



**House
Legislative
Analysis
Section**

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NEW WORKERS COMPENSATION APPEAL BOARD

Senate Bills 419 and 422 with House committee
amendments
Senate Bills 420 and 421 (Substitutes S-1)
First Analysis (6-8-89)

RECEIVED

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Sponsor: Sen. Frederick Dillingham
Senate Committee: Human Resources and Senior Law Library
Citizens
First House Committee: Appropriations
Second House Committee: Labor

THE APPARENT PROBLEM:

Despite numerous amendments to the Worker's Disability Compensation Act in 1985 that were intended to solve problems of delays within the workers' compensation hearing and appeal process, it is reported that the worker's compensation appeal board still has a backlog of some 5,700 cases. Among the changes made by Public Act 103 of 1985 was an increase in the size of the board — from 15 to 30 members — and the creation of a seven member appellate commission that would coexist with and then replace the board, in the expectation that the board would eliminate the backlog by its scheduled expiration date of July 1, 1989. Under the act, the board was to be responsible for reviewing decisions on petitions filed by March 31, 1986, while the commission would review cases filed after that date, and also cases that had been pending for at least one year.

Rather than simply extending the life of the board in the hope that it will eventually catch up on its backlog of cases, it has been suggested that the size of the board be increased, that productivity standards be built into the system to expedite the review of the backlogged cases, and that those on the board who do not meet these standards be replaced.

THE CONTENT OF THE BILLS:

Currently, under the Worker's Disability Compensation Act, provisions creating the 30-member worker's compensation appeal board are scheduled to expire on July 1, 1989. The bills would amend the act to create a 45-member appeal board that would expire on June 30, 1991. A subsequent appeal board consisting of five "permanent members," and "adjunct members" who would receive fees for final decisions, would exist from July 1, 1991, to October 1, 1993, after which the remaining cases would be decided by the worker's compensation appellate commission. The bills are tie-barred to each other.

Senate Bill 419. Currently, the appeal board consists of five members each who are representative of employee and employer interests, and 20 members who are representative of the general public. The bill would create, as of July 1, 1989, an appeal board consisting of these 30 previous members — who would serve on the board until they were appointed or their successors were appointed — and 15 additional members. The 15 additional members would be appointed by the governor, with the advice and consent of the Senate, for terms ending June 30, 1991. Should the present board consist of less than 30 members as of June 30, 1989, the governor would be required to fill those vacancies. Under the bill, a majority

of the board would be attorneys in good standing with the state bar. Under the bill, members of the board would be required to devote their entire time to and personally perform their duties, and to desist from outside business or professional activity. Each board member, with the exception of the chairperson, would be required to produce 36 written opinions, decisions, or dissents in each six-month period and to participate as a second or third panel member on additional cases during each period. The minimum productivity standard requirement would be reduced proportionately for any member who was absent from work for two weeks or more due to illness or disability resulting from pregnancy, childbirth, or any other medical condition. A member of the board could be removed by the governor for good cause. A member could also be removed by the chairperson for failure to meet the productivity standards.

MCL 418.252

Senate Bill 420. Under current law, the existing appeal board is scheduled to expire as of July 1, 1989, or when there are no more cases to be decided, whichever occurs first. If any cases remain to be decided after July 1, 1989, they would, under current law, be reviewed and decided by the appellate commission. Under Senate Bill 420, remaining cases would be reviewed and decided instead by the 45-member appeal board proposed in Senate Bill 419. The bill would provide an expiration date of June 30, 1991 for the 45-member board, and would require that remaining cases from that board be reviewed by a subsequent board proposed in Senate Bill 422. Senate Bill 420 would also delete the July 1, 1989 repeal of sections that pertain to the existing board (under Senate Bill 422 those sections would be repealed on October 1, 1993).

MCL 418.266

Senate Bill 421. Current law gives the chairperson of the board, among other duties, general supervisory control over assignment of the work of the appeal board and its employees, and requires the chairperson to exercise his or her powers and duties to dispose of the cases to be heard by the board not later than July 1, 1989. The bill would amend the act to require, instead, a disposition date of June 30, 1991 by the appeal board that would be constituted under Senate Bill 419.

