Approved March 11, 1985
Date

MINUTES OF THE SENATE COMMITTEE ON LABOR, INDUSTRY AND SMALL BUSINESS

The meeting was called to order by Senator Dan Thiessen at
Chairperson

1:30 xxx./p.m. on Monday, February 25, 1985 in room 529-S of the Capitol.

All members were present except:
Senator Jack Steineger (excused)

Committee staff present:
Jerry Ann Donaldson, Research Department
Gordon Self, Revisor
Marion Anzek, Committee Secretary

Conferees appearing before the committee:
Stu Entz, Iowa Beef Packers, Inc.
Ron Todd, Kansas Insurance Department
Larry Magill, Exec. Vice Pres., Independent Insurance Agents of Kansas
John Rathmel, D.H.R., Workers' Compensation, Dept. of Human Resources
Karen McClain, Kansas Association of Reatltors

The Chairman called the meeting to order.

A motion was made by Senator Werts, and seconded by Senator Norvell to approve the minutes of February 18, 1985. Motion carried.

Stu Entz: Thank you Mr. Chairman and members of the committee. I have a couple of bill requests to be considered by the committee, during this session. The 1st one deals with Vocational Rehabilitation, and many of you know, in the last couple of years, there has been no motivation on the part of employers to rehabilitate employees. There is no off set to benefit the employer. We are basically, trying to give the employer credit for putting the employee back to work. 2nd one deals with 2nd injury fund, and this is designed to carry employers who have put people back to work, who have suffered previous injury, and step in an help with the liability for those employers. At this point in time the courts have set the policy and employers are certainly not inclined to re employ people with prior injuries. (See Attachment A and B). These are the two policies, we are proposing the committee introduce.

A motion was made by Senator Werts, and seconded by Senator Kerr to introduce these bills. Motion carried.

Senator Morris: Mr. Chairman, I discussed with you earlier in the year, regarding some type of off set where business people, for example may not have had a claim for a given length of time, and then it was only a couple of dollars, and now they find themselves where they may still may be at 2½% or 3%, and going up every year. I think this is something the committee should consider. I think there should be some device where, and some States do this, where after a given period of time, say five years without a claim, they may pay the minimum.

Chairman Thiessen: Senator Morris, do you have any guidelines of what you would like to say in a bill, and we could get a request in?

Senator Morris: There were parts in a bill that was introduced last year, SB666. there were many that were controversial, but perhaps they could extract out of this particular bill, and use it as a guideline to start from.

There is another measure, that we may have to call on Mr. Entz for an answer, that I am well aware of, and I think that many of you are. People that are employeed for part time work, like a nurse, and is called to duty for 2 days, and she knows at that time, that it is only going to be for 2 days, and at the end of that period, she is umemployed, and she draws unemployment benefits, even though she was employed for a specific short term period. This is how they want to work, and I don't think the unemployment law ever intended to draw on funds for, short term employment. What it means is, less funds for those that are deserving and in need of funds.

I would like to see both of these measures in, even if we just have some more hearings on them.

Conceptual motion was made to introduce these bills, by Senator Morris and seconded by Senator Werts. Motion carried.

Ron Todd: I am here in regard to what Insurance Agents may have said, in regard to Employees, and Independent Contractors. If I understand the question, from Chairman Thiessen, it is whether or not agents, are employees or independent contractors. Now that is covered by the findings of Insurance Companies. This has to be determined after a loss has occured, and as I understand, independent contractor has to be determined by what the court has laid out as guidelines. You have to look at the Insurance Companies standpoint, the companies underwriting risk, and agents that represent the companies, to do that, they try to make the best determination that they can, on the individual facts, to determine if they are employees or independent contractors. Bearing in mind that if they are ultimately ruled to be employees, then the insurance company that insures the rest of the employees for that employer is on risk, in other words, they would have to pay the compensation.

Senator Feleciano:The question that arises, came to us from counsel, from AFL-CIO the other day, that the relationship between a broker an a real estate person, in a case whereby, they signed an agreement for a independent contractor, treat that agreement such as they are not an employee, per se. In that relationship under the workers compensation act, are they treated as an independent contractor, as far as the workers compensation act is concerned?

Ron Todd: Senator, the only way that I can answer that, if the court would rule, they are not independent contractors, then they are employees, and then the company should recover.

Senator Feleciano: I am not talking about the courts. You, in the insurance department, how do you treat that relationship, between a broker and real estate agent?

Ron Todd: Rate classification, applies to employees. Now, if we had a ambiguous situation, where an employer comes up and says they do not think the insurance is rating this right, then we try to hear both sides of that, and our decision on whether the rate is right or not, and has to do with the individual facts of that situation, as to the best, on how we could relate it with how the court would decide. I know I am not answering the way, you want me to, but I can't without being in court, and on a National level.

Senator Feleciano: On the National level, how do they treat the independent contractors tax, and other employees in real estate or any other profession, do they allow that, or do they exclude that as part of the lending premium of the workers contract?

Ron Todd: Yes, it was passed in each individual State.

Senator Feleciano: What is the standing with the State of Kansas with independent contractors?

Ron Todd: This so called independent contractor is treated as an employee. If he is actually an independent contractor, then he would not be under the law paid by the insurance company. It is clear to us in talking about rates that the plan is independent contractors.

Senator Feleciano: Can the insurance company force that broker to buy workers compensation on an independent contractor?

Ron Todd:No. If we wouldn't let them write it, the way that they wanted to, then they would refuse to write the risk, at all. The answer to that is yes. No, in the case of workers compensation. We do have, what is known as the workers assigned risk plan. If an employer is refused insurance, it can be obtained through the assigned risk plan.

Senator Morris: That special fund you just mentioned, that assigned risk plan, is that at the standard rate, or very close to it?

Ron Todd: Yes.

Senator Morris: What is your definition of an independent contractor?

Ron Todd: I have always understood that a independent contractor, is one which the agent has no control over, whatsoever, other than asking for a finished product.

Senator Werts: If contract between broker and salesperson, specifically exempted, the salesperson from any benefits from workers compensation, specifically in writing, would that in any way, right to claim, would you except that as evidence, they would have a right to claim?

Ron Todd: I would try to.

Senator Werts: Supposing the insurance company, would be a point of that, as part of the contract.

Ron Todd: That would be much better, if you had the employer, the employee and the insurance company, then there should be no reason why the insurance company would want to charge the extra premium on that payroll. If everyone understood, most insurance companies would go along.

Senator Norvell: In follow up to Senator Werts question. If we consider SB176, as is, aren't there any questions on the part of the insurance agents, as to whether brokers need to carry insurance on their independent contractors?

Ron Todd: I think there is.

Larry Wolgast: If it can be shown an employee, employer relationship, they are covered, regardless of any paper you have signed.

Senator Werts: It would take the court to make the determination, then?

Larry Wolgast: No, I think the commissioner could make that determination.

John Rathmel: Supposing, we would still be allowed to look at the true facts of the situation to determine, whether there was a pointed relationship, rather than chance in a contract situation. What concerns me, on this bill is, by definition, if the person is a qualified real estate salesman, and has his compensation paid by commission, and has a signed contract, by definition, that person is an independent contractor, regardless of the back ground factual situation.

I would also like to point out Senator Werts, that under the workers compensation act K.S.A. 44-543, any contract which an employer requires of an employee, is conditioned upon the workers compensation act. So, if you do have an employment relationship, and even though you have a signed statement saying that the person, considers himself an independent contractor, they do not come under workers compensation. If he is termed an employee, then that statement would be void.

Chairman Thiessen: If SB176 were to pass, which statute would you go by? Would you go by the old workers compensation law, which says that, or would you go by what SB176 says?

John Rathmel: I don't know, if SB176 passes in its present form, it causes a great amount of difficulity, and then we have the legislature saying, by definition, we have a salesman, with a contract and the commission, and you have the legislature saying that person is an independent contractor. It would probably be a tough question for us to determine, the legislation intent, and I am not sure that is what you would want to do.

Senator Gordon: What would be your suggestion to this bill, to make it more clear so we could have both independent contractors and employees?

Larry Magill: I don't have any suggestions, because you have the same problem, but not only real estate people, you can have contractors and sub contractors. Our sub contractors furnish their own insurance, but they don't do that in real estate.

I appreciate having the opportunity to have the chance to come in and offer a few comments. I have a department news letter, from 1979 (Attachment C) which explains how grave the independent contractor situation is. I also, have a copy of the Knoble vs. National Carriers Case, (Attachment D) which involves a trucking situation, representing the National Carriers, as an independent contractor. The court found in this case by looking at the actual circumstances, that the employee, was an employee.

There is no way in advance to determine ahead of time is a salesperson is an independent contractor or an employee. In fact, you can't say it, until the court determines it. You can render an opinion to the Insurance Department,

but it carries no weight. The statute doesn't allow that. The insurance agent goes to the real estate broker, and explains that there is no way, he can say for sure that they are not going to be held liable for workers compensation. Now in a case where a broker has no other employees, and he decides not to carry workers compensation, that is fine, then there is no insurance company involved. The only problem there is, if an agent is injured, that very likely could end up being a claim against the insurance agent. We have a case pending now in Topeka, and it has not gone to court yet, but it does look like it may be a substantial reward for an individuel here in town, who claims after the fact that he was not told he could buy workers compensation on himself. (See Attachment E)

Senator Werts: What do you think of the language in SB176?

Larry Magill: What I heard said today, my interpretation, it looks fairly clear. I would like to suggest, we would support bringing, them in or taking them out, of the bill, as we have a hard time leaving the status quo, because from our stand point it is really a mess.

Karen McClain: My people have said, agents as a rule, on independent contractors, they want those people on paying premiums, just as they cover themselves, because the statute is so invidious.

Chairman Thiessen: John, in the case where some employer thought that he did not have to carry workers compensation, and then later it was ruled that they have benefits coming, what do you do?, go back and collect premiums on the employer or where does that money come from then?

John Rathmel: Frankly, I don't know. All we know, is that if you have an employer that is covered under the act, he is required to foot the bill or buy insurance for them, if he has no insurance for them, then it goes back to his obligation.

Chairman Thiessen: Well, if he does not carry workers compensation, and he does have liability, does that fall back on the liability insurance then?

John Rathmel: No, because employment relationship with workers compensation act, has exclusive written rights for the employee under state law, and he has to come up with workers compensation. We don't have any statutory authority to enter into a case, before it actually comes to us. We do offer, not anything binding, to reflect the Attorney General's opinion. If somebody has the fact, and they want to kind of thumb nail, which way it is going, we will do it, but we disclaim anything in writing, because it seems we never get the full facts before the hearing, and we don't want to lock in any thing, by saying no, that is not covered.

