



South Dakota Legislative Research Council

Issue Memorandum 94-7

1994 WORKERS' COMPENSATION LEGISLATION

Workers' compensation continued to be a major topic of discussion during the 1994 Legislative Session. This discussion primarily focused around two bills which were initiated by the Workers' Compensation Advisory Council and introduced on behalf of the Governor. These bills were an attempt to address the increasing costs of workers' compensation which have resulted in increasing workers' compensation insurance premiums for the employers of the state. Senate Bill 256, which provides revenues for the automation of workers' compensation records and for the funding of a workers' compensation advisory council, was considered by all interested parties to be noncontroversial and passed with no significant changes. Senate Bill 257, which provided for the permanent workers' compensation advisory council and made significant changes regarding workers' compensation, however, was very much controversial and was not approved until a conference committee worked out a compromise.

This issue memorandum will examine the significant provisions of those bills. It will review the provisions as they were initially introduced as well as the final enactments.

Senate Bill 257

Workers' Compensation Advisory Council

Senate Bill 257 proposed to make permanent the Workers' Compensation Advisory Council which was created by legislation in 1992 and was scheduled to sunset July 1, 1994. This council was created to aid the Department of Labor and the Department of Commerce and Regulation in reviewing the workers' compensation program and to make recommendations for its improvement. The bill proposed changes to the council which was an eight-member council appointed by the Governor and composed of individuals from industry and labor and other interested parties. These provisions were revised by the Senate in reaction to a feeling that the council was dominated by employer interests. The House made further minor amendments regarding the council. The compromise finally worked out by the conference committee contained the version of the council as passed by the House. The following table compares the major provisions of the council as initially proposed to those that were adopted.

ADVISORY COUNCIL

	AS INTRODUCED	AS ADOPTED
Membership	11	11
Voting members	9	8
Nonvoting members	2	3
Members representing employers	4	4
Members representing employees	4	4
Appointed from list of recommendations	No	Yes
May be from a personnel department	Yes	No
Length of term	3 Years	3 Years
Vote requirement	Majority	Unanimous
Chair	Lt. Governor	Lt. Governor

The lieutenant governor, the secretary of labor,

and the secretary of commerce and regulation would be the nonvoting members of the council under the bill finally approved. The final version also provided that two of the employee representatives would be appointed by the Governor from recommendations submitted by the South Dakota Federation of Labor, and no employee representative can be a member of a personnel department. In addition, the compromise provided that the expenses of the council are to be paid by the Department of Labor and that any recommendations from the council would require a unanimous vote. This unanimous vote requirement was added to help ensure that the interests of employers and workers were treated equally and that any recommendations would be a consensus decision of the council.

Provisions regarding the council are found in section 1 of the bill.

Definition of Injury

Senate Bill 257 as introduced revised the definition of a work place injury. It repealed the current statutory definition of injury and replaced it with a definition which required that work-related activity be the major contributing cause of the injury. It also required that objective medical evidence be submitted before a work-related injury would be considered compensable. It was felt this change would help ensure that workers' compensation claims are not made for injuries that occur outside the work place.

The Senate in its deliberations on the bill deleted this change in definition at the request of labor groups. These groups feared that a new definition might actually deny benefits to injured workers. The change was subsequently reinstated by the House. However, in the end the change was eventually dropped as part of the compromise worked out in conference

committee. Undoubtedly this is an issue which will continue to be examined by the advisory council in the future.

Repeal of Cozine Provisions

When a worker suffers a work-related injury that permanently affects the worker's ability to perform a job, the worker is assigned an impairment rating which is expressed as a percentage to the affected body part and that is used to determine the amount of workers' compensation to which the worker is entitled. In 1990 the South Dakota Supreme Court in the case of *Cozine v. Midwest Coast Transport* required that, in addition to the impairment rating, an injured worker's loss of use due to the injury should also be considered in determining permanent, partial disability benefits. This decision was incorporated into law by the 1992 Legislature. Many employers and their lawyers felt this decision opened the door to higher benefits payments and subsequently higher workers' compensation insurance premiums.

Senate Bill 257, as introduced, repealed the law upon which the Cozine ruling was based. Instead of the benefits workers would have received under that law, the bill proposed that benefits be shifted to workers who sustain more serious on-the-job injuries according to a "top-loading" formula. The more serious the injury the greater amount of benefit they would receive. It was indicated by the Department of Labor that the National Council on Compensation Insurance estimated that repeal of this provision would reduce workers' compensation costs by up to seven percent. The "top-loading" formula would add about three percent back to the cost of the system, according to the Department of Labor.

The sections of Senate Bill 257 regarding the Cozine decision were removed by the Senate, but were then reinstated by the House. They

remained in the bill as part of the conference committee compromise and can be found in sections 4 to 6, inclusive, of the bill.

