SUBJECT: Workers' compensation hazardous employer program revisions

COMMITTEE: Business and Industry — committee substitute recommended

VOTE: 8 ayes — Brimer, Dukes, Corte, George, Ritter, Siebert, Solomons, Woolley

0 nays

1 absent — Giddings

WITNESSES: None

BACKGROUND: Chapter 411, subchapter D of Title 5 of the Labor Code, the Texas Workers' Compensation Act, requires the Texas Workers' Compensation Commission (TWCC) to administer a program to identify employers with hazardous worksites and to notify the employers and their insurance carriers of this designation.

Under the Extra-Hazardous Employer Program, which became effective in 1991, an employer is deemed "extra-hazardous" if its injury frequency is substantially higher than the frequency that reasonably may be expected for that business or industry. An employer may contest or appeal its designation as an extra-hazardous employer.

Within 30 days of receiving notice of the extra-hazardous designation, an employer must obtain a safety consultation from TWCC, the employer's insurance carrier, or a certified consultant. The consultant must file a written report of the findings with TWCC and the employer, and the consultant and employer work together to formulate an accident-prevention plan that addresses the cited hazards.

TWCC must conduct a follow-up investigation of an employer's worksite within six to nine months of the original inspection. If during reinspection TWCC determines that the employer is not complying with the accident-prevention plan, TWCC may implement additional safety plans. The employer must reimburse TWCC for reasonable costs the agency incurs for these activities.

Chapter 411, subchapter A provides immunity from liability to a safety consultant, insurance company, or employee of the insurance company for an accident that was caused by or could have been prevented by a safety consultation.

The Extra-Hazardous Employer Program also requires that to obtain a license to write workers' compensation insurance, insurers must provide adequate accident-prevention facilities or services. TWCC inspects these facilities and services every two years.

At its inception, this program applied to private and public employers, excluding federal and state entities. In 1996, however, the Third Court of Appeals ruled that "to the extent that the Texas Extra-Hazardous Employer Program addresses workplace safety issues for which an OSHA [federal Occupational Safety and Health Administration] standard is in effect, the Program is preempted by OSHA" (*Ben Robinson Company v. Texas Workers' Compensation Commission*, 934 S.W.2d 149, Tex.App-Austin 1996). As a result, practical application of the program is limited to public employers, excluding federal and state entities.

DIGEST:

CSHB 2514 would extend safety consultants' and insurance companies' immunity from liability to include workplace injuries or occupational diseases that were caused by or could have been prevented by an inspection, prevention program, or other activity or service undertaken by the insurance company or consultant.

The bill would rename the Extra-Hazardous Employer Program the "Hazardous Employer Program" and explicitly exempt federal and state agencies from the program.

CSHB 2514 would make the following existing subsections applicable only to counties, municipalities, special districts, school districts, junior college districts, housing authorities, community centers for mental health and mental retardation services, or any other legal political subdivision subject to Chapter 504 of the Texas Workers' Compensation Act:

- Sec. 411.043, requiring an employer to obtain a safety consultation within 30 days of receiving notice of Hazardous status from TWCC, requiring the safety consultant to file a written report with TWCC and the employer, and

requiring the employer and consultant to develop an accident-prevention plan to be monitored by TWCC;

- Sec. 411.044, authorizing TWCC to investigate an accident on the site of an employer subject to an accident-prevention plan;
- Sec. 411.045, requiring TWCC to conduct a follow-up investigation of the employer between six and nine months after completion of the accident-prevention plan and requiring TWCC to certify whether the employer is in compliance;
- Sec. 411.046, providing that failure to implement an accident-prevention plan or other hazard abatement constitutes a Class B misdemeanor for every day of noncompliance; and
- Sec. 411.047, providing that an employer whose injury rate is still too high at the time of a follow-up inspection is subject to continued monitoring by TWCC and may be subject to additional safety plans with which the employer must comply.

CSHB 2514 would limit the applicability of the Hazardous Employer Program for private employers solely to designation. Participation by private employers in TWCC-offered programs or services would be voluntary. TWCC could charge private employers for services or programs offered by the agency and accepted voluntarily by the employer. TWCC could not charge for consulting with employers on OSHA compliance or for collecting information as required by the federal government. A private employer, although not confined by the requirements of the Hazardous Employer Program, would still be able to appeal or contest the designation.