Chairman Thiessen: We will take this up for further discussion, and I want to talk to the sponsor of the bill some more, and I do intend to schedule meetings, Monday and Tuesday of the next two weeks, because we will have some bills we will want to look at.

Meeting was adjourned at 2:30 p.m. by the Chairman.

GUEST LIST

COMMITTEE: SENATE LABOR, INDUSTRY & SMALL BUSINESS DATE: 2-25-85

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
KAREN McCLAIN	Topeka	KS Assoc of Realtors
JOHN RATHMEL	TOPEKA	DHR - WORKERS' COMP
M. Hauver	"	Equity Investments
Rob Hodges	"	KCCI
MARK BESHEARS	TOPEKA	IBP, INC.
Stu Entz	"	"
LARRY MAGILL	"	IIAK
RON Todd	"	Ks. Ins. dept.
LM CORNISH	"	Kansas Right to Life
Wayne Maichel	"	Kansas AFL-CIO

WORKERS' COMPENSATION ACT OF 1985
TO PROVIDE VOCATIONAL REHABILITATION

K.S.A. 44-510d is amended as follows.

(a) No change.

(b) whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510 and amendments thereto, and no additional compensation shall be allowable or payable for either temporary or permanent disability, except that, the Director shall allow additional compensation during the actual healing period, such period not to be more than ten percent (10%) of the total period allowed for the scheduled injury in question. The return of the employee to his or her usual occupation shall terminate the healing period.

K.S.A. 44-510e is amended as follows.

(a) Should the employer and the employee be unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. 44-510d, as amended, the amount of compensation shall be settled according to the provisions of the workers' compensation act as in other cases of disagreement: Provided, That in case of temporary or permanent partial general disability not covered by such schedule, the workman shall receive weekly compensation as determined in this subsection (1) during such period of temporary or permanent partial general disability not exceeding a maximum of four hundred

fifteen (415) weeks. Weekly compensation for temporary partial general disability shall be sixty-six and two-thirds percent (66-2/3%) of the difference between the average gross weekly wage that the workman was earning prior to such injury as provided in the workers' compensation act and the amount he is actually earning after such injury in any type of employment, such weekly compensation in no case to exceed the maximum as provided for in K.S.A. 44-510c, as amended. Permanent partial general disability exists when the workman is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d, as amended.

The extent of permanent partial general functional disability shall be the extent, expressed as a percentage, to which the work has been anatomically impaired.

The extent of permanent partial general work disability shall be the extent, expressed as a percentage, by which the ability of the worker has been reduced from engaging in work of a type and character that the worker is reasonably able to perform, based upon the worker's age, education, training, experience, and physical abilities.

The amount of weekly compensation for permanent partial general disability, except for loss of wage earning capacity provided by K.S.A. 44-510g, shall be determined: (1) By multiplying the average gross weekly wage of the workman prior

to such injury by the percentage of permanent partial general disability as determined under this subsection (a); and (2) by then multiplying the result so obtained by sixty-six and two-thirds percent (66-2/3%). The amount of weekly compensation for permanent partial general disability so determined shall in no case exceed the maximum as provided for in K.S.A. 44-510c, as amended. If there is an award of permanent partial disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the workman shall be paid compensation for not to exceed four hundred fifteen (415) weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528, as amended.

(b) No changes.

(c) No changes.

(d) No changes.

(e) No changes.

K.S.A. 44-510g, the entire present section will be stricken and the new language as follows.

(a) A primary purpose of the workers' compensation act shall be to restore the injured employee to comparable gainful employment.

(b) As used in the workers' compensation act, "comparable gainful employment" means employment which is reasonably attainable, which the employee can reasonably perform, and which

returns the employee as close as feasible to pre-injury economic status.

"Vocational education" means a regimen of formal instruction in a classroom setting with an established curriculum designed to enable a successful pupil to acquire a new marketable skill in comparable gainful employment.

"On-the-job training" means a regimen of formal and informal instruction in a workplace setting designed to enable a successful pupil to acquire a new marketable skill in comparable gainful employment.

"Job placement" means placing a person in comparable gainful employment which is expected to be a permanent placement in a permanent job but which does not necessarily enable the person to acquire a new marketable skill.

(c) The director shall appoint a specialist in vocational rehabilitation who shall be referred to as the rehabilitation administrator. The rehabilitation administrator shall be in the classified service, and if the administrator has served in this capacity for a period of one year prior to the passage of this act, the administrator shall be considered permanent in the classified service.

(d) The rehabilitation administrator shall study the problems of vocational rehabilitation education, on-the-job training and job placement, and investigate and maintain a

directory of all rehabilitation facilities, public or private, and be fully knowledgeable regarding the eligibility requirements of all state and federal and other public vocational rehabilitation facilities and the benefits offered by each.

The rehabilitation administrator shall have the duties of directing and approving vocational rehabilitation of employees in accordance with this act.

(e) An employee who has suffered an injury or occupational disease which prevents the employee from returning to the same employment the employee was performing at the time of the injury or occupational disease shall be referred to the rehabilitation administrator. Such employee shall be entitled to prompt vocational rehabilitation services as may be reasonably necessary to restore the employee to comparable gainful employment.

(f) On the rehabilitation administrator's own instance or upon application of the employee or employer, the rehabilitation administrator may refer the employee to a facility for evaluation and for a report of the practicability of, need for, and kind of service, training or rehabilitation which is or may be necessary and appropriate to render such employee fit for comparable gainful employment. Referral by the rehabilitation administrator shall be to the Kansas division of rehabilitation programs if such services are available within 90 days, otherwise such referral may be to private evaluation facilities. If the evaluation is done through a private facility, the cost,

if any, of such evaluation and report shall be paid from the rehabilitation fund. If the employer chooses to refer the employee to a private evaluation facility approved by the rehabilitation administrator, such referral must be approved by the rehabilitation administrator and will be paid by the employer.

(g) Upon completion of evaluation, the rehabilitation specialist assigned to the case shall submit a rehabilitation plan to the rehabilitation administrator and the parties. The rehabilitation administrator shall approve or disapprove the plan within 30 days. If disapproved, the rehabilitation administrator shall give reasons for such disapproval and may make suggestions for modification of the plan. The report, together with the rehabilitation administrator's recommendation, shall be provided to the parties. The report, together with the rehabilitation administrator's recommendation, shall be provided to the parties. A plan recommending job placement shall be disapproved unless the recommended plan places the employee in comparable gainful employment.

If a party does not agree with the approval or disapproval of the plan by the rehabilitation administrator, such party may apply to the director for hearing on the plan within 20 days of the date such approval or disapproval was sent to the parties.

(h) After affording the parties an opportunity to be heard and present evidence, the director may (1) approve the vocational rehabilitation plan; (2) refer the claim back to the rehabilitation administrator for further recommendation; (3) order a different plan; or (4) disallow vocational rehabilitation.

(i) Where vocational education or training is recommended in the report, or is deemed necessary by the director to restore the employee to comparable gainful employment, the director may direct the employee to an appropriate private or public training facility. If there is a cost for services, the costs will be paid from the rehabilitation fund.

(j) Where vocational evaluation, education or training requires that the employee reside at or near a facility or institution away from the employee's customary residence, either in or out of the state of Kansas, the reasonable costs of the employee's board, lodging and travel shall be paid from the rehabilitation fund pursuant to guidelines adopted by the rehabilitation administrator.

If the approved plan undertakes on-the-job training, compensation shall be paid, if for general bodily injury, at the greater of permanent partial general functional disability or 80% of the difference between pre-injury wage and post-injury wage earning capability.

If the approved plan undertakes vocational education, temporary total compensation shall be paid until the completion of the education. Thereafter, compensation shall be paid, if for general bodily injury, at the greater of permanent partial general functional disability or 80% of the difference between pre-injury wage and post-injury wage earning capability.

If an injured employee is determined to be too severe to rehabilitate, compensation, following temporary total disability compensation, if for general bodily injury, shall be on the basis of permanent partial general work disability, but not less than permanent partial general functional disability.

Compensation for scheduled injuries, following rehabilitation, shall be as provided for by K.S.A. 44-510, provided that, the amount of weekly compensation shall not exceed the benefits provided in K.S.A. 44-510f and amendments thereto.

A completed rehabilitation plan shall remain open for review and further recommendation for a period of six months. Thereafter, a party may apply for further modification of the plan on the ground that the employee is unable to perform the work established by the plan because of disability due to the accident or conditions preexisting the accident or the post-injury wage earning capacity has increased or decreased.

If the injured employee refuses to undertake or fails to complete the rehabilitation education or training program

determined to be suitable for such employee, the employee shall be considered as having elected to not participate in the rehabilitation process and compensation shall be paid for disability equal to the percent of functional impairment suffered as a result of the accident.

K.S.A. 44-528 is amended as follows.

(a) Any award or modification thereof agreed upon by the parties, except lump sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the director for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review the director may appoint one (1) or two (2) physicians to examine the employee and report to the director. The director shall hear all competent evidence offered and if the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the incapacity or disability of the employee has increased or diminished, the director may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing

or diminishing the compensation subject to the limitations provided in the workmen's compensation act.

(b) If the director shall find that the employee has returned to work for the same employer in whose employ the employee was injured or for another employer and is capable of earning the same or higher wages than the employee did at the time of the accident, or is capable of gaining an income from any trade or employment which is equal to or greater than the wages the employee was earning at the time of the accident, or shall find that the employee has absented and continues to absent so that a reasonable examination cannot be made of the employee by a physician selected by the employer, or has departed beyond the boundaries of the United States, the director may cancel the award.

(c) The number of reviews under this section shall be limited pursuant to rules and regulations adopted by the director to avoid abuse.

K.S.A. 44-531 should be amended as follows.

(a) No changes.

(b) No changes.

(c) No lump sum awards shall be rendered with respect to accidents occurring after July 1, 1985, unless:

(1) It has been determined by the rehabilitation administrator that the employee is not in need of vocational rehabilitation, or;

(2) the employee has completed a rehabilitation program approved by the rehabilitation administrator, or;

(3) the employee has elected not to take part in a rehabilitation program.

K.S.A. 44-534a should be amended as follows.

(a) After filing an application for a hearing pursuant to K.S.A. 44-534 or K.S.A. 44-528 and amendments thereto, the employee may make application for a preliminary hearing, in such form as the director may require by rules and regulations, on the issues of: (1) the furnishing of medical treatment; (2) the payment of temporary total disability compensation; (3) the payment of temporary total compensation during vocational rehabilitation evaluation or training; or (4) the advisability of the vocational rehabilitation plan as approved by the rehabilitation administrator.