Odd Lots

As introduced Senate Bill 257 proposed to codify case law regarding "odd lots." These are workers who sustain an injury that does not totally disable them, but because of their individual circumstances (age, education, training, etc.) they cannot secure regular employment in their community, and, therefore, in effect, are permanently totally disabled. Community was defined as a sixty-mile radius of the employee's residence. The bill also provides moving expenses to "odd lots" who decide to relocate to secure employment.

These provisions regarding "odd lots" were removed by the Senate and reinstated by the House. They subsequently remained a part of the conference committee compromise. The definition of community was changed by the conference committee, however, to define it as the area within sixty road miles of the employee's residence. The provisions regarding "odd lots" are found in sections 7 and 8 of the bill.

Rehabilitation Benefits

If an injury prevents a worker from returning to his or her usual and customary employment, the worker is entitled to workers' compensation benefits while engaged in a rehabilitation program and for a period of up to sixty days if the worker is actively preparing to engage in a program of rehabilitation. Senate Bill 257 as introduced establishes the factors used to define usual and customary line of employment for the proposes of making a rehabilitation claim. Factors to be considered include the skills and abilities of the worker, the length of time the

worker spent in the type of work in which he or she was injured and its proportion to the worker's entire working career, and the duties of the person at the work place. The bill also eliminated the sixty-day period in which an injured worker may receive benefits while preparing to engage in a rehabilitation program. Employers felt this period was too long and resulted in cases where injured workers said they were planning to participate in some type of retraining or rehabilitation to get benefits and then did not go through the retraining or rehabilitation.

These provisions regarding rehabilitation claims were removed by the Senate and were reinstated by the House. In the conference committee the rehabilitation provisions as introduced were kept as part of the compromise bill with one exception. The sixty-day period was not repealed; instead, a provision was added to require a certificate of enrollment in a program of rehabilitation before an injured worker could continue to receive benefits. The provisions regarding rehabilitation are found in sections 9 and 10 of the bill.

Reporting Requirements

Various changes in law regarding the reporting of on-the-job injuries were proposed in Senate Bill 257 to provide for a more timely reporting of these injures in an effort to reduce the cost of workers' compensation claims. The bill as introduced reduced the employee's deadline for reporting an injury from thirty to ten days and established a one-year deadline for employees who had good cause for not reporting an injury during the ten-day period. The bill also allowed the Department of Labor to impose a one hundred dollar civil penalty on employers, insurance companies, and self-insured employers that did not meet certain deadlines for reporting on-the-job injuries.

The Senate removed the changes regarding the employee's deadline for reporting injuries before it passed the bill. This provision was reinstated by the House. The conference committee, in addressing this issue, came up with a provision to deny benefits to employees who fail to report an injury within three business days instead of the previous thirty days or the ten days as initially proposed in the bill. The provisions regarding reporting are found in sections 12 to 15, inclusive, of the bill.

Senate Bill 256

Senate Bill 256 as recommended by the Workers' Compensation Advisory Council was to revise legislation passed in 1993 which imposed certain fees on workers' compensation policies and placed an application fee on self-insured employers. These fees were to be used to finance the automation of workers' compensation record keeping within the Department of Labor. Such automation will facilitate the compilation of better statistics regarding work place injuries and help identify where some of the more substantial costs of work place injuries are occurring.

Senate Bill 256 was approved by the Legislature as introduced with no significant changes. The bill increased a fee on workers' compensation insurance policies from ten to fourteen dollars per policy. This fee was dedicated to the Department of Labor for the purpose of automating the administration of workers' compensation law and supporting the workers' compensation advisory council. The bill also authorized the Department of Labor to increase by administrative rule the application

fee on self-insured employers. This fee was continuously appropriated to the department for the purposes of conducting an actuarial review of the applicant's financial condition and automating the administration of the workers' compensation law.

It is estimated by the Department of Labor that the cost of the automation unit, the cost of the actuarial review, and the cost of the advisory council should total about \$250,000 a year and should be covered by the fees authorized by Senate Bill 256.

Conclusion

With the revisions to the Workers' Compensation Advisory Council, the repeal of the Cozine provisions, the codification of provisions regarding "odd lots," and the modifications regarding rehabilitation benefits and reporting requirements, significant changes were made by the 1994 Legislature regarding workers' compensation. These changes were the result of compromises made between the interests of employers and the interests of workers, with neither side getting completely what they wanted. The changes also probably will not be the last ones to face the workers' compensation system. However, because of some of these changes, the advisory council and the Legislature should be in a better position to improve upon the system in the future.

This issue memorandum was written by Dave Ortbahn, Research Analyst for the Legislative Research Council. It is designed to supply background information on the subject and is not a policy statement made by the Legislative Research Council.
