

SUBJECT: Legal representation at workers compensation hearings

COMMITTEE: Business and Industry — favorable, with amendments

VOTE: 8 ayes — Brimer, Rhodes, Corte, Elkins, Giddings, Janek, Solomons, Woolley

0 nays

1 absent — Dukes

WITNESSES: For — None

Against — Randy McNeel, Harris & Harris

On — Kevin McGillicuddy, Hammerman & Gainer

BACKGROUND : The Texas Workers' Compensation Act sets forth strict requirements for contested cases involving liability for worker injury or death. First, a disability determination officer at the Texas Workers Compensation Commission (TWCC) attempts to resolve the dispute through informal mediation efforts. Failing resolution, the parties attend a benefit review conference, another informal meeting. Unresolved matters are forwarded to a formal contested case hearing conducted by a hearings officer. Only issues raised in the benefit review conference may be raised in this forum. The decision of the hearing officer may be appealed by either party first to an appeals panel and then to district court.

Claimants may be represented at arbitration, conference, or hearing by an attorney or an employee of the attorney or by a relative. Only the attorney may receive a fee and only upon approval by the commission or court. An insurance carrier may be represented by an attorney or adjuster, with no restrictions on their fees.

DIGEST: HB 3216 would allow insurance companies to be represented by an attorney in a contested workers compensation proceeding only if the claimant also was represented by an attorney. Adjusters also licensed as attorneys could represent insurance carriers in any hearing provided they were appearing

before the commission in their capacity as an adjuster and were licensed or registered under both occupations on January 1, 1997.

HB 3216 would authorize the Texas Workers Compensation Commission to adopt rules as necessary to implement and enforce the bill's provisions. The bill would take effect September 1, 1997, and would apply only to workers' compensation claims filed on or after that date.

**SUPPORTERS
SAY:**

HB 3216 would bring fairness and equity to the workers' compensation hearings process by ensuring that both parties are allowed all or nothing when it comes to legal representation at administrative hearings. The workers compensation reforms of 1989 have made it so difficult for plaintiffs' attorneys to collect fees in workers comp cases that most claimants cannot find an attorney to represent them in the early stages of the arbitration process. Yet these stages are critical because only issues raised in the benefits review hearings may be considered later. Claimants often do not have the legal knowledge to represent themselves adequately at these hearings, even if they have the informal support of hearings officers and ombudsmen employed by the Texas Workers' Compensation Commission to serve as a resource for injured workers.

HB 3216 would not threaten an insurer's right to due process because due process does not require legal representation at administrative hearings. If due process required legal representation at this stage, then claimants would have to be represented as well.

The current law has no restrictions on attorney's fees for insurance companies, which can easily afford to have attorneys or attorney/adjusters represent them at every stage of the arbitration process. These insurance defense attorneys usually specialize in workers compensation claims and are very knowledgeable about the legal intricacies and technicalities of the process. Workers who must represent themselves in hearings against these experienced attorneys find themselves at a significant disadvantage. Even though workers may consult with a commission ombudsman, these ombudsmen are not authorized to practice law and must be cautious about giving legal advice. Even a good ombudsman cannot provide the same level of representation that an attorney can.

HB 3216 would allow an insurance company to be represented by employees or independent adjusters at hearings in which the claimant does not have an attorney. Adjusters and employees who represent an insurer are usually very knowledgeable about workers compensation claim issues and can provide a comparable level of expertise as that provided by the commission ombudsmen for claimants.

HB 3216 would also prevent attorney/adjusters from circumventing this provision by requiring that they appear before the commission as adjusters. It also would discourage a rush to dual licensing by setting a retroactive date.

While HB 3216 does not include specific notice requirements to ensure that insurers are informed of whether or not a claimant will have an attorney, the bill authorizes the TWCC to promulgate rules to address such issues.

When the Texas workers compensation system was overhauled in 1989, insurance companies claimed that a major goal was to eliminate attorneys from the administrative hearings process. HB 3216 would accomplish this without dismantling any of the reforms achieved with that legislation.

**OPPONENTS
SAY:**

HB 3216 would deny insurers their constitutional right to due process and would be the first step of an effort to dismantle successful reforms to the Texas workers compensation system. This system ensures that injured workers are well-represented at every stage in the process, regardless of whether they have an attorney.

Insurers should not be denied the right to an attorney simply because a claimant has chosen not to exercise that privilege. Claimants may consult with a commission ombudsman at every stage in the process, at no charge to the claimant. Because these ombudsmen work only on contested workers compensation claims, many are more knowledgeable and experienced than the attorneys who represent insurance carriers.

Under current law, issues and evidence not presented at early stages of the dispute resolution process cannot be raised later. Consequently, insurance carriers that are prevented from using an attorney at these early hearings

would probably lose more claims simply because certain issues were not raised or important evidence not introduced.

Under HB 3216, the insurance carrier would have no way of knowing beforehand whether or not the claimant planned to be represented by an attorney. There is no practical way to prepare a case under these conditions. Even with a notice provision, the claimant could have a change of heart at the last minute and choose not to use an attorney. This situation would create confusion and lead to more continuances, which would further clog an already backlogged agency.

OTHER
OPPONENTS
SAY:

A better alternative to HB 3216 would be to beef up the ombudsmen program. The TWCC should hire more ombudsmen and pay them higher salaries. This would allow the commission to attract and retain experienced and knowledgeable ombudsmen to effectively represent claimants against attorneys for insurance companies. Currently, many ombudsmen are lured away from the commission after a few years by insurance companies offering higher salaries.

NOTES:

The committee amendments would specify that an insurance carrier could be represented by any employee or by an attorney or adjuster who was not an employee and that insurance carriers could be represented by adjusters who were also licensed attorneys as of January 1, 1997, provided they were appearing before the commission in their capacity as an adjuster.