At least seven days prior to filing an application or a preliminary hearing, the employee shall notify the employer of the employee's intent to file such an application and shall confirm such notice by letter. Upon receipt of an application for such a preliminary hearing, the director shall give seven days' written notice by mail to the employer of the date set for such hearing. Such preliminary hearing shall be summary in nature and shall be held by the director or an administrative law judge, and the director or administrative law judge shall exercise such powers as are provided for the

conduct of full hearings on claims under the workers' compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the director or administrative law judge may make a preliminary award of medical and temporary total disability compensation against the respondent or, in proper cases, the workmen's compensation fund to be in effect pending the conclusion of a full hearing on the claim. Temporary total compensation so ordered under this section shall be paid on a weekly basis. If such payments are made by the workmen's compensation fund and later determined to be the responsibility of the respondent, the workmen's compensation fund shall be reimbursed by the respondent. The decision in such preliminary hearing shall be rendered within five (5) days of the conclusion of such hearing. No such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

(b) If compensation in the form of medical benefits or temporary total disability benefits have been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to a preliminary award and the amount of compensation to which the employee is entitled is found upon full hearing of the claim to be less than the compensation paid or if compensation

is totally disallowed upon a full hearing on the claim, the employer and the employer's insurance carrier shall be reimbursed from the workmen's compensation fund established in K.S.A. 1980 Supp. 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount of compensation that the employee is entitled to as determined in the full hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

New section.

(a) There is hereby created in the state treasury the workers' compensation rehabilitation fund. The expense of workers' compensation vocational rehabilitation testing and training pursuant to K.S.A. 44-510g shall be paid from such fund. The director of workers' compensation shall be responsible for administering the workers' compensation rehabilitation fund, and all payments from the workers' compensation rehabilitation fund shall be upon warrants of the director of accounts and reports issued pursuant to vouchers approved by the director of workers' compensation or a person or persons designated by the director.

The director of workers' compensation shall estimate as soon as practicable after January 1 of each year the expenses necessary for workers' compensation vocational rehabilitation testing and training pursuant to K.S.A. 44-510g for the fiscal year beginning on July 1 thereafter.

(b) On or before May 15 of each year, the director of workers' compensation shall impose an assessment against all insurance carriers, self-insurers and group-funded workers' compensation pools insuring the payment of compensation under the workers' compensation act, the proceeds of which shall be credited to the worker's compensation rehabilitation fund. The total amount of each such assessment shall be equal

to an amount sufficient, in the opinion of the director of workers' compensation, to pay all amounts which may be required to be paid from such fund during the current fiscal year, less the balance remaining in the fund from prior fiscal years. The total amount of each such assessment shall be apportioned among those upon whom it is imposed, such that each is assessed an amount that bears the same relation to such total assessment as the amount of money paid or payable in workers' compensation claims by such insurance carrier, self-insurer or group-funded workers' compensation pool in the immediately preceding calendar year bears to all such claims paid or payable during such calendar year. The maximum amount which shall be collected from any carrier, self-insurer or group-funded workers' compensation pool shall be one-half of 1% of the workers' compensation benefits paid or payable by such carrier, self-insurer or group-funded workers' compensation pool. Not later than May 15 of each year, the director of workers' compensation shall notify all such insurance carriers, self-insurers and group-funded workers' compensation pools of the amount of each assessment imposed under this subsection on such carrier, self-insurer or group-funded workers' compensation pool, and the same shall be due and payable on the July 1 following.

(c) The director of workers' compensation shall remit all monies received by or for such director under this subsection to the state treasurer. Upon receipt of any such remittance the state treasurer shall deposit the entire amount thereof in the state treasury to the credit of the workers' compensation rehabilitation fund.

44-534a. (a) After filing an application for a hearing pursuant to K.S.A. 1980 Supp. 44-534 and amendments thereto, the employee may make application for a preliminary hearing, in such form as the director may require by rules and regulations, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven (7) days prior to filing an application for a preliminary hearing, the employee shall notify the employer of the employee's intent to file such an application and shall confirm such notice by letter. Upon receipt of an application for such a preliminary hearing, the director shall give seven (7) days' written notice by mail to the employer of the date set for such hearing. Such preliminary hearing shall be summary in nature and shall be held by the director or an administrative law judge in any county designated by the director or administrative law judge, and the director or administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workmen's compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the director or administrative law judge may make a preliminary award of medical and temporary total disability compensation against the respondent or, in proper cases, the workmen's compensation fund to be in effect pending the conclusion of a full hearing on the claim. Temporary total compensation so ordered under this section shall be paid on a weekly basis. If such payments are made by the workmen's compensation fund and later determined to be the responsibility of the respondent, the workmen's compensation fund shall be reimbursed by the respondent. The decision in such preliminary hearing shall be rendered within five (5) days of the conclusion of such hearing. No such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

2-25-85
ATTACHMENT B
Senate Lbr. Ind,
& Sm. Bus.

(b) If compensation in the form of medical benefits or temporary total disability benefits have been paid by the employer or the employer's insurance carrier either voluntarily or pursuant to a preliminary award ~~entered under this section~~ and the amount of compensation ~~so awarded is~~ reduced ~~or~~ to which the employee is entitled is found upon full hearing of the claim to be less than the compensation paid or if compensation is totally disallowed upon a full hearing on the claim, the employer and the employer's insurance carrier shall be reimbursed from the workmen's compensation fund established in K.S.A. 1980 Supp 44-566a and amendments thereto, for all amounts of compensation so paid which are in excess of the amount

of compensation that the employee is entitled to as determined in the fu. hearing on the claim. The director shall determine the amount of compensation paid by the employer or insurance carrier which is to be reimbursed under this subsection, and the director shall certify to the commissioner of insurance the amount so determined. Upon receipt of such certification, the commissioner of insurance shall cause payment to be made to the employer or the employer's insurance carrier in accordance therewith.

44-567. (a) An employer operating within the provisions of the workmen's compensation act who knowingly employs or retains a handicapped employee as defined in K.S.A. 1978 Supp. 44-566 and amendments thereto, shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds that the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workmen's compensation fund.

(2) Subject to the provisions of the workmen's compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds that the injury probably or most likely would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable ~~and based upon medical evidence~~ the amount of disability and proportion of the cost of award which is attributable to the employee's preexisting physical or mental impairment, and the amount so found shall be paid from the workmen's compensation fund.

O K.

(b) In order to be relieved of liability under this section, the employer must prove either that the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or that the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. *Knowledge of a physician who examined or treated the employee on behalf of the employer shall be imputed to the employer. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment.

INSERT

(c) Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents himself or herself as not having such an impairment or handicap; (2) misrepresents himself or herself as not having had any previous accidents; (3) misrepresents himself or herself as not having previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents himself or herself as not having had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents himself or herself as not having any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation.

(d) An employer shall not be relieved of liability for compensation awarded nor shall he or she be entitled to an apportionment of the costs thereof as provided in this section, unless the employer shall cause the commissioner of insurance, in the capacity of administrator of the workmen's compensation fund, to be impleaded, as provided in K.S.A. 1978 Supp. 44-566a and amendments thereto, in any proceedings to determine the compensation to be awarded a handicapped employee who is injured or disabled or has died, by giving written notice of the employee's claim to the commissioner of insurance prior to the first full hearing where any evidence is presented on the claim.

(e) Amendments to this section shall apply only to cases where a handicapped employee, or his or her dependents, claims compensation as a result of an injury occurring after the effective date of such amendments.

(f) The total amount of compensation due the employee shall be the amount for disability computed as provided in K.S.A. 1978 Supp. 44-503a, 44-510 to 44-510g, inclusive, and 44-511, and amendments thereto, and in no case shall the payments be less nor more than the amounts provided in K.S.A. 1978 Supp. 44-510c and amendments thereto.

K.S.A. 44-567(b) * The employer's knowledge of the pre-existing impairment will establish a reservation in the mind of the employer when deciding whether to hire or retain the employee.

Testimony on SB 176
Before the Senate Labor & Industry Committee
By: Larry W. Magill, Jr., Executive Vice President
Independent Insurance Agents of Kansas

Thank you for the opportunity to appear on SB 176 exempting "qualified real estate agents" from coverage under the Workers' Compensation Act if they met two tests. The two tests would be that they are paid on the basis of sales or other output and that they performed under a written contract that provides they are not treated as an employee with respect to such services for tax purposes. Our association's position is either support of the exemption in SB 176 or conversely specifying in the statute that they are considered employees, but not to leave the existing situation.

The present situation involving all types of independent contractors is extremely gray. In the absence of an actual court decision on the facts of a specific situation, there is no way that either an employer, or their insurance agent or insurance company, can determine in advance if a situation is one of contractor/independent contractor or employer/employee. Attached to our testimony is a copy of the Division of Workers' Compensation newsletter from 1979 laying out some of the tests involved in establishing an independent contractor relationship, some court cases and providing some advice.

Specifically, the court in Evans vs. Board of Education of Hays, 178 Kan. 275, stated that, "It is not the exercise of discretion, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control." Their particular relationship could actually fluctuate back and forth between independent contractor and employee based on the amount of control exercised by an employer.

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The bulletin also goes on to point out that, "The right to hire or discharge the worker also can be an important element in this test. Generally if an independent contractor does not perform a job he was contracted to do in a satisfactory manner, the legal recourse is not to discharge that person but to sue the person for breech of contract due to faulty workmanship or incomplete services."

We feel that in most cases where an injured real estate agent brings suit for workers' compensation benefits, that the Division of Workers' Compensation is likely to find an employer/employee relationship. Their general approach is to construe interpretation of the workers' compensation statutes liberally in favor of the employee.

Also attached is a copy of the Knoble vs. National Carriers, Inc., Supreme Court decision involving an independent contractor relationship in the trucking industry. The decision goes into an extensive review of all the facts that the court took into consideration in determining that it was actually an employer/employee relationship.

This gray area of defining who is an independent contractor versus employee provides insurance agents with a number of problems. For example, in the case of an employer broker with no other payroll except sales agents, that employer could conceivably decide not to buy workers' compensation coverage. If a real estate agent is subsequently severely injured and sues the employer, it could very likely end up as an errors and omissions professional liability claim against the insurance agent for the broker. Unless the insurance agent has documented his file that he recommended the coverage and the broker declined it, a court is likely to find in favor of the real estate broker. For that reason, we would advise all of our members to obtain a signed document stating that they recommended that the broker buy coverage even though the broker considered all real estate

agents as independent contractors and had no other payrolls. Once a court finds that it is an employee relationship, then the broker is personally liable for benefits even if the workers' compensation fund untimately pays them to the employee.

In the case of a broker with other payrolls that buys workers' compensation coverage, the insurance company is then placed in the position of providing automatic coverage on those real estate agents should they be found by a court to actually be employees and not independent contractors. For this reason, companies have frequently taken the position that those real estate agent payrolls must be included on the workers' compensation policy.

