended. The medical evidence was to the effect that the "tweaking" incident contributed very little overall to the need for surgery but essentially represented the "straw that broke the camel's back".

Ultimately the amount of permanent partial disability compensation to which Hanson was entitled had to be decided. While all of the doctors who examined Hanson and testified agreed there was a pre-existing impairment, they could not agree on the amount of pre-existing impairment. The previous injuries and condition had not been "rated" as to impairment because ratings are generally only given in workers compensation cases, not for injuries or conditions suffered away from the workplace. The evidence was evaluated and found that the claimant had a pre-existing impairment of function in the right knee but awarded compensation for the aggravation above and beyond that pre-existing impairment.

The Workers Compensation Appeals Board (WCAB) reversed the finding concluding the evidence presented was insufficient to establish the amount of pre-existing impairment.

It must be recognized that not every current injury results in a permanent impairment of function. Similarly, just because there has been a previous injury and treatment, there was not necessarily a resulting permanent impairment. Each case must be considered on its own facts to determine the nature of the prior injury or condition and whether, with reference to the AMA Guides, a pre-existing impairment may be established. It is the responsibility of the ALF to ensure that there is an adequate evidentiary record to support his or her decision. Appeals from decisions of the ALJ's are made to the WCAB and ultimately to the Kansas Court of Appeals. While proceedings before the WCAB are *de novo*, meaning the WCAB can make its own findings of fact and are not bound by the findings of the ALJ, the WCAB is limited to the same record that was developed before the ALJ.

The present workers compensation system is not perfect but no system yet developed has attained that perfection. Significant substantive changes to the act based upon the Hanson decision are arguably unwarranted. Existing WCAB decisions require rateable pre-existing conditions to be deducted from later injuries and ratings. The most problematic area of litigating "pre-existing impairments" is identifying pre-existing conditions and obtaining medical records relating to those conditions (Attachment 2).

Tom Trigg, Deputy Superintendent, Blue Valley Unified School District #229, stated school district are concerned about the increasing premiums for worker's compensation insurance. Specifically, Blue Valley Schools experienced an increase from 2002-03 to 2003-04 of 51%. The district's premium in 2002-03 was $422,768 and in 2003-04 it increased to $637,968.

Blue Valley Schools bids worker's compensation on the open market each year. Blue Valley has also explored self-insurance as an option for workers compensation. The rates quoted above were the least expensive option each year (Attachment 3).

Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund (KBIWCF), a homogeneous fund formed under Chapter 44 of the Kansas Statutes to provide workers compensation coverage for companies in the residential and light commercial construction industry, stated that Kansas law requires that any person/company having an annual payroll of $20,000 or more carry workers compensation insurance. Health insurance will not pay for treatment if the injury happened on the job. The problem arises when the injured party does not have health insurance and is injured on activities away from work. Often this is seen in the smaller construction companies that do not furnish health insurance for their employees. Often "Monday" injuries are reported. Workers compensation insurance was established to ensure that the injured employee would be able to provide for his family without having to file a lawsuit against his employer and await a decision sometime in the future. Education of all Kansas companies as to how to provide a safe workplace for their employees is much preferred to the way Kansas is operating now (Attachment 4).

Scott Anderson, Kansas Farmers Service Association (KFSA), Hutchinson, Kansas, stated their top priority was to provide the best available insurance protection, risk management and safety services for all customers. Based on a $28,600 salary, grain elevator employees have had a 105% increase in premiums; farm machinery operators a 32% increase; feed mill employees a 43% increase; and retail petroleum and propane employees a 17% increase (Attachment 5).

The meeting adjourned at 11:00 a.m. The next meeting will be February 11, 2004