SUBJECT: Continuing the Texas Workers' Compensation Commission

COMMITTEE: Business and Industry — favorable, with amendments

VOTE: 9 ayes — Brimer, Brady, Corte, Crabb, Eiland, Giddings, Janek, Rhodes, Solomons

0 nays

WITNESSES: For — Richie Jackson, Texas Restaurant Association; George B. Allen, Texas Apartment Association; Pam Beachley, Business Insurance Consumers Association; George Christian, Jobs for Texas; George S. Christian, Texas Association of Defense Counsel; Frank S. Denton, Texas Self-Insurance Association; Joe Hanson, Ted Roberts, Texas Association of Business and Chambers of Commerce; Don Summers, National Federation of Independent Businesses; Fred Fox, M. Dillon Snowden, Texas Association of Rehabilitation Professionals in Private Sector; Jane Noojin, D.C., J.P. Word, Texas Chiropractic Association; Fred G. Leon, D.C.; Bruce Amason, D.C.; Craig R. Barton, D.C.; Henry E. Insall Jr., D.C.

Against — Rick Freeman, Joseph M. Hamilton

On — David Holland, Ken Levine, Steve Hopson, Patricia Jaramillo, John Hubbard, Aric Garza, Sunset Commission; Todd K. Brown, Texas Workers' Compensation Commission;

BACKGROUND: The Texas Workers' Compensation Commission was created in 1989 to enforce compliance with state workers' compensation laws, monitor benefits, resolve claim disputes and assist in development of risk management programs and safe workplaces. TWCC will be abolished September 1, 1995, under current law unless continued by the Legislature.

DIGEST: HB 1089, as amended, would continue the Texas Workers' Compensation Commission until September 1, 2007, and enact Sunset Commission recommendations including the authority to investigate fraud and other violations, the extra-hazardous business program, ombudsman training, state agency risk management, transferring administrative cases to the State Office of Administrative Hearings and the treatment of occupational diseases.

HB 1089 would also add standard provisions usually recommended by the Sunset Commission, including a governor-appointed board chair and requirements concerning board qualifications, training and conflict-of-interest prohibitions, complaint processing, public notice, career advancement and equal employment opportunity. HB 1089 would take effect September 1, 1995.

Benefits. Eligibility for 401 weeks of benefits for an occupational disease would begin on the date the worker first received income benefits, not on the date of the injury. This change would apply to diseases for which the date of injury occurred on or after September 1, 1995.

A business owner or corporate executive officer would be entitled to benefits unless specifically excluded through a policy endorsement.

Doctors would be required to meet qualification standards developed by the commission to serve as designated doctors. Only the injured worker or the commission could communicate with the designated doctor about the worker's medical condition. The commission would be required to evaluate the designated doctors for compliance with the act, and could impose sanctions for infractions in addition to or in place of administrative penalties currently in law.

Report requirements. Insured employers would be required to report an injury to the insurance carrier and deliver a copy of the report to the injured worker. Reports to the injured worker would also be required to contain a summary of the workers' statutory rights and responsibilities.

All employers, including the non-insured, could be fined up to $500 for failure to report injuries to the commission. The knowing, intentional or reckless disclosure or receipt of confidential information reported to the commission would be a Class A misdemeanor, which carries a maximum penalty of one year in jail and a $4,000 fine.

Lapses in confidentiality of information collected by the commission could only be prosecuted in the county where the information was unlawfully disclosed; Travis County would be removed from the law as an alternative venue.

Ombudsman qualifications. To qualify as an ombudsman, a commission employee who assists injured workers without attorneys in a claims dispute,

on or after September 1, 1995, a person would have to demonstrate knowledge of workers' compensation laws and rules, have strong interpersonal skills and experience resolving problems and have at least three years experience in workers' compensation. The commission also would be required to adopt ombudsman training guidelines and continuing education requirements.