MCL 418.261

Senate Bill 422. The bill would amend the act to create a new appeal board beginning July 1, 1991, if any cases remained to be decided by the previous board. Under the bill, the board would consist of five permanent members appointed by the governor with the advice and consent of

the Senate that represented the general public, and, in addition, qualified adjunct members. Permanent members of the board would be required to devote their entire time to and personally perform their duties, and to desist from outside business or professional activity.

Under the bill the chairperson of the board, who would be designated by the governor, would be required to establish and maintain a list of qualified adjunct members. Each member of the previous appeal board who had met the productivity standards for the previous two years would be qualified as an adjunct member. The chairperson would also be required to select additional persons to the list of qualified adjunct members who met one or more of the following requirements:

- Was an attorney, licensed to practice in the state.
- Was a former or retired worker's disability compensation magistrate.
- Was a former or retired worker's disability compensation administrative law judge.

Upon application for qualification as an adjunct member, an individual would indicate a designation of either employer or employee representative. Questions on members' qualifications or the appropriateness of designations would be resolved by the Department of Labor.

Under the bill, all cases pending before the appeal board would be assigned to a panel of two adjunct members on a random basis. Each panel would be composed of an employee representative and an employer representative, and at least one member would be an attorney. The chairperson could refuse to assign cases to an adjunct member if he or she determined the member had too many undecided cases already assigned. In assigning cases, the chairperson would also be required to pass over an adjunct member if there were any indication of a potential conflict of interest. Each member of a panel would be required to review a case immediately, to determine if there were a potential conflict of interest, and to notify the chairperson if one were discovered. The chairperson would be required to disqualify an adjunct member who could not hear a case impartially, including a case in which the member was interested as a party, was personally biased or prejudiced for or against a party or attorney, had been consulted or employed as an attorney in the matter in controversy, or had been a partner of a party, attorney for a party, or a member of a law firm representing a party within the preceding two years. If a member were disqualified, or if there were a conflict of interest, the chairperson would immediately reassign the case.

The bill would require cases to be assigned in pairs of two cases, with one member of the panel having primary responsibility for each case. Each could consult with the other on the cases. The decision reached by the assigned member of a panel would be the final decision of the board. If a final decision could not be reached, the chairperson would assign one of the general public permanent members of the board as a third panel member to review the matter. The third panel member would be required to choose between the two decisions, and that decision would be the decision of the board. If one panel member had decided the case for which he or she had primary responsibility, the second panel member would have 30 additional days to decide his or her assigned case. If the cases were not decided within the 30 days, the chairperson would assign another permanent board member as a third panel member. Each member of a panel

would be paid a fee of \$1,000 when the board had issued a final decision in both cases of a pair of cases. The fee could be increased by the chairperson for an individual pair of cases if, after written application by the panel members, the chair found that one or both of the cases was unusual and required an exceptional amount of time and effort.

The proposed appeal board's term would expire October 1, 1993, or when the governor advised the secretary of state in writing that there were no more cases to be decided, whichever occurred first. If there were cases remaining, they would be remanded to and decided by the appellate commission. The appellate commission would also decide cases remanded to the board after October 1, 1993. Under the bill, the commission would review such cases according to the law applicable to reviews conducted by the board.

The bill would take effect July 1, 1991.

MCL 418.253

HOUSE COMMITTEE ACTION:

The House Labor Committee adopted several amendments to Senate Bill 419 that altered the Senate-passed version of the bill by:

- requiring that 30 members of the previous appeal board serve on the 45-member board until they were appointed, or their successors were appointed and qualified.
- deleting a provision of the Senate version of the bill that would have required an appeal board member's removal if the chairperson did not certify that he or she had met the productivity standards required under the bill. Under the House amendment, the removal would be optional.
- deleting provisions from the bill that would have provided incentives, in the form of bonuses, to members of the appeal board who exceeded the productivity standard of 36 written opinions.
- deleting a provision that would have provided an exception to the productivity standard requirement if a member were absent from work for one month or more due to illness or disability, and required instead that the minimum productivity standard requirement be reduced proportionately for any member absent from work for two weeks or more due to illness or disability.

Further, the House Labor Committee adopted an amendment to Senate Bill 422 that altered the Senate-passed version of the bill by clarifying the reasons and providing guidelines for determining when an adjunct member would be considered to have a conflict of interest in a case under review.

