

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 2, 2005 in Room 241-N of the Capitol.

All members were present except:
Patricia Kilpatrick- excused

Committee staff present: Norman Furse, Revisor of Statues
Renaë Jefferies, Office of Revisor of Statutes
Jerry Ann Donaldson, Kansas Legislative Research Department
June Evans, Committee Secretary

Conferees appearing before the committee:

Tom Whitaker, Executive Director, Kansas Motor Carriers Association
Douglas C. Hobbs, Wallace, Saunders, Austin, Brown & Enochs, Chtd.
Pat Shelley, President, Teague Electric
Duane Simpson, Kansas Grain and Feed Association (KGFA) and Kansas Agribusiness Retailers Association (KARA)

Others attending:
See attached list.

The Chairman opened the meeting and asked if there were any bill introductions?

Representative Ruff requested three bills: (1) Benefits for injured workers increased from \$125,000 to \$250,000 for permanent disability and increase the average wage bill benefits from 100% to 200%. (2) Employer liability. (3) Physicians choice.

Representative Burgess requested two bills: (1) Reduce the number of members on the Workers Compensation Advisory Council from four to three on each side and repeal the \$50,000 cap on disability. (2) Pay raise for Workers Compensation Administrative Law Judges and alter the nomination process.

Vice Chairman Todd Novascone requested a prompt payment act bill.

Terri Roberts, Kansas Coalition for Workplace Safety, requested a bill providing for competitive bidding process pursuant to which the Insurance Commissioner shall seek, and any insurer seeking to qualify as the residual market insurer may submit, rates at which the insurer will agree to insure any employer who is in good faith entitled to but who is unable to procure workers compensation insurance through ordinary methods. The insurance commissioner shall establish an interactive internet site which shall enable any employer licensed in this state to obtain a quote from each workers compensation insurer licensed to write the coverage sought by the employer.

The Chairman said tomorrow, February 3rd, would be the last day for bill introductions.

The Chairman opened the hearing on **HB 2141 -Workers compensation; burden of proof for admission of chemical test result into evidence.**

Tom Whitaker, Executive Director, Kansas Motor Carriers Association, testified as a proponent to **HB 2141**, stating they appeared before the Workers Compensation Advisory Council requesting support to include certain drug levels under the conclusive presumption of employee impairment in the workers compensation statutes. The Advisory Council approved the request and the 1999 Legislature approved **SB 219** which included the drug concentration levels which are the same as those levels found in the Federal Motor Carriers Safety Administration's drug testing levels which are the same as those levels found in the Federal Motor Carrier Safety Administration's drug testing rules and regulations.

HB 2141 clarifies that a positive post-accident drug test performed in accordance with federal and state laws would be conclusive evidence of impairment. The Kansas Motor Carriers Association supports mandatory drug and alcohol testing for truck drivers (Attachment 1).

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on February 2, 2005 in Room 241-N of the Capitol.

Douglas C. Hobbs, Wallace, Saunders, Austin, Brown & Enochs, Chtd., appeared in support of **HB 2141**. Mr. Hobbs testified on behalf of the Kansas Self-Insurers Association (KSIA), a not-for-profit organization comprised of more than one hundred firms, businesses, corporations, group-funded pools and other private and public entities who operate as self-insurers in Kansas. **HB 2141** amends K.S.A. 44-501 making it easier for employers to utilize the so-called “intoxication defense” in the workers compensation statutes which bars recovery to employees who are injured on the job when their own intoxication or illegal drug use contributed to their injuries. Under the current statutory framework set forth in K.S.A. 44-501(d)(2), the employer (respondent) has the burden of proof to establish that the claimant’s injury, disability or death “was contributed to by the employee’s use or consumption of alcohol and/or drugs.” In order for the employer to successfully utilize this defense it must prove two elements: that the injured worker was under the influence of alcohol AND that there was a nexus between the drug use and the accident. Intoxication is most commonly proven through drug tests. K.S.A. 44-501(d)(2) provides, “it shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above levels shown on the chart”.

Judicial interpretation of K.S.A. 44-501(d)(2) has made the requirements of the introduction into evidence of intoxication tests so onerous that the intoxication defense has been rendered essentially useless.

HB 2141 attempts to align the probable cause requirements in the Workers Compensation Act with the law in criminal cases. New legislation should condemn, rather than encourage, drug use in the workplace (Attachment 2)

Pat Shelley, President, Teague Electric Construction, Lenexa, testified in support of **HB 2141**. Mr. Shelley stated he had personal experience dealing with the provisions of **HB 2141**. An employee was injured on the job. The company has had a substance abuse program for years, so when this employee went for medical treatment, a drug screen was automatically part of the procedure. The employee tested positive – so the employee was terminated. The employee was denied insurance benefits, attorneys got involved on both sides and it is not yet resolved. The statute is pretty clear what the original intent was, but its specific wording says “The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met: (A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working.”

When a workers compensation insurance carrier has an open claim, they analyze the situation and they calculate a ‘worst case scenario’ for medical, legal and compensation, then they maintain a reserve fund equal to that ‘worst case’ amount. When a case remains open for a long period of time, that reserve shows up on the company’s claims history just like a closed and paid claim. When the workers compensation insurance is renewed, the premiums are based on an experience modification factor that reflects a reserve amount that might never be paid out (Attachment 3).

Duane Simpson, testifying on behalf of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA) as a proponent for **HB 2141**. Between 2001 and 2004, agribusiness has seen workers compensation increases ranging from 17% to 105%. Workers have had to lay off workers to keep their doors open. One of the big cost drivers of workers compensation in Kansas is the cost of litigation. **HB 2141** will not solve the workers compensation problems our industry faces, but it will be a small step in the right direction and restore some common sense to the system.

All **HB 2141** does is lower the legal hurdle to establish probable cause when testing employees for the use of alcohol or drugs when they have workplace related injuries (Attachment 4).

The Chairman closed the hearing on **HB 2141**.

The following written testimony was distributed by proponents to **HB 2141**: Janet Stubbs, Administrator, Kansas Building Industry Workers Compensation Fund (Attachment 5) and Leslie Kaufman, Governmental Relations Director, Kansas Cooperative Council (Attachment 6).

CONTINUATION SHEET

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on February 2, 2005 in Room 241-N of the Capitol.

The Chairman asked if there were any more bill introductions.

Bud Burke requested a bill that would add one member to the Medical Directory Advisory Committee.

The Chairman asked if it were tied to Commerce and Labor and Mr. Burke replied it did.

Representative Yoder requested a bill to eliminate the Workers Compensation Advisory Council.

The Chairman stated that without objection all the bill requests would be accepted for introduction.

The meeting adjourned at 10:40 a.m. The next meeting will be February 3, 2005.