Extra-Hazardous Employer Program. The commission could exclude a business from being identified as an extra-hazardous employer if the business could show that the incident triggering commission investigation was a fatal accident that occurred outside the control of the employer or the course of the worker's employment.

The commission could hold a hearing if the employer or workplace was the suspected proximate cause of the fatality. If the hearing established the employer or workplace as the proximate cause, the commission could require the employer to participate in the extra-hazardous program.

State agency responsibilities. Each state agency would be required to develop and implement by January 1, 1996, health and safety programs and programs designed to assist injured workers to return to work.

The Attorney General's Office, Workers' Compensation Division, would act as the state's insurer, not as the employer, before the TWCC and courts. State agencies would be considered the employer.

Self-insurers. The commission director would be removed as a voting member from the board of the Texas Self-Insurer Guaranty Association, and a certified self-insurer would be added.

Assessments for the trust fund would be collected from self-insuring employers over 10 years instead of five years, and the board of directors of the trust fund would be required to adopt a year-by-year schedule of assessments to meet the 10-year funding goal.

State Office of Administrative Hearings. Hearings on administrative violations would be conducted by the State Office of Administrative Hearings (SOAH). A memorandum of understanding between the commission and SOAH would make the transfer effective January 1, 1996. The administrative law judge would make the final decision on administrative violations, the extra-hazardous employer program

commission findings and denied health services payment. In all other cases the judge would propose a decision to the commission.

Commission investigations and sanctions. Commission investigation files would be confidential, not subject to the open records act and could only be disclosed under specific circumstances.

Sanctions against doctors for violations of commission medical policies and guidelines could be used to remove a doctor from the list of approved doctors in addition to sanctions against doctors for administrative violations.

Insurance carriers would commit a Class C administrative violation, punishable by a $1,000 fine, by failing to notify the commission of a settlement or benefit termination or reduction or by denying preauthorization in a manner inconsistent with commission rules. A health care provider would commit a Class D administrative violation, punishable by a $500 fine, by failing to timely file required reports or records.

Fraudulent attempts to obtain or deny workers' compensation benefits valued at $1,500 or less would be a Class A misdemeanor, maximum penalty of one year in jail and a $4,000 fine; for benefits of more than $1,500, the offense would be a state jail felony, with a maximum penalty of two years in a state jail and a $10,000 fine.

Fraudulent attempts to obtain workers' compensation coverage or to avoid premium payments would be subject to a Class A misdemeanor if the amount of premium was less than $1,500 or a state jail felony if the amount of the premium was $1,500.

SUPPORTERS SAY:

HB 1089 would continue the Texas Workers' Compensation Commission with only a few adjustments to the current system, which is operating well overall. It would also save the state about $10 million in the next biennium by requiring state agencies to assume risk management and workers' compensation claim responsibilities.

No major structural or procedural change is needed in the workers' compensation system. Reforms enacted in 1989 and 1991 are ensuring timely and appropriate benefits, increasing insurance availability and

reducing the workers' compensation costs. The Texas Supreme Court recently found the system completely constitutional.

American Medical Association guidelines used by doctors to determine impairment, though imperfect, are resulting in more appropriate disability determinations and compensation than in the past. Changing the guidelines at this point would require retraining all physicians and would result in confusion and delays.

Employers could still decide whether or not to purchase workers' compensation insurance. Most employers who choose to not to have such coverage can pay benefits out-of-pocket or through catastrophic indemnity policies. Nonsubscription gives many employers greater benefit control and communication with the injured worker than a system with an insurance "middleman." Injured workers have the right to sue nonsubscribing employers for benefits and compensation.

State agency responsibilities. HB 1089 would give state agencies clear responsibilities and strong incentives to create safe workplaces and return injured workers to work, saving the state about $10 million in the next biennium. Because state agencies are not financially or statutorily involved in managing workers' compensation claims, required reports may not be filed promptly, resulting in late benefit payments to workers and administrative violations by the state. Designating the state agencies, instead of the Attorney General's Office, as the employer would give the agencies direct responsibilities for workers' compensation claim management.