This is an established rule of law that holds the general contractor liable for workers' compensation benefits for employees of an uninsured subcontractor. Of course, if the real estate agents provided the broker with a certificate of insurance showing that they had purchased individual workers' compensation coverage, then the insurance company would have no exposure and no reason to charge any premium. Again, this is analogous to the construction industry.

Whether or not a company requires a real estate broker to include agents' payrolls depends on company underwriting rules. Most independent insurance agents represent a number of companies and probably can find one without that requirement. However, workers' compensation is generally not written by itself but rather as a part of all the commercial insurance needs for a broker. Therefore, there may be other reasons why an agent would not want to move the entire account. In that case, coverage could be placed through the Workers' Compensation Assigned Risk Plan.

Even though a company might write an initial workers' compensation policy that did not include any real estate agent payroll, that is not necessarily assurance that they would not pick those payrolls up on audit at the end of the policy term unless they had agreed not to in the beginning. This could conceivably happen even in the Assigned Risk Plan.

The weight of court decisions and administrative interpretation of present statutes is on the side of finding real estate agents employees. If this committee and the legislature wish to address this problem, we urge them to either clearly include real estate agents as employees or clearly allow them to be excluded, which SB 176 appears to do. We would be happy to provide any additional information desired by the committee.

KANSAS DEPARTMENT OF
Human Resources
DIVISION OF WORKERS' COMPENSATION

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(Taken from March, 1979, Workers' Compensation Information Letter)

INDEPENDENT CONTRACTOR OR EMPLOYEE?
Special Problems Presented by Truck Drivers, Real Estate Salespersons, Ministers and Others

This office is frequently contacted in regard to the problem of the independent contractor. The basic question is whether an individual is an independent contractor or an employee. This can be a very important question in regard to whether an employer must cover the worker as an employee or whether the worker is indeed an independent contractor, and therefore, not subject to the employer's insurance coverage. Under the Kansas Workmen's Compensation Law if a worker is an employee, he cannot be required to contribute towards purchasing the workers' compensation insurance. If the worker is an employee, then the employer must purchase the insurance and the employer cannot withhold funds from the employee's pay or commission to purchase the insurance.

In workers' compensation the determination of whether a worker is an employee or an independent contractor is through the so-called "common law test" as applied by the Kansas Supreme Court or Kansas Court of Appeals. In other words there is no statute in our Workmen's Compensation Law that sets the definition for the legal requirement as to whether a certain individual is an employee or an independent contractor. A workers' compensation examiner, or the Director, or other appeal courts will arrive at this determination by examining the prior decisions of our Supreme Court as to how they have defined an employee. In the case of Snyder v. Lamb, 191 Kan. 446, our Supreme Court said, "The question whether, in a given situation, an injured workman occupied the status of an independent contractor--as distinguished from an employee—has been before this court many times. Generally speaking, an independent contractor is one who, exercising an independent employment, contracts to do a piece of work according to his own methods and without being subject to control of his employer except as to the result of his work." The court further noted in that case that the right of control test is not an exclusive test to determine the relationship, but other relevant factors are also to be considered. The court in the case of Evans v. Board of Education of Hays, 178 Kan. 275, noted, "...an independent contractor represents the will of his employer only in the result of his work and not as to the means by which it is accomplished." The court further noted in that decision, "It is not the exercise of direction, supervision or control over a workman which determines whether he is a servant or an independent contractor, but the right to exercise such direction, supervision or control."

It is not always easy for a workers' compensation examiner or an appeal judge to determine whether the purported employer did have the right of control over the worker's activities. As the court noted above, it is not whether the right of control is actually exercised, but rather it was reserved. The right to hire or discharge the worker also can be an important element in this test. Generally if an independent contractor does not perform a job he was contracted to do in a satisfactory manner, the legal recourse is not to discharge that person but to sue the person for breach of contract due to faulty workmanship or incomplete services. Usually an independent contractor cannot be discharged at the whim of the person contracting the work. An employee, however, can be subject to this type of termination. Generally where an independent contractor is involved the person engaging the independent contractor usually enters into a written agreement where a certain end result is contracted for and a certain set amount of money will be paid once that end result is completed. For instance if a home owner contracted with a plumbing service to build a bathroom for a certain amount of money and did not engage in the supervision of the independent contractor while he performed the job, then that person performing the job would most probably be an independent contractor. However, if a person was a contractor who built homes and contracted with a certain individual that he would be paid so much an hour while he did the plumbing work, generally gave directions how the plumbing work should be completed and had the right to discharge that person at any time during the progress of the work, that person doing the work would most probably be an employee. The problems that exist are in the "gray" areas where there exists an extremely close question of whether that person is an employee or an independent contractor. All we can advise someone in that situation is that a person may be taking a financial risk if they do not cover the worker, because if it is determined that the worker is an employee, the employer would be required to pay the benefits even though he is uninsured. Sometimes general contractors and others will require certificates of insurance from all persons doing work for them, and therefore, avoid the contractor vs. employee question and protect themselves from workers' compensation claims. The only problem with this is that some workers might complain that they are being required to carry workers' compensation insurance on themselves even though they believe themselves to be employees. Therefore, the problem can arise even before an accident may occur. Several areas of special interest are noted below in regard to whether the relationship of employer-employee may exist.

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When the law was revised in 1974, we had many inquiries whether church ministers would be considered employees or independent contractors. This question arose chiefly due to the fact that the Internal Revenue Service apparently considers most ministers self-employed and not employees. However, applying the "common law test" to most situations involving ministers indicated to our office that these people most probably were in the status of being employees rather than independent contractors. In most cases the minister is subject to discharge by a church board and they do have a certain right of control over his ministerial activities in regard to directions as to his duties and how he generally should perform them. There may be certain special circumstances where the minister would not be considered an employee, but in most cases reviewed, it was felt that the church should provide workers' compensation coverage for the minister.

Another area of special interest is in regard to real estate salespersons. Apparently most real estate salespersons consider themselves self-employed in regard to filing Federal income tax returns. Of course, most real estate salespersons earn their livelihood by strictly commission sales. The fact that a person is paid on a commission basis does not, in itself, determine that a person is an independent contractor. The problem in this area seems to be whether there is a right of control over these individuals by the real estate broker. In the situations we look at, most real estate salespersons work for one broker only and represent themselves as being affiliated with that broker. Usually the broker has the right to discontinue the relationship at any time he wishes. Sometimes an agreement between the broker and the salesperson is drawn up in such a manner that it specifically states that the salesperson is not an employee but an independent contractor. It is noted that our Supreme Court has said that these written agreements are not controling where the actual conduct of the parties is otherwise.

Another area of prime interest is in the trucking industry. We have somewhat a better guideline in this area due to a fairly recent Supreme Court case, that of Knoble v. National Carriers, 212 Kan. 331. This case can also be applicable to other situations involving the question of employee vs. independent contractor. In the Knoble case the truck driver owned the tractor and leased it to the trucking firm. The employee, with his tractor, towed the trailer of the trucking firm. The truck driver and the trucking firm had a written contract which specifically stated the parties did not intend to create an employer-employee relationship. Truck drivers were not prescribed as to the number of days they had to work or times they had to work; however, they had to conform to the I.C.C. regulations as to the amount of time they could work in a given day. The truck drivers were given advances for expense money which was deducted from their payment on completion of delivery of a load. Some of the evidence brought out in the case was that the drivers received instructions from the dispatcher as to what commodities were to be hauled and where they were to be delivered. The drivers were required to check with the employer on a call-in basis at least once a day. The employee was paid on the basis of 70% of the gross revenue taken in by the truck and no social security or withholding tax was withheld or paid by the trucking firm. The Supreme Court in that case concluded that the lower court was correct in finding an employer-employee relationship to exist. The court in making this finding, noted, "that Respondent (trucking company) exercised or had the right to exercise as much control over the drivers of leased vehicles as it desired or was required to exercise in order to operate efficiently." The court further noted that there was no exact formula which may be used in determining if one is an employee or an independent contractor and concluded, "The determination of the relation in each instance depends upon the individual circumstances of the particular case."

It might also be noted that where one person is exclusively associated with another in order to conduct his business efficiently, the principle in the relationship, as a practical matter, must exercise or reserve some control over the worker's activities. Also it might be observed that a person who is willing to be considered an independent contractor may have a change of feeling as to this status once he is injured on the job.

Generally in a contact by an employer, insurance agent or employee, it is difficult for our office at times to give a definite opinion whether a person is an independent contractor or an employee. We can only point out the case law as noted above. The final determination of this question is up to a workers' compensation examiner or appeal judge. Where an employer-employee relationship is found to exist, the employer would be required to pay the benefits even though he did not carry workers' compensation insurance. The liability can be very high because of unlimited medical and present overall dollar maximums, along with the employer's attorney's fees.

No. 46,829

DEBORAH J. KNOBLE, WIDOW, CAMILLE E. KNOBLE AND SONJA C. KNOBLE, MINOR DAUGHTERS OF VIRGIL LEO KNOBLE, DECEASED, *Appellees*, v. NATIONAL CARRIERS, INC. AND HARTFORD ACCIDENT AND INDEMNITY COMPANY, *Appellants*.

(510 P. 2d 1274)

SYLLABUS BY THE COURT

1. WORKMEN'S COMPENSATION—*Extent of Review—Judgment of Trial Court Supported by Evidence—Question of Law.* Under K. S. A. 44-556, the appellate jurisdiction of this court in workmen's compensation cases is limited to reviewing questions of law only. Whether the district court's judgment in a compensation case is supported by substantial competent evidence is a question of law as distinguished from a question of fact.

2. SAME—*Determining Whether Evidence Supports the Findings—When Conclusive.* In reviewing the record to determine whether it contains substantial evidence to support the district court's factual findings, this court is required to review all of the evidence in the light most favorable to the prevailing party below. Where the findings of fact made by the district court are based on substantial evidence, they are conclusive, and we have no power to weigh the evidence and revise those findings or reverse the final order of the court. Although this court may feel the weight of the evidence, as a whole, is against the findings of fact so made, it may not disturb those findings if they are supported by substantial competent evidence.

3. SAME—*Determining Employer-Employee Relationship—Test.* The primary test used by the courts in determining whether an employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor.

4. SAME—*Findings Supported by Evidence—Freedom of Contract Not Violated—Venue.* In a workmen's compensation case the record is examined and it is *held:* (1) there was substantial competent evidence to support the trial court's finding that the relationship of employer and workman existed; (2) such finding did not violate the employer's constitutional right to freedom of contract; and (3) the order of the workmen's compensation director fixing venue was not error.

Appeal from Crawford district court, division No. 1; DON MUSSER, judge. Opinion filed June 9, 1973. Affirmed.

Carry W. Lassman, of Keller, Wilbert, Palmer and Lassman, of Pittsburg, argued the cause and was on the brief for the appellants.

Murvyl M. Sullinger, of Pittsburg, argued the cause and was on the brief for the appellees.