The bill would prohibit TWCC from reinspecting a hazardous employer until at least six months after the original inspection. It would prohibit TWCC from reinspecting an insurance carrier whose accident-prevention services were found to be inadequate until 180 days after the original inspection. The reinspection would have occur no later than 270 days after the original inspection. The bill would require the insurance company to reimburse TWCC for reasonable costs associated with the reinspection.

CSHB 2514 would take effect September 1, 1999. The section providing extended immunity from liability for an insurance company or safety consultant would apply only to a cause of action occurring on or after the effective date. Similarly, the section requiring insurance carriers to reimburse TWCC for reasonable costs of reinspection would apply only when the

original inspection occurred after the effective date.

SUPPORTERS SAY:

Under current law, consultants and insurance companies are immune from liability only for *accidents* that conceivably could have been prevented by an inspection. Although the term "accident" originally was intended to include injuries and occupational diseases, this section of the law could be interpreted to exclude injuries and occupational diseases. By making this immunity explicit, CSHB 2514 would prevent frivolous lawsuits.

Extending immunity to inspectors would ensure safe inspections and honest reporting. An inspector should not have to fear retaliation from employers who disagree with the safety inspection. The immunity would not provide a disincentive to perform an adequate inspection. Inspectors must be certified by TWCC, and failure to conduct an adequate inspection could result in revocation of an inspector's certification.

Because reinspections are rare, the overall cost to the insurance industry of reimbursement for these reinspections would be minimal. From the beginning of fiscal 1996 to the second quarter of fiscal 1999, only 20 of 244 inspections found inadequacy of insurance carriers. Reinspections cost an average of $3,000 to $4,500, so the insurance industry would not suffer from these costs.

The designation "Extra-Hazardous" is too condemnatory and should be changed. Currently there is no intermediate step between a safe employer and one called "Extra-Hazardous." The severity of this designation served more of a purpose before the Third Court of Appeals ruled that, because of OSHA preemption, the program did not apply to private employers. At that time, consumers and potential employees needed to recognize the gravity of potential hazards of the workplace.

Excluding private employers from the Extra-Hazardous Employer Program would conform to the Third Court of Appeals ruling that OSHA preempts the TWCC program. TWCC already has changed its rules to address that ruling, and CSHB 2514 would codify TWCC's current rules.

OPPONENTS SAY:

Giving safety inspectors broader immunity from liability could discourage thorough inspections and jeopardize workers' health and safety. If a safety consultant or insurance company cannot be held accountable for the consequences of an inadequate inspection, the consultant or company has no

practical incentive to spend time and money performing an adequate one. While some accidents and injuries cannot be foreseen or prevented, many others can.

Occupational diseases are usually the result of prolonged exposure to harmful conditions and are therefore less haphazard and more preventable than accidents or injuries. Ensuring safe inspections can reduce the number of workers' compensation claims and save money for employers and insurers alike.

An "Extra-Hazardous" designation does exactly what was it intended to do — inform consumers about the potential health and safety of an employer's workers. The public has a right to know about highly hazardous working conditions, especially when it comes to applying for employment. The potential hazards of the workplace should not be underrepresented. The public has become inured to the word "hazardous" because of its widespread usage in phrases like"hazardous materials" and "smoking may be hazardous to your health."

OTHER OPPONENTS SAY:

Requiring insurance companies to reimburse TWCC for reinspection could force insurers to pass these costs on to insurance customers. These additional costs could discourage new carriers from entering the market.

Requiring insurance companies to pay for reinspections would be tantamount to fining them for failure of the original inspection. A more fair approach would be to require only insurers who fail the reinspection to pay for the original inspection and any subsequent inspections.

NOTES:

The committee substitute added the provision extending inspectors' immunity from liability to include injuries or occupational diseases that were caused by or may have been prevented by an inspection, and it added an effective date for that provision. It also added the provision explicitly exempting federal and state entities from the Hazardous Employer Program.

In the 1997 legislative session, a bill with a similar immunity provision, HB 1305 by Brimer, passed both houses. The conference report passed the House but died in the Senate.