FISCAL IMPLICATIONS:

According to the House Fiscal Agency, the cost to the state for salaries and administrative support needs for Senate Bill 419 would be as follows:

\$731,000 for the remainder of the present fiscal year
\$4,239,118 for fiscal year 1989-90
\$2,718,200 for fiscal year 1990-91

Senate Bill 422 would incur costs of \$1.15 million each year for fiscal years 1991-92 and 1992-93 for salaries and administrative support needs. (6-6-89)

ARGUMENTS:

For:

The delay inherent in a backlog of nearly 6,000 cases is simply intolerable and a disgrace to Michigan's disability compensation system. Moreover, it imposes a grave injustice on the injured workers who must wait years for a final resolution of their claims. Clearly, the 1985 amendments that were designed to achieve administrative reform have not effected the anticipated improvements, since far more cases came into the system than were foreseen at that time. The bills' two-layer proposal would address the remaining backlog as quickly and efficiently as possible, without sacrificing competency for the sake of expediency. By retaining the board's current function for two more years, while expanding its size by 50 percent, the first stage of the proposal should increase the board's productivity, while avoiding the administrative delays that could arise from implementing a new system. The proposed productivity standards also would be consistent with the minimum quotas instituted within the last year or so, which currently require board members to produce six decisions, opinions, or dissents per month. The second part of the proposal, establishing a new panel system, would assure quick elimination of the backlog.

Against:

The bills propose an unnecessarily complex resolution to a problem that requires a simple, short-term solution. Rather than providing for a larger board that would have only a two-year grace period before being succeeded by an entirely new panel system, the bills should simply extend the life of the existing board for three years. In the first place, appointing 15 new board members could take six to nine months, leaving only 15-18 months for the complete board to do its work. If qualified people could, in fact, be found to take a job of such limited duration, they would not have enough time to eliminate the backlog. In the second place, the bills are vulnerable to challenges of unconstitutionality. Senate Bill 419 would appear to give the chairperson of the new appeal board the discretion to dismiss a member who failed to meet productivity standards. Since the members of the board are appointed by the governor, this requirement is probably unconstitutional. Senate Bill 422 could be unconstitutional because it would change the rules in the middle of the game. Claimants filing appeals between 1986 and 1991 would be entitled to expect a certain kind of review, but would receive an entirely different kind under the proposed panel system.

Response: It is anticipated that the enlarged and extended board proposed in Senate Bill 419 would dispose of the backlog, making the board proposed in Senate Bill 422 unnecessary. It would be important to have the subsequent board as a backup, however, in case the expanded board failed to eliminate the backlog.

It is not clear how review by the board proposed in Senate Bill 422 would differ from review by the existing board or by the board proposed in Senate Bill 419. Cases would be assigned to a two-member panel that consisted of one employer and one employee representative. Provisions of the law concerning evidence, written opinions, responsibilities of the board chairperson, and judicial review are to be retained under the bill. In any case, the law entitles a party to file a claim for review, but not review by a particular appeal board.

Against:

At present, the board renders approximately 2,000 decisions per year; if the board were increased by 50 percent, this figure would probably climb to 3,000 per year. Working at this rate, the board could catch up on the backlog of cases in two years, but would have little time to attend to new cases. Thus, the board would be placed in the same position it was in three years ago, and two years from now would face another backlog.

POSITIONS:

The Worker's Compensation Appeal Board in the Department of Labor supports the bills. (6-2-89)

The Department of Labor supports the bills. (6-2-89)

The AFL-CIO supports the bills. (6-6-89)

The S.E.I.U./Michigan Council 35 supports the bills. (6-6-89)

The UAW supports the bills. (6-6-89)

The National Federation of Independent Business supports the bills. (6-6-89)

The American Insurance Association supports the bills. (6-6-89)

The Committee to Protect Workers Compensation supports the bills. (6-6-89)

The Small Business Association of Michigan supports the bills. (6-6-89)

Michigan Injured Workers, Inc. supports the bills. (6-1-89)

The Michigan Merchants Council supports the bills. (6-6-89)

The Michigan Manufacturers Association has no position on the bills. (6-6-89)

The Department of Civil Service has no position on the bills. (6-6-89)