Risk management is a process to identify and reduce the frequency and severity of accidents and is currently the responsibility of the Attorney General's Office. State agencies are negligent in implementing risk management programs developed by the Attorney General's Office and are experiencing unnecessary losses and accidents.

Ombudsman training and worker assistance. HB 1089 would strengthen the ombudsman program. Important benefit decisions are made at worker's compensation conferences and hearings, and no statutory qualifications exist for ombudsmen who assist workers without attorneys. The ombudsman program was a major component of the reforms enacted in 1989 to curb attorney costs. Workers may still hire attorneys; however, attorney's fees are limited to 25 percent of benefits, while other parties have no such limit.

Insurance carriers were represented by attorneys in 40 percent of all benefit review conferences and 82 percent of all contested hearings. Most workers do not obtain legal representation, making the ombudsman often the only adviser they have.

Ombudsmen qualifications should be loosely specified in law because the commission needs competent and versatile individuals who can work with people from all educational, socio-economic and ethnic backgrounds. A college degree is no guarantee that a person has the necessary understanding, communication and analytical skills. Some otherwise-qualified commission employees could not be promoted if such a qualification were imposed.

Workers would benefit from the requirement for the employer to give a copy of the injury report to the worker and for the commission to develop information in Spanish and English explaining the process.

Benefits. Specific qualifications should be imposed for designated doctors who play a crucial role in determining the extent of a worker's injury and eligibility for benefits. They also should be held to confidentiality and evaluation requirements.

Symptoms of occupational diseases may emerge long after exposure or an endangering situation occurs, so that statutory provisions ending all income benefits 401 weeks after the date of injury or exposure should be changed.

Many workers' compensation insurance policies exclude owners from benefits without specifying the exclusion in advance. Owners should be covered routinely because they are often subject to the same degree of risk in the course of business as their employees.

Extra-hazardous employers program. Businesses should not be labeled extra-hazardous, and be subject to the costs this brings, because of a death that occurred outside the control of the employer or the workplace, for example, a suicide or heart attack. Under these circumstances, HB 1089 would allow the commission to exempt an employer.

Businesses and the state are also spending a lot of money in contested program hearings. Since the program began, 46 percent of employers identified as extra-hazardous due to a fatality have been released from the program after an administrative hearing determined that the event causing

the identification was not in the control of the employer. In fiscal 1993 the commission spent more than $271,000 on program hearings. The hearing process as allowed under this bill follows recently adopted commission policy and would ensure a sufficient investigation and consideration of all factors leading to the death.

Fatalities are not treated lightly by the commission. Commission rules give fatalities greater weight than other incidents when determining whether a hazardous condition exists.

Extra-hazardous employer program is an appropriate name, and if being so identified is stigmatizing to some employers, it would serve as an incentive to make the safety improvements necessary to be released from the program.

Reporting. By removing the employer's duty to directly report to the commission, the bill would allow, but not require, insurance carriers to file the report electronically, saving money and time for the state, insurers and employers. Most carriers already use electronic filing for other purposes.

HB 1089 would allow the commission to impose penalties consistent with penalties for covered employers on non-insured employers for failure to report or for lapses in confidentiality. Covered employers can be penalized for failure to report under other areas of the code, but non-covered employers can only be penalized if they are caught twice failing to report.

Creating penalties under the Job Safety Information System of the Labor Code (subchapter C, chapter 411) would improve data collection and research on workplace injuries and illnesses and the effectiveness of the workers' compensation system. It also would help the commission identify extra-hazardous employers.

Administrative hearings and penalties. Transferring administrative hearings to SOAH would improve the impartiality and the independence of the hearing process. Most hearing participants — hearing officers, prosecutors and investigation staff — currently are commission employees, increasing the opportunity for ex parte communications and the perception of collusion. Benefit disputes will continue to be handled by the commission following the workers' compensation dispute resolution process.