The opinion of the court was delivered by

FOTH, C.: In 1971 Virgil L. Knoble and Dean W. Bateman were joint owners of a 1968 International tractor which they had leased to National Carriers, Inc., a nationwide trucking firm whose chief business was hauling beef for its parent company, National Beef Packing Company, of Liberal, Kansas. Their contract with National Carriers required the partners to furnish not only the tractor but their own services as drivers (or those of acceptable substitutes).

On January 8, 1971, they were hauling one of National Carriers' refrigerated trailers loaded with National Beef's meat to Worcester, Massachusetts. Near Indianapolis, Indiana, they had a collision in which Knoble was killed. His dependents applied for benefits under the workmen's compensation act, which were allowed at both the administrative and district court levels. National Carriers and its workmen's compensation insurance carrier have appealed, contending primarily that Knoble and Bateman were independent contractors, and not employees of National Carriers.

The trial court found, as had the workmen's compensation examiner, that "the relationship of employer and workman existed between the respondent and the decedent." Our scope of review is, of course, severely limited:

"Under K. S. A. 44-556, the appellate jurisdiction of this court in workmen's compensation cases is limited to reviewing questions of law only. Whether the district court's judgment in a compensation case is supported by substantial competent evidence is a question of law as distinguished from a question of fact. (*Holley v. Dickey Clay Mfg. Co.*, 157 Kan. 355, 139 P. 2d 846, 148 A. L. R., Anno., 1131; *Coble v. Williams*, 177 Kan. 743, 747, 282 P. 2d 425; *Bowler v. Elmdale Developing Co.*, 185 Kan. 785, 347 P. 2d 391.) In reviewing the record to determine whether it contains substantial evidence to support the district court's factual findings, this court is required to review all of the evidence in the light most favorable to the prevailing party below. Where the findings of fact made by the district court are based on substantial evidence, they are conclusive, and we have no power to weigh the evidence and revise those findings or reverse the final order of the court. Although this court may feel the weight of the evidence, as a whole, is against the findings of fact so made, it may not disturb those findings if they are supported by substantial competent evidence. (*Evans v. Board of Education of Hays*, 178 Kan. 275, 284 P. 2d 1068; *Barr v. Builders, Inc.*, 179 Kan. 617, 296 P. 2d 1106; *Weimer v. Sauder Tank Co.*, 181 Kan. 422, 337 P. 2d 672; *Durnil v. Grant*, 187 Kan. 327, 356 P. 2d 872.) Numerous decisions of like import

are cited in 9 West's Kansas Digest, Workmen's Compensation, §§ 1940, 1969, and 5 Hatcher's Kansas Digest (Rev. Ed.), Workmen's Compensation, § 153." (*Jones v. City of Dodge City*, 194 Kan. 777, 778-9, 402 P. 2d 108.)

In *Shay v. Hill*, 133 Kan. 157, 158, 299 Pac. 263, we put it a little differently when we asked "Was there evidence, whether opposed or not, warranting a reasonable inference, although a contrary inference might reasonably be drawn, to sustain the judgment of the district court?" We look, then, for evidence from which the trial court might reasonably have drawn its inference that Knoble and Bateman were employees rather than independent contractors; we are not concerned with evidence from which the contrary inference might be drawn.

Such evidence must, of course, meet certain yardsticks. In *Jones*, supra, we said:

"It is often difficult to determine in a given case whether a person is an employee or an independent contractor since there are elements pertaining to both relations which may occur without being determinative of the relationship. In other words, there is no exact formula which may be used in determining if one is an employee or an independent contractor. The determination of the relation in each instance depends upon the individual circumstances of the particular case.

"*The primary test* used by the courts in determining whether an employer-employee relationship exists is *whether the employer has the right of control* and supervision over the work of the alleged employee, and the right to direct the manner in which the work is to be performed, as well as the result which is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control, which renders one a servant rather than an independent contractor. (*Evans v. Board of Education of Hays*, [178 Kan. 275, 284 P. 2d 1068]; *Davis v. Julian*, 152 Kan. 749, 756, 107 P. 2d 745; *Schroeder v. American Nat'l Bank*, 154 Kan. 721, 121 P. 2d 186.)" (194 Kan., at 780. Emphasis added.)

See also, *McCarty v. Great Bend Board of Education*, 195 Kan. 310, 403 P. 2d 956.

In particular, therefore, we seek evidence to satisfy the "primary test" of the "right of control." We look first at the description of the parties' relationship given by the surviving partner, Bateman, as summarized by the examiner:

"Bateman related that although the tractor unit was leased to Respondent, he and Knoble drove it. They received their instructions from the dispatcher of National Carriers, Inc. These instructions included what commodity was to be hauled, to whom, where and when it was to be delivered.

"After leaving with a load of a particular commodity, which was usually beef, from Liberal, Kansas, they were to make what was termed 'check calls' each day between 8:00 a. m. and 10:00 a. m. and 4:00 p. m. and 6:00 p. m. to

Respondent's dispatcher. The purpose of these 'check calls' was to inform the dispatcher of their location, distance from destination, approximate arrival time and receive further instructions, if any.

"Upon arrival at a destination, they were required to call Respondent's dispatcher and inform him that they were ready to unload. They would usually then be instructed to call the dispatcher when they unloaded. After unloading the beef, company policy (National Carriers, Inc.) required that the trailer be washed and cleaned for the next load. After unloading and cleaning the trailer, they would then receive instructions from Respondent's dispatcher in regard to their next load; what commodity it was to be, when and where it was to be delivered.

"The return load was usually as close to the midwest as possible and could be any commodity. Bateman and Knoble had no control over the commodity, its destination or arrival time and they had no authority to contract with shippers on their own.

"Upon returned [sic] to the Midwest, Bateman and Knoble would usually call in to Respondent's dispatcher for further instructions. They were then told what they were to do next.

"The tractor unit owned by Bateman and Knoble and leased to National Carriers, Inc., was subject to regular safety inspection by Respondent; was driven on license tags and I. C. C. and K. C. C. permits issued to Respondent; Respondent paid the fuel tax for the tractor and the unit fuel. Respondent carried public liability, property damage and cargo insurance as well as collision insurance on the trailer. Bateman and Knoble insured the tractor unit for collision insurance.

"Bateman and Knoble were pretty well regulated in the time they could spend at home and away from their truck because of the obligation to deliver loads on time.

"If they were at home, they had to make their regular check calls twice daily and were subject to a $25.00 fine if they failed to do so.

"Bateman and Knoble were paid 70 percent of the gross revenue taken in by the truck; no social security or withholding tax was withheld or paid in or for their behalf.

"Bateman and Knoble were responsible for the expense of maintenance and repair of the tractor.

"Bateman signed the contract or lease agreement in his own behalf and that of the decedent Virgil Knoble, the original of which is a part of the record as Respondent's Exhibit No. 1.

"According to the terms of the contract, Bateman and Knoble were to furnish the tractor and labor to haul up to 4,000,000 pounds of commodities, although there was no promise on the part of Respondent to furnish any commodities to haul. Respondent was to have the exclusive possession, control and use of the leased tractor. The contract could be terminated immediately for violation of its terms and without cause on thirty days written notice.

"The contract further provided that the parties did not intend to create an employer-employee relationship between Respondent and Bateman and Knoble or any of their employees, if any.

"The contract provided that it was to become effective upon its execution and remain so for not less than 30 days and 'that upon completion of the

obligation of transportation as provided in paragraph 1, by the contractor, this contract and all its terms and conditions shall be automatically renewed to the extent of the obligation of transportation provided in paragraph 1. This contract shall likewise be automatically renewed upon each subsequent completion of transportation, as provided in paragraph 1, unless terminated in the manner hereinbefore provided'.

"Bateman and Knoble had no prescribed days or time they had to work, but they were required to haul their loads and adhere to I. C. C. regulations regarding working time.

"Bateman and Knoble were furnished with identification cards showing them to be employees of Respondent for purposes of identification on the road and for gaining admission to the premises of National Carriers, Inc. and National Beef Packers, Inc.

"They were given advances for expense money which were deducted from their payments upon completion of a load."

This testimony was supplemented by that of the general manager of National Carriers at the time of the accident, similarly summarized:

"Some trailers used for the hauling of quartered beef carcasses were owned by Respondent and some were leased from individual contractors or operators.

"National Beef Packing Company and National Carriers, Inc. used the same yards or facilities located in Liberal, Kansas. Trailers were loaded with beef by employees of National Beef Packing Company. Drivers normally do not go in the loading area and supervise loading, but they can make suggestions as to how the load could be apportioned so that the trailer would not be overloaded on one end or the other.

"Drivers were instructed as to what temperature was to be maintained in the trailer, and instructed not to drive fast over rough roads or railroad tracks. Drivers were required to call in twice daily while they were on a trip. A fine of $25.00 would be levied if they failed to do so.

"If drivers had permission to be at home, they were not considered to be on duty and were not required to make check calls, except possibly on Thursday for possible loading on Friday.

"Respondent furnished motel facilities for drivers who were waiting in Liberal, Kansas, for their trailer to be loaded.

"Upon unloading beef at is destination, which was performed by consignee's, drivers were to call in for information on their next load. They could not accept a return load without Respondent's knowledge and permission.

"In some instances, Respondent would 'trip lease' the tractor-trailer unit to other companies for a return trip. In this case, the drivers would, to a degree, be under the control of the company to which they were leased, but the drivers would still 'check call' Respondent's dispatcher and still follow Respondent's instructions.

"All revenue from hauling and trip leases went to and was handled by Respondent. Respondent paid all fuel tax with the exception of the state of Ohio.

"Any one expecting to operate one of Respondent's trucks was required to fill out a job application form; and although the Department of Transportation

Regulations required that a driver be physically and mentally qualified and experienced, Respondent did control whether a particular person could drive one of the leased units.

"Mr. Pruitt was partly responsible for the formation of the lease agreements and his purpose in trying to set up an independent contractor relationship was to relieve Respondent of the obligation of deducting and paying social security and withholding taxes.

"Drivers could not be allowed to pick up loads of freight on their own but must haul loads contracted for by Respondent 'because no company—National Carriers included—could just let operators go helter skelter and not know where they were at, what they were doing, and where they were going. They couldn't have any control over that type of operation'."

All the foregoing testimony was substantially uncontradicted.

Respondent's efforts before the examiner were largely devoted to explaining the control which it clearly exercised by pointing to the requirements of the governmental regulatory agencies under which it operated. While such regulations may indeed furnish reasons for at least part of the control exercised, they do not alter the fact of its existence.

