

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Susan Wagle at 8:30 a.m. on March 9, 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
Ms. Janet Stubbs, Administrator, Kansas Building Industry Workers compensation Fund
Mr. Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce

Others attending:

See attached list.

Continued Hearing on Substitute for HB2134 – an act concerning workers compensation

Upon calling the meeting to order, the Chair stated at yesterday's Committee meeting they were offered a binder entitled, "Comparison of Substitute for HB2134 as Passed by the House, HB2134 Compromise, and Current Law," which was explained by Mr. Fred Greenbaum, Attorney, McAnay, VanCleave & Phillips. She called on him today asking, since he had covered the binder at yesterday's meeting, was he going to cover his written testimony today? He said no, but would offer it as written only. A copy of his written testimony is (Attachment 1) attached and incorporated into the Minutes as written.

The Chair then called on Ms. Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund (KBIWCF), who stated their operation is a homogeneous group funded pool for the residential and light commercial construction industry of Kansas and is generally in support of this bill. However, she would like to share with the Committee, some of the concerns the KBIWCF regarding the bill including:

1.) Under new Section 3 of the current bill, page 5 under (F), they are concerned how broadly the "just cause" definition will be applied but certainly agree that it is a start in the right direction. She explained a large percentage of construction workers are alcohol and drug users who are eager to avoid a drug test. Some often wait until after work and go to an ER or occupational health facility not normally used by their employer. It is the intent of KBIWCF to require all employees of our members to sign a form granting permission for a post accident drug test when hired. KBIWCF does require new hire drug testing, and to post accident drug tests within 4 to 6 hours after the accident/injury.

2.) The amendment regarding additional drug testing data was requested by them because the techniques have been developed which were not in existence at the time the 1993 statutes were written. She added, labs retain the specimens for one year so there would be no problem with allowing the claimant to have a retest done in the time period allowed. They ask that this amendment be retained in the House version.

3.) Under Section 25 (d), they believe that the House Committee received inaccurate information regarding current translator fee liability. KBIWCF currently sends interpreters to medical appointments and to Court hearings for claimants and accepts that as the cost of employers hiring non-English speaking workers.

4.) Lastly, they believe that 30-days is far too long for reporting an injury and realizes this provision is not going to change, so the members will handle this through the Employer Policy Manual and enforcement procedures. A copy of her testimony is (Attachment 2) attached and incorporated into the Minutes as referenced.

Chairperson Wagle asked Ms. Stubbs where the oral swab for drug testing is in the bill and did the House allow for this? (Page 5 and yes, the House allowed.)

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The Chair recognized Senator Holland who asked Ms. Stubbs, when she talked about misclassification occurring, is that pretty prevalent? (Yes.)

The Chair then said, is she correct in saying that the testimonies of Mr. Gary Terrell, Attorney, Kansas Association of Defense Council; Mr. Bernie Koch, Executive Director, Kansas Economic Progress Council; and Mr. Kevin McFarland, President, Kansas Association of Homes and Services for the Aging (KAHSA) are all written and they did not wish to testify? (Each answered yes.) Copies of their testimonies are (Attachment 3) attached and incorporated into the Minutes as referenced.

The Chair stated, the last person to come before the Committee to testify was Mr. Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce who said their coalition of business organizations support this bill in both forms: the version which passed the House, as well as the original compromise and will leave it to the will of the Committee as to which version to accept. He did say that nothing in the compromise agreement was removed by the House, only additions were made.

Mr. Stafford also cited several court cases which significantly altered the intent of the work comp system including the *Fernandez* case being corrected stating, you must be eligible for a valid contract of employment to be eligible for work disability.

Lastly, he stated while these are a few of the positive changes for employers, they also focus on the changes taking place in this legislature which benefit the injured worker. The business community was willing to increase caps to benefit legitimately injured workers. This legislation raises the Permanent Partial and Permanent Total caps by \$30,000 each and the death benefit also increasing from \$250,000 to \$300,000.

Next, he then went through the amendment covering some changes that need to be made, which they consider probably technical in nature, including:

1.) The balloon that was included in Mr. Greenbaum and Mr. Andersen's testimony, anything in yellow or highlighted is a Department of Labor/Department of Insurance amendment.

2. To get this bill back to its original form, they have struck the House language so the majority of the language in red are amendments added by the House that we are removing from the bill. This is language clean up as seen on page 6, lines 34 through 36, where the Department of Health and Human Services and the Department of Health and Environment have been capitalized. However, per Mr. Ken Wilke, Kansas Legislative Research Department, it is not necessary to capitalize these. Any language that is black that is stricken, is the way it stands in the bill, and the existing statute that is being deleted. Also, any black italicized language is just from the base bill. The blue language is what they are adding. They did make a change dealing with the compensation rates and also tweaked the definition of the "prevailing factor." He said this essentially goes back to the compromise with the amendments from the Departments of Labor and Insurance.