HB 1089 would allow the commission to take action against providers, carriers and employers for specific, serious offenses instead of waiting for an established pattern of violations to occur. This would improve system compliance and effectiveness. HB 1089 would also add penalties to the Labor Code regarding fraudulent practices that were removed from the Penal Code last session during its recodification. These penalty amendments would help the commission appropriately sanction violators.

Protecting commission files from public disclosure would improve the commission investigations and improve employer reporting.

OPPONENTS SAY:

Modifications to ombudsman training and the extra-hazardous employer program could be made stronger. Ombudsman qualification requirements are too low and nonspecific. For example they fail to make a college degree a requirement. Ombudsmen play important roles in assisting injured workers who are often involved in contested cases in which the other side has legal representation. Ombudsmen participated in more than one third of the benefit review conferences and almost one half of the contested case hearings in 1993.

HB 1089 would give the commission too much flexibility in identifying a business as extra-hazardous when a death has occurred. The program was established to rein in statewide occupational injury rates and rising workers' compensation rates by identifying employers with higher-than-average incidents of injuries. A death that occurs in the course of business can indicate an unsafe work environment and should not be taken lightly.

The commission should be required, not simply permitted, to conduct a hearing if the commission determines that the employer or the work environment was the proximate cause of the fatality. Also, if the hearing establishes that the cause of the fatality was within the employer's control or within the scope of employment, the commission should be required, not permitted, to designate the employer as extra-hazardous.

"Extra-hazardous employer" is a stigmatizing designation and should be changed to obtain better cooperation from employers.

More severe penalties should be provided. A $500 fine for failure to report an injury would be a light slap on the wrist for most businesses, which may purposefully mislead, intimidate and harass injured workers.

OTHER OPPONENTS SAY:

HB 1089 would not correct major flaws in the Texas workers' compensation system that jeopardize worker rights. Also, it is too early to say that the system is working well; reforms were enacted in 1989 and 1991, and the most recent information available is 1992 data. It could be that lower costs are at the expense of workers, not from an efficient and effective system.

The workers compensation system is complex, and workers should have a better chance to be represented by lawyers from the start. Several state courts had found the law unconstitutional in restricting worker's access to legal representation. Most workers do not understand the workers' compensation system, and even the most readable brochures will not give enough assistance to help a worker through a complex case. Ombudsmen are prevented by law from giving legal advice or from advocating for the worker. No matter how well-trained, ombudsmen will never be a match against lawyers hired by employers, insurance carriers and health care providers.

Texas is one of only three states in which workers compensation insurance is voluntary and injured workers are at the mercy of their employer's benevolence. Injuries are often ignored or downplayed, and workers are pressured to rush back to work. The Texas Workers' Compensation Research Center found nearly 1 million workers with no benefits, although a third of them mistakenly believed their employer carried benefits for on the job injuries.

The guidelines developed by the American Medical Association (AMA) that are being used by doctors to determine worker impairment and eligibility for benefits are out-of-date, produce inconsistent results and are being used in a manner contrary to their purpose. The AMA and many doctors have testified to the courts and to the Sunset Commission that the guidelines are inappropriately used in law. During the interim the Legislative Oversight Committee developed a unique Texas Impairment Schedule but did not recommend the schedule as an AMA substitute. Nevertheless, the law should be changed to improve the impairment rating method.

NOTES:

The committee adopted proposed amendments relating to:

• the entitlement of business owners to workers' compensation coverage;

• state agency workers' compensation responsibilities and recognition of Texas Tech Health Science Center as a state agency acting in capacity of employer;
• commission compliance with legislative requests and oversight;
• exemption of reports filed by an employer or insurance carrier to the commission from being used as evidence against the employer or carrier if the facts in the report are contradicted by the employer or insurance carrier in a proceeding before the commission or a court.

Also on today's calendar are HB 1090, continuing the Texas Workers' Compensation Fund with amendments to its governing statute, and HB 1091, which would sunset the Texas Workers' Compensation Research Center and create the Research and Oversight Council on Workers' Compensation.