One witness, the company controller, pointed out that National Carriers owned all the trailers and some of the tractors it used, and to drive the latter employed drivers on its regular payroll. For its payroll drivers it carried a group Blue Cross-Blue Shield policy; its "contract" drivers were not eligible for that policy, so for them the company carried a group policy with Bankers Life affording hospitalization, major medical, life and disability insurance. The payroll drivers had, he said, "certain rules and regulations they had to follow." Asked what different status the "contract" drivers had as to complying with the company's rules and regulations, he replied:

"A. Two big differences I think of right off, drivers on our company owned tractors were required to leave the tractors on National Beef's lot every night when they left. The tractor never went home with them. They were also required to be there. Another one was we told our drivers where to fuel up, where to fill the tractor up with gas, with fuel. We have certain areas designated, designated areas, where they go in, fill up, sign a ticket and leave. They do not pay for it.

"Q. These persons operating under this contract don't have to do that, is that right?

"A. No."

Other evidence showed that while the partners might be able to take their truck home they were not permitted to use it, even for moving Knoble's own mobile home.

Without recapitulating, we think the evidence amply supports

the examiner's conclusion, adopted by the trial court, "that Respondent exercised or had the right to exercise as much control over the drivers of leased vehicles as it desired or was required to exercise in order to operate efficiently." On this record the inference of an employer-employee relationship is clearly permissible. See *Watson v. Dickey Clay Mfg. Co.*, 202 Kan. 366, 450 P. 2d 10, *Willbeck v. Grain Belt Transportation Co.*, 181 Kan. 512, 313 P. 2d 725; and *Shay v. Hill*, supra. In each of these cases an owner-driver of a truck, operating under arrangements closely analagous to the one at bar, was held to be an employee and not an independent contractor.

The company, however, urges that this conclusion squarely contradicts the express language employed by the parties in their written contract, and thus deprives it of its constitutionally guaranteed freedom of contract. The simple answer to this contention is that, as demonstrated by the authorities previously cited, the relationship of contracting parties depends on *all* the operative facts; the label which they choose to employ is only one of those facts. Parties are free to contract as they please, but mere terminology cannot bind a court or prevent it from assessing the effect of the overall conduct of the parties.

Finally, the company objects to the order of the director fixing Crawford County as the place for hearing by the examiner. Both parties recognize that the act contains no venue provision applicable to an out-of-state accident covered by the Kansas act. To fill the gap the director had duly adopted K. A. R. 51-3-6:

"The law does not provide for the venue of hearing a claim when the accident occurred out of the state. It is the ruling of the director that when an accident has occurred outside of the state of Kansas, and the Kansas workmen's compensation director has jurisdiction to determine the claim, the workmen's compensation director for the state of Kansas shall have jurisdiction to designate the county in Kansas where the claim shall be heard, and the setting of the claim for hearing in a certain county in Kansas shall constitute the order designating venue. The district court of the county in which such claim arising from an injury which has occurred outside the state of Kansas is finally set for determination shall have jurisdiction of an appeal taken from an award of the director. The director will entertain an application of the employee or employer as to where a claim arising out of an injury which occurred outside of the state of Kansas shall be set for hearing, to accommodate the parties."

The company requested the director to fix venue in Neosho County, where claimants lived, while the claimants objected to

moving it from Crawford County where counsel for both sides were officed, where most of their witnesses lived, and where they intended to move. On appeal, the company also suggests that Seward County would have been a proper venue, since that was the situs of the contract.

The company's position depends on borrowing venue provisions from the Code of Civil Procedure, a course which we have consistently rejected. See, *Kissick v. Salina Manufacturing Co., Inc.*, 204 Kan. 849, 466 P. 2d 344, Syl. ¶ 3; *Magers v. Martin Marietta Corporation*, 193 Kan. 137, 392 P. 2d 148, Syl. ¶ 1; *Fleming v. National Cash Register Co.*, 188 Kan. 571, 363 P. 2d 432, Syl. ¶ 4. The director is authorized by K. S. A. 44-573 to promulgate such rules and regulations as may be necessary to administer the act, and K. A. R. 51-3-6 fell within that authority. (The subsequent amendment of the regulation is not material here.) The director was required by regulation to exercise his discretion; we find no abuse in its exercise here, and certainly no prejudice to the respondent.

The judgment is affirmed.

APPROVED BY THE COURT.

Session of 1984

SENATE BILL No. 666

By Senators Morris, Burke, Francisco, Hayden, Kerr, Roitz, Thiessen and Vidricksen

2-7

AN ACT concerning the employment security law; relating to benefits and contributions; amending K.S.A. 1983 Supp. 44-703, 44-704 and 44-710a and repealing the existing sections.

Be it enacted by the Legislature of the State of Kansas:

Section 1. K.S.A. 1983 Supp. 44-703 is hereby amended to read as follows: 44-703. As used in this act, unless the context clearly requires otherwise: (a) (1) "Annual payroll" means the total amount of wages paid or payable by an employer during the calendar year.

(2) "Average annual payroll" means the average of the annual payrolls of any employer for the last ~~three~~ *five* calendar years immediately preceding the computation date as hereinafter defined if the employer has been continuously subject to contributions during those ~~three~~ *five* calendar years and has paid some wages for employment during each of such years. In determining contribution rates for the calendar year, if an employer has not been continuously subject to contribution for the ~~three~~ *five* calendar years immediately preceding the computation date but has paid wages subject to contributions during ~~only the two~~ *the four or less* calendar years immediately preceding the computation date, such employer's "average annual payroll" shall be the average of the payrolls for those ~~two~~ calendar years *in which the employer has paid wages subject to contributions.*

(b) "Base period" means the first four of the last five completed calendar quarters immediately preceding the first day of an individual's benefit year, except that the base period in respect to combined wage claims means the base period as defined in the law of the paying state.

Senate Lbr., Inds. & Sm. Bus.2-25-85

(c) (1) "Benefits" means the money payments payable to an individual, as provided in this act, with respect to such individual's unemployment.

(2) "Regular benefits" means benefits payable to an individual under this act or under any other state law, including benefits payable to federal civilian employees and to exservicemen pursuant to 5 U.S.C. chapter 85, other than extended benefits.

(d) "Benefit year" with respect to any individual, means the period beginning with the first day of the first week for which such individual files a valid claim for benefits, and such benefit year shall continue for one full year. In the case of a combined wage claim, the benefit year shall be the benefit year of the paying state. Following the termination of a benefit year, a subsequent benefit year shall commence on the first day of the first week with respect to which an individual next files a claim for benefits. When such filing occurs with respect to a week which overlaps the preceding benefit year, the subsequent benefit year shall commence on the first day immediately following the expiration date of the preceding benefit year. Any claim for benefits made in accordance with subsection (a) of K.S.A. 44-709 and amendments thereto shall be deemed to be a "valid claim" for the purposes of this subsection if the individual has been paid wages for insured work as required under subsection (e) of K.S.A. 44-705 and amendments thereto. Whenever a week of unemployment overlaps two benefit years, such week shall, for the purpose of granting waiting-period credit or benefit payment with respect thereto, be deemed to be a week of unemployment within that benefit year in which the greater part of such week occurs.

(e) "Commissioner" or "secretary" means the secretary of human resources.

(f) (1) "Contributions" means the money payments to the state employment security fund which are required to be made by employers on account of employment under K.S.A. 44-710 and amendments thereto, and voluntary payments made by employers pursuant to said statute.

(2) "Payments in lieu of contributions" means the money

payments to the state employment security fund from employers which are required to make or which elect to make such payments under subsection (e) of K.S.A. 44-710 and amendments thereto.

(g) "Employing unit" means any individual or type of organization, including any partnership, association, agency or department of the state of Kansas and political subdivisions thereof, trust, estate, joint-stock company, insurance company or corporation, whether domestic or foreign including nonprofit corporations, or the receiver, trustee in bankruptcy, trustee or successor thereof, or the legal representatives of a deceased person, which has in its employ one or more individuals performing services for it within this state. All individuals performing services within this state for any employing unit which maintains two or more separate establishments within this state shall be deemed to be employed by a single employing unit for all the purposes of this act. Each individual employed to perform or to assist in performing the work of any agent or employee of an employing unit shall be deemed to be employed by such employing unit for all the purposes of this act, whether such individual was hired or paid directly by such employing unit or by such agent or employee, provided the employing unit had actual or constructive knowledge of the employment.

(h) "Employer" means:

(1) (A) Any employing unit for which agricultural labor as defined in subsection (w) of this section is performed and which during any calendar quarter in either the current or preceding calendar year paid remuneration in cash of $20,000 or more to individuals employed in agricultural labor or for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, employed in agricultural labor 10 or more individuals, regardless of whether they were employed at the same moment of time.

(B) For the purpose of this subsection (h)(1), any individual who is a member of a crew furnished by a crew leader to perform service in agricultural labor for any other person shall be treated

as an employee of such crew leader if:

(i) Such crew leader holds a valid certificate of registration under the farm labor contractor registration act of 1963 or substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment or any other mechanized equipment, which is provided by such crew leader; and

(ii) Such individual is not in the employment of such other person within the meaning of subsection (i) of this section.

(C) For the purpose of this subsection (h)(1), in the case of any individual who is furnished by a crew leader to perform service in agricultural labor for any other person and who is not treated as an employee of such crew leader:

(i) Such other person and not the crew leader shall be treated as the employer of such individual; and

(ii) Such other person shall be treated as having paid cash remuneration to such individual in an amount equal to the amount of cash remuneration paid to such individual by the crew leader, either on the crew leader's own behalf or on behalf of such other person, for the service in agricultural labor performed for such other person.

(D) For the purposes of this subsection (h)(1) "crew leader" means an individual who:

(i) Furnishes individuals to perform service in agricultural labor for any other person;

(ii) Pays, either on such individual's own behalf or on behalf of such other person, the individuals so furnished by such individual's for the service in agricultural labor performed by them; and

(iii) Has not entered into a written agreement with such other person under which such individual is designated as an employee of such other person.

(2) (A) Any employing unit which: (i) In any calendar quarter in either the current or preceding calendar year paid for service in employment wages of $1,500 or more, or (ii) for some portion of a day in each of 20 different calendar weeks, whether or not such weeks were consecutive, in either the current or preceding

calendar year, had in employment at least one individual, whether or not the same individual was in employment in each such day.

(B) Employment of individuals to perform domestic service or agricultural labor and wages paid for such service or labor shall not be considered in determining whether an employing unit meets the criteria of this subsection (h)(2).

(3) Any employing unit for which service in employment as defined in subsection (i)(3)(E) of this section.

(4) Any employing unit, whether or not it is an employing unit under subsection (g) of this section, which acquires or in any manner succeeds to (A) substantially all of the employing enterprises, organization, trade or business, or (B) substantially all the assets, of another employing unit which at the time of such acquisition was an employer subject to this act.

(5) Any employing unit which paid cash remuneration of $1,000 or more in any calendar quarter in the current or preceding calendar year to individuals employed in domestic service as defined in subsection (aa) of this section.