3.) In going through each of the Department of Labor's requested changes or concerns from yesterday's hearing, he said all have been addressed with the exception of:

a.) Deleting the Department of Insurance's section, the subcontractor or sole proprietor waivers that is New Section 3 and offered in the balloon with Mr. Stafford's testimony yesterday. So if that were going to be deleted, that would have to be New Section 3, on page 2, which would have to be stricken from the bill.

b.) The change on page 56, line 12, where the red "or injury" is stricken, they actually need to delete "accident" and replace it with the word "injury" so line 12 would read, "to the date of the injury and subject to the maximum weekly."

Lastly, he stated these are two changes to the balloon they brought to satisfy all the points in the Department of Labor's testimony and one technical clean up. A copy of his testimony is (Attachment 4) attached and incorporated into the Minutes as referenced.

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The Chair then asked for questions or comments from the Committee which came from Senators Masterson, Wagle, and Holland including

1. The only two changes you propose to this is in K.S.A. 44-536, changing “or injury” and then you referenced new Section 3. Could you clarify this New Section 3 for me? (It is striking the entire new section.)
2. This has some technical clean up in it and are House changes, so we can negotiate in conference, and is this just a technical change in new Section 3? (It is striking the amendments in the Department of Labor's testimony yesterday to be consistent to what they like to see changed. It is his understanding their concern was the language included did not fix the problem that exists today.)
3. For clarification, the question was asked if Mr. Greenbaum's side and Mr. Andersen's side are familiar with this and are good to go with this balloon in New Section 3? (Yes, and they also agree with the two recommendations just offered.)

The Chair recognized Ms. Kathie Sparks, Deputy Secretary, Department of Labor, who referred the Committee to page 2, New Sec. 2, line 2, “An employer or self-insured employer “may” provide.” The DOL asks that this be changed to “shall” provide, making it mandatory. The other amendment was brought to Committee yesterday from Secretary Brownlee on how we elect the Board.

The Chair asked, is the Secretary willing, if the Committee adopts the DOL's amendment, to also allow those individuals to be appointed by the Secretary and undergo Senate confirmation hearings? (We think that would be okay, but one issue that we would change is the appointment process, people who are subject to Senate confirmation cannot take action on their Board until they have actually been confirmed.)

The Chair recognized Senator Emler who stated there are some Senate confirmations that are not permitted to act. An example being, the person who is there continues to act until the successor is not only appointed but confirmed. He went on to say, if it is during the summer, then the Confirmation Oversight Committee handles. And in this instance, an example would be, we have an Acting Fire Marshall right now and he does not have to be confirmed and is permitted to act as long as he has the letter of authority that he is the Fire Marshall. However, you are not allowed to be “Acting” for more than 6-months. Deputy Secretary Sparks stated all that they would ask is that language be added so that person can be “Acting” until they are confirmed even if only for that period of time.

The Chair recognized Senator Steineger who asked if it was necessary that these people be confirmed by the Senate? Senator Emler was called on. He said this was discussed yesterday afternoon whether or not this would impact the entire bill. The idea behind this methodology was that prior to this, it goes back to a political situation, depending on who was on the second floor. This new methodology would take heavy politics out of it and there would be some group that had some oversight over who actually could get appointed. Under the current system of judges, it is very similar to what is being done in workers comp., i.e. there is a panel that recommends three names from which the judge is chosen. If you do away with the panel you still have to have some oversight.

The Chair then called on Mr. Reed Holwegner, Office of the Revisor of Statutes, who has informed her of some clarifications on what is in this amendment and what she thinks their intentions are. Mr. Holwegner stated when the House worked this bill and it came to the Senate, one of the House provisions was the deletion of an Work Force Advisory Council that was repealed. He asked, is this also being asked to be repealed in this amendment? Mr. Stafford stated this was requested by the House and they would recommend being consistent with taking that out.

The Chair asked if this needed to be added to this package? (Mr. Holwegner said this would have to be stricken in Section 28, page 62, line 21, the last statutory citation, 44-596 and said this was a House amendment.)

Senator Steineger made a motion to move that the Committee adopt the amendment of Mr. Eric Stafford, with the appropriate change that staff has just pointed out, the appropriate deletion on page 62. It was seconded by Senator Lynn.

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The Chair recognized Senator Emler who stated two things to consider, which he can make as a substitute motion. Referring to page 2, line 2, there seems to be an agreement that “may” can be changed to “shall,” is there any real opposition? (Not a problem with the language that is written here, it is just a matter of explaining to the employers that this needs to be done.) Also all of Section 3 needs to be stricken as shown on page 2, lines 13 through 38, is that correct? (Yes.) And on page 56, strike the word “accident” and replace it with “injury”, correct? (Yes.) Lastly, Senator Emler asked Mr. Holwegner, when he was talking about the deletion on page 62, line 21, was 44-596, was there any place else in the bill where that language is referred? (When the House Committee invoked it in the House, this was the only place it was referenced.) Senator Emler then stated, if agreeable, he would make a substitute amendment that the Committee adopt the above changes along with those additional changes. He felt this would get the Committee where they were headed which was sort of the original agreement with the discussed changes, the technical corrections, etc., but also allows you to conference with the House.