(6) Any employing unit which having become an employer under this subsection (h) has not, under subsection (b) of K.S.A. 44-711 and amendments thereto, ceased to be an employer subject to this act.

(7) Any employing unit which has elected to become fully subject to this act in accordance with subsection (c) of K.S.A. 44-711 and amendments thereto.

(8) Any employing unit not an employer by reason of any other paragraph of this subsection (h), for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; or which, as a condition for approval of this act for full tax credit against the tax imposed by the federal unemployment tax act, is required, pursuant to such act, to be an "employer" under this act.

(9) Any employing unit described in section 501(c)(3) of the

federal internal revenue code of 1954 which is exempt from income tax under section 501(a) of the code that had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not such weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(i) "Employment" means:

(1) Subject to the other provisions of this subsection, service, including service in interstate commerce, performed by

(A) Any active officer of a corporation; or

(B) Any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(C) Any individual other than an individual who is an employee under subsection (i)(1)(A) or subsection (i)(1)(B) above who performs services for remuneration for any person~~;~~:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for such individual's principal; or

(ii) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, a principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

For purposes of subsection (i)(1)(C), the term "employment" shall include services described in paragraphs (i) and (ii) above only if:

(a) The contract of service contemplates that substantially all of the services are to be performed personally by such individual;

(b) The individual does not have a substantial investment in facilities used in connection with the performance of the services (other than in facilities for transportation); and

(c) The services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(2) The term "employment" shall include an individual's entire service within the United States, even though performed entirely outside this state if,

(A) The service is not localized in any state, and

(B) The individual is one of a class of employees who are required to travel outside this state in performance of their duties, and

(C) The individual's base of operations is in this state, or if there is no base of operations, then the place from which service is directed or controlled is in this state.

(3) The term "employment" shall also include:

(A) Services performed within this state but not covered by the provisions of subsection (i)(1) or subsection (i)(2) shall be deemed to be employment subject to this act if contributions are not required and paid with respect to such services under an unemployment compensation law of any other state or of the federal government.

(B) Services performed entirely without this state, with respect to no part of which contributions are required and paid under an unemployment compensation law of any other state or of the federal government, shall be deemed to be employment subject to this act only if the individual performing such services is a resident of this state and the secretary approved the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this act.

(C) Services covered by an arrangement pursuant to subsection (l) of K.S.A. 44-714 and amendments thereto between the secretary and the agency charged with the administration of any other state or federal unemployment compensation law, pursuant to which all services performed by an individual for an employing unit are deemed to be performed entirely within this state, shall be deemed to be employment if the secretary has approved an election of the employing unit for whom such

services are performed, pursuant to which the entire service of such individual during the period covered by such election is deemed to be insured work.

(D) Services performed by an individual for wages or under any contract of hire shall be deemed to be employment subject to this act unless and until it is shown to the satisfaction of the secretary that: (i) Such individual has been and will continue to be free from control or direction over the performance of such services, both under the individual's contract of hire and in fact; and (ii) such service is either outside the usual course of the business for which such service is performed or that such service is performed outside of all the places of business of the enterprise for which such service is performed.

(E) Service performed by an individual in the employ of this state or any instrumentality thereof, any political subdivision of this state or any instrumentality thereof, any instrumentality of more than one of the foregoing or any instrumentality which is jointly owned by this state or a political subdivision thereof and one or more other states or political subdivisions of this or other states, provided that such service is excluded from "employment" as defined in the federal unemployment tax act by reason of section 3306(c)(7) of that act and is not excluded from "employment" under subsection (i)(4)(A) of this section.

(F) Service performed by an individual in the employ of a religious, charitable, educational or other organization which is excluded from the term "employment" as defined in the federal unemployment tax act solely by reason of section 3306(c)(8) of that act, and is not excluded from employment under paragraphs (I) through (M) of subsection (i)(4).

(G) The term "employment" shall include the service of an individual who is a citizen of the United States, performed outside the United States (except in Canada or, prior to and including December 31 of the year in which the U.S. secretary of labor approves an unemployment compensation law submitted by the Virgin Islands), in the employ of an American employer (other than service which is deemed "employment" under the provisions of subsection (i)(2) or subsection (i)(3) or the parallel

provisions of another state's law), if:

(i) The employer's principal place of business in the United States is located in this state; or

(ii) The employer has no place of business in the United States, but

(A) The employer is an individual who is a resident of this state; or

(B) The employer is a corporation which is organized under the laws of this state; or

(C) The employer is a partnership or a trust and the number of the partners or trustees who are residents of this state is greater than the number who are residents of any other state; or

(iii) None of the criteria of paragraphs (i) and (ii) above of this subsection (i)(3)(G) are met but the employer has elected coverage in this state or, the employer having failed to elect coverage in any state, the individual has filed a claim for benefits, based on such service, under the law of this state.

(H) An "American employer," for purposes of subsection (i)(3)(G), means a person who is:

(i) An individual who is a resident of the United States; or

(ii) A partnership if 2/3 or more of the partners are residents of the United States; or

(iii) A trust, if all of the trustees are residents of the United States; or

(iv) A corporation organized under the laws of the United States or of any state.

(I) Notwithstanding subsection (i)(2) of this section, all service performed by an officer or member of the crew of an American vessel or American aircraft on or in connection with such vessel or aircraft, if the operating office, from which the operations of such vessel or aircraft operating within, or within and without, the United States are ordinarily and regularly supervised, managed, directed and controlled is within this state.

(J) Notwithstanding any other provisions of this subsection (i), service with respect to which a tax is required to be paid under any federal law imposing a tax against which credit may be

taken for contributions required to be paid into a state unemployment compensation fund or which as a condition for full tax credit against the tax imposed by the federal unemployment tax act is required to be covered under this act.

(K) Domestic service in a private home, local college club or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more in any calendar quarter in the current calendar year or the preceding calendar year to individuals employed in such domestic service.

(4) The term "employment" shall not include: (A) Service performed in the employ of an employer specified in subsection (h)(3) of this section if such service is performed by an individual in the exercise of duties:

(i) As an elected official;

(ii) as a member of a legislative body, or a member of the judiciary, of a state or political subdivision;

(iii) as a member of the state national guard or air national guard;

(iv) as an employee serving on a temporary basis in case of fire, storm, snow, earthquake, flood or similar emergency;

(v) in a position which, under or pursuant to the laws of this state, is designated as a major nontenured policymaking or advisory position or as a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week;

(B) Service with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(C) Service performed by an individual in the employ of such individual's son, daughter or spouse, and service performed by a child under the age of ~~18~~ *21* years in the employ of such individual's father or mother;

(D) Service performed in the employ of the United States government or an instrumentality of the United States exempt under the constitution of the United States from the contributions imposed by this act, except that to the extent that the congress of the United States shall permit states to require any

instrumentality of the United States to make payments into a unemployment fund under a state unemployment compensatio law, all of the provisions of this act shall be applicable to suc instrumentalities, and to services performed for such instrumen talities, in the same manner, to the same extent and on the sam terms as to all other employers, employing units, individuals an services. If this state shall not be certified for any year by th federal security agency under section 3304(c) of the federa internal revenue code, the payments required of such instru mentalities with respect to such year shall be refunded by th secretary from the fund in the same manner and within the sam period as is provided in subsection (f) of K.S.A. 44-717 an amendments thereto with respect to contributions erroneously collected;

(E) Service covered by an arrangement between the secre tary and the agency charged with the administration of any othe state or federal unemployment compensation law pursuant t which all services performed by an individual for an employing unit during the period covered by such employing unit's duly approved election, are deemed to be performed entirely within the jurisdiction of such other state or federal agency;

(F) Service performed by an individual under the age of 18 in the delivery or distribution of newspapers or shopping news, not including delivery or distribution to any point for subsequent delivery or distribution;

(G) Service performed by an individual for an employing unit as an insurance agent or as an insurance solicitor, if all such service performed by such individual for such employing unit is performed for remuneration solely by way of commission;

(H) Service performed in any calendar quarter in the employ of any organization exempt from income tax under section 501(a) of the federal internal revenue code (other than an organization described in section 401(a) or under section 521 of such code) if the remuneration for such service is less than $50. In construing the application of the term "employment," if services performed during 1/2 or more of any pay period by an individual for the person employing such individual constitute employment, all

the services of such individual for such period shall be deemed to be employment; but if the services performed during more than 1/2 of any such pay period by an individual for the person employing such individual do not constitute employment, then none of the services of such individual for such period shall be deemed to be employment. As used in this subsection (i)(4)(H) the term "pay period" means a period (of not more than 31 consecutive days) for which a payment of remuneration is ordinarily made to the individual by the person employing such individual. This subsection (i)(4)(H) shall not be applicable with respect to services with respect to which unemployment compensation is payable under an unemployment compensation system established by an act of congress;

(I) Services performed in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;

(J) Service performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of such individual's ministry or by a member of a religious order in the exercise of duties required by such order;

(K) Service performed in a facility conducted for the purpose of carrying out a program of:

(i) Rehabilitation for individuals whose earning capacity is impaired by age or physical or mental deficiency or injury, or

(ii) Providing remunerative work for individuals who because of their impaired physical or mental capacity cannot be readily absorbed in the competitive labor market, by an individual receiving such rehabilitation or remunerative work;

(L) Service performed as part of an employment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work relief or work training;

(M) Service performed by an inmate of a custodial or correctional institution, unless such service is performed for a private,

for-profit employer;

(N) Service performed, in the employ of a school, college, or university, if such service is performed by a student who is enrolled and is regularly attending classes at such school, college or university;

(O) Service performed by an individual under the age of 22 who is enrolled at a nonprofit or public educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on as a student in a full-time program, taken for credit at such institution, which combines academic instruction with work experience, if such service is an integral part of such program, and such institution has so certified to the employer, except that this subsection (i)(4)(O) shall not apply to service performed in a program established for or on behalf of an employer or group of employers;

(P) Service performed in the employ of a hospital licensed, certified or approved by the secretary of health and environment if such service is performed by a patient of the hospital.

(j) "Employment office" means any office operated by this state and maintained by the secretary of human resources for the purpose of assisting persons to become employed.

(k) "Fund" means the employment security fund established by this act, to which all contributions and reimbursement payments required and from which all benefits provided under this act shall be paid and including all money received from the federal government as reimbursements pursuant to section 204 of the federal-state extended compensation act of 1970, and amendments thereto.

(l) "State" includes, in addition to the states of the United States of America, any dependency of the United States, the Commonwealth of Puerto Rico, the District of Columbia and the Virgin Islands.

(m) "Unemployment." An individual shall be deemed "unemployed" with respect to any week during which such individual performs no services and with respect to which no wages

are payable to such individual, or with respect to any week of less than full-time work if the wages payable to such individual with respect to such week are less than such individual's weekly benefit amount.