The Chair recognized Senator Holland who referred back to the language changing “may” to “shall” asking was this brought forth by the Department of Labor? (Yes.) Are both the business and labor committee comfortable with this? (Mr. Stafford said they would go with the will of the Committee, Mr. Andersen said it is current law. Mr. Greenbaum thinks “may” is sufficient from the standpoint of what we know is a practical matter in terms of their checks. Ms. Stubbs stated they have cut costs by doing electronic deposits of their TDB checks so not sure if the first letter of notification would be acceptable.

The Chair called on Secretary Brownlee who referred the Committee to Ms. Ann Haught, Acting Director of the Division of Workers Compensation, who stated as it is current law, “may” is good but “shall is better”.)

The Chair went back to the motion stating that they are on Senator Emler's amendment he has proposed with some changes. He stated if the “shall” goes in, it does not have to be on or with a check for temporary disability benefits, but still does not address the issue of an electronic transfer as there is no check. So, he said, there would have to be a separate notice that goes out with this statement in it.

The Chair recognized Senator Steineger who asked to withdraw his first motion, offering a new motion that the Committee adopt this balloon with the appropriate deletion of Section 3 on page 2, with the appropriate deletion on page 62, line 21, reference to 44-596, leaving page 56 as is and with respect and authority to the Revisor to correct technical issues. It was seconded by Senator Masterson and the motion carried.

The Chair had recognized both Mr. Stafford, who stated that in speaking with their attorneys, they are comfortable with the word “accident” so it is not necessary to change, and Senator Emler, who added to Senator Steineger's proposed amendment “with authority to the Revisor to correct technical issues.”

The Chair then stated they would now address the DOL's request including:

- 1.) an amendment on the word “shall”, saying she had heard no opposition to this change and
- 2.) an amendment changing the way the judges are appointed

The Chair recognized Senator Masterson who stated when they look at the language, on the “shall” or the “may” it does say on or with a check. So if you electronically transfer that is not a check so he would contend that even if that language is in there, the language would be required in conjunction with electronic checks. Senator Emler stated this could be an issue that could be discussed in conference as well.

The Chair asked Secretary Brownlee if they had the actual language of how they choose judges? The Secretary said after discussion following yesterday's meeting it was accepting Senate confirmation and giving the Revisor authority to add this with the appropriate latitude that the timing work out . And this again can be discussed in conference.

The Chair recognized Senator Emler who made the motion the Committee adopt the recommendation of changing “may” to “shall”. It was seconded by Senator Lynn and the motion carried.

Senator Masterson made a motion the Committee adopt the Department of Labor's balloon with Senate confirmation. It was seconded by Senator Lynn.

The Chair recognized Senator Holland who asked if both business and labor had heard this before and did they have a position? (Mr. Anderson said they vehemently oppose because of two things, you won't get as qualified candidates because you are serving at the pleasure of the Governor and we do not have district

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court review of what appellate judges do now.) The Chair then asked Secretary Brownlee why she asked for this? (First of all they serve for four years and they are proposing that the Secretary appoint these work comp appeals board judges. She said what she indicated yesterday regarding how the system now works. The two parties, KCCI and Labor, unanimously agreeing on the names they put forward and the Secretary makes the appointment and feels these two entities do not reflect the entirety of the workforce in Kansas.

The Chair again recognized Senator Holland who offered two comments: first, labor and business came together in good faith to bring this before the Committee. Secretary Brownlee should have injected herself to work with these people to get this figured out but is now injecting the amendment at the last minute, Second, he does not feel the Committee understands the appeals board process and the dynamics we are affecting and opposes this amendment.

Again, the Chair reminded the Committee there is a long process, they have had testimony today regarding drug use and things in the House that people still want, so this is a continued discussion. She said they are back on the amendment as proposed by Senator Masterson, seconded by Senator Lynn. The Chair recognized Senator Longbine who asked, does the Senate confirmation give the Revisor latitude to allow technical changes?The Chair asked Senator Masterson if his motion conceptually included this? (Yes.) The Chair then asked for a vote from the Committee and the motion passed. Senator Steineger made a motion to move the bill out of Committee. It was seconded by Senator Olsen and the motion passed.

Adjournment

As it was past adjournment time, the Chair announced the meeting was adjourned. The time was 9:31 a.m.

The next meeting is scheduled for March 10, 2011.