(n) "Employment security administration fund" means the fund established by this act, from which administrative expenses under this act shall be paid.

(o) "Wages" means all compensation for services, including commissions and bonuses and the cash value of all remuneration in any medium other than cash, *except for the value of meals furnished an employee on the employer's premises.* The reasonable cash value of remuneration in any medium other than cash, shall be estimated and determined in accordance with rules and regulations prescribed by the secretary. The term "wages" shall not include:

(1) That part of the remuneration which has been paid in a calendar year to an individual by an employer or such employer's predecessor in excess of $3,000 for all calendar years prior to 1972, $4,200 for the calendar years 1972 to 1977, inclusive, $6,000 for calendar years 1978 to 1982, inclusive, and $7,000 with respect to employment during any calendar year following 1982, except that if the definition of the term "wages" as contained in the federal unemployment tax act is amended to include remuneration in excess of $7,000 paid to an individual by an employer under the federal act during any calendar year, wages shall include remuneration paid in a calendar year to an individual by an employer subject to this act or such employer's predecessor with respect to employment during any calendar year up to an amount equal to the dollar limitation specified in the federal unemployment tax act. For the purposes of this subsection (o)(1), the term "employment" shall include service constituting employment under any employment security law of another state or of the federal government;

(2) The amount of any payment to, or on behalf of, an individual in its employ under a plan or system established by an employing unit which makes provisions for individuals in its employ generally or for a class or classes of such individuals

(including any amount paid by an employing unit for insura or annuities, or into a fund, to provide for any such payment) account of (A) retirement, or (B) sickness or accident disabil or (C) medical and hospitalization expenses in connection w sickness or accident disability or (D) death. If the individual its employ: (i) Has not the option to receive, instead of provisio for such death benefit any part of such payment or, if such de benefit is insured, any part of the premiums (or contributions premiums) paid by such individual's employing unit; and (ii) h not the right, under the provisions of the plan or system or poli of insurance providing for such death benefit, to assign su benefit, or to receive cash consideration in lieu of such bene either upon such individual's withdrawal from the plan or sy tem providing for such benefit or upon termination of such pl or system or policy of insurance or of such individual's servic with such employment unit;

(3) The payment by an employing unit (without deductio from the remuneration of the employee) of the tax imposed upo an employee under section 3101 of the internal revenue cod with respect to remuneration paid to an employee for domest service in a private home of the employer or for agricultur labor. This paragraph (3) of subsection (o) will apply to a remuneration paid after December 31, 1980, except that th paragraph (3) of subsection (o) shall not apply to any payme made before January 1, 1984, by any governmental unit fo positions of a kind for which all or a substantial portion of th social security employee taxes were paid by such governmenta unit (without deduction from the remuneration of the employee under the practices of such governmental unit in effect o October 1, 1980;

(4) Notwithstanding the foregoing provisions of this subsec tion (o), "total wages" mean the gross amount paid by an em ployer to such employer's employees with respect to a week month, year or other period as required by subsection (c)(2) of K.S.A. 44-710, and amendments thereto.

(p) "Week" means such period or periods of seven consecu tive calendar days, as the secretary may by rules and regulation

prescribe.

(q) "Calendar quarter" means the period of three consecutive calendar months ending March 31, June 30, September 30, or December 31, or the equivalent thereof as the secretary may by rules and regulations prescribe.

(r) "Insured work" means employment for employers.

(s) "Approved training" means any vocational training course or course in basic education skills approved by the secretary or a person or persons designated by the secretary.

(t) "American vessel" or "American aircraft" means any vessel or aircraft documented or numbered or otherwise registered under the laws of the United States; and any vessel or aircraft which is neither documented or numbered or otherwise registered under the laws of the United States nor documented under the laws of any foreign country, if its crew performs service solely for one or more citizens or residents of the United States or corporations organized under the laws of the United States or of any state.

(u) "Institution of higher education," for the purposes of this section, means an educational institution which:

(1) Admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(2) Is legally authorized in this state to provide a program of education beyond high school;

(3) Provides an educational program for which it awards a bachelor's or higher degree, or provides a program which is acceptable for full credit toward such a degree, a program of postgraduate or postdoctoral studies, or a program of training to prepare students for gainful employment in a recognized occupation; and

(4) Is a public or other nonprofit institution;.

~~(5)~~ Notwithstanding any of the foregoing provisions of this subsection (u), all colleges and universities in this state are institutions of higher education for purposes of this section.

(v) "Educational institution" means any institution of higher education, as defined in subsection (u) of this section, or any

institution in which participants, trainees or students are offe an organized course of study or training designed to transfe them knowledge, skills, information, doctrines, attitudes or a ities from, by or under the guidance of an instructor or tea and which is approved, licensed or issued a permit to operat a school by the state department of education or other gov ment agency that is authorized within the state to appr license or issue a permit for the operation of a school. courses of study or training which an educational institu offers may be academic, technical, trade or preparation for g ful employment in a recognized occupation.

(w) (1) "Agricultural labor" means any remunerated serv

(A) On a farm, in the employ of any person, in connec with cultivating the soil, or in connection with raising or vesting any agricultural or horticultural commodity, inclu the raising, shearing, feeding, caring for, training, and man ment of livestock, bees, poultry, and fur-bearing animals wildlife.

(B) In the employ of the owner or tenant or other operator farm, in connection with the operating, management, conse tion, improvement, or maintenance of such farm and its tools equipment, or in salvaging timber or clearing land of brush other debris left by a hurricane, if the major part of such ser is performed on a farm.

(C). In connection with the production or harvesting of commodity defined as an agricultural commodity in sec (15)(g) of the agricultural marketing act, as amended (46 S 1500, sec. 3; 12 U.S.C. 1141j) or in connection with the ginnin cotton, or in connection with the operation or maintenanc ditches, canals, reservoirs or waterways, not owned or oper for profit, used exclusively for supplying and storing wate farming purposes.

(D) (i) In the employ of the operator of a farm in handl planting, drying, packing, packaging, processing, freezing, g ing, storing, or delivering to storage or to market or to a carrier transportation to market, in its unmanufactured state, any a cultural or horticultural commodity; but only if such oper

produced more than 1/2 of the commodity with respect to which such service is performed;

(ii) In the employ of a group of operators of farms (or a cooperative organization of which such operators are members) in the performance of service described in paragraph (i) above of this subsection (w)(1)(D), but only if such operators produced more than 1/2 of the commodity with respect to which such service is performed;

(iii) The provisions of paragraphs (i) and (ii) above of this subsection (w)(1)(D) shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

(E) On a farm operated for profit if such service is not in the course of the employer's trade or business.

(2) "Agricultural labor" does not include service performed prior to January 1, 1980, by an individual who is an alien admitted to the United States to perform service in agricultural labor pursuant to sections 214(c) and 101(a)(15)(H) of the immigration and nationality act.

(3) As used in this subsection (w), the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses, or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(x) "Reimbursing employer" means any employer who makes payments in lieu of contributions to the employment security fund as provided in subsection (e) of K.S.A. 44-710 and amendments thereto.

(y) "Contributing employer" means any employer other than a reimbursing employer or rated governmental employer.

(z) "Wage combining plan" means a uniform national arrangement approved by the United States secretary of labor in consultation with the state unemployment compensation agencies and in which this state shall participate, whereby wages earned in one or more states are transferred to another state,

called the "paying state," and combined with wages in the paying state, if any, for the payment of benefits under the laws of the paying state and as provided by an arrangement so approved by the United States secretary of labor.

(aa) "Domestic service" means any service for a person in the operation and maintenance of a private household, local college club or local chapter of a college fraternity or sorority, as distinguished from service as an employee in the pursuit of an employer's trade, occupation, profession, enterprise or vocation.

(bb) "Rated governmental employer" means any governmental entity which elects to make payments as provided by K.S.A. 44-710d and amendments thereto.

(cc) "Benefit cost payments" means payments made to the employment security fund by a governmental entity electing to become a rated governmental employer.

(dd) "Successor employer" means any employer, as described in subsection (h) of this section, which acquires or in any manner succeeds to (1) substantially all of the employing enterprises, organization, trade or business of another employer or (2) substantially all the assets of another employer.

(ee) "Predecessor employer" means an employer, as described in subsection (h) of this section, who has previously operated a business or portion of a business with employment to which another employer has succeeded.

Sec. 2. K.S.A. 1983 Supp. 44-704 is hereby amended to read as follows: 44-704. (a) *Payment of benefits.* All benefits provided herein shall be payable from the fund. All benefits shall be paid through the secretary of human resources, in accordance with such rules and regulations as the secretary may adopt. Benefits based on service in employment defined in subsections (i)(3)(E) and (i)(3)(F) of K.S.A. 44-703 and amendments thereto, shall be payable in the same amount, on the same terms and subject to the same conditions as compensation payable on the basis of other service subject to this act except as provided in subsection (e) of K.S.A. 44-705 and subsection (e)(2) of K.S.A. 44-711, and any amendments to these statutes.

(b) *Determined weekly benefit amount.* An individual's de-

termined weekly benefit amount shall be an amount equal to 4.25% of the individual's total wages for insured work paid during ~~that calendar quarter~~ *the highest two consecutive calendar quarters* of the individual's base period in which such total wages were highest, subject to the following limitations:

(1) If an individual's determined weekly benefit amount is less than the minimum weekly benefit amount, it shall be raised to such minimum weekly benefit amount;

(2) if the individual's determined weekly benefit amount is more than the maximum weekly benefit amount, it shall be reduced to the maximum weekly benefit amount; and

(3) if the individual's determined weekly benefit amount is not a multiple of $1, it shall be raised to the next higher multiple of $1, except that for all new claims for benefits filed after June 30, 1983, it shall be reduced to the next lower multiple of $1.

(c) *Maximum weekly benefit amount.* On July 1 of each year, the secretary shall determine the maximum weekly benefit amount by computing 60% of the average weekly wages paid to employees in insured work during the previous calendar year and shall prior to that date announce the maximum weekly benefit amount so determined, by publication in the Kansas register, except that (1) the maximum weekly benefit amount for the twelve-month period commencing on July 1, 1983, shall not be more than the maximum weekly benefit rate for the twelve-month period commencing on July 1, 1982, and (2) if the surcharge for calendar year 1984 is assessed against employers under subsection (a) of K.S.A. 1983 Supp. 44-710h, the maximum weekly benefit amount for the twelve-month period commencing on July 1, 1984, shall not be more than the maximum weekly benefit rate for the twelve-month period commencing on July 1, 1982. Such computation shall be made by dividing the gross wages reported as paid for insured work during the previous calendar year by the product of the average of midmonth employment during such calendar year multiplied by 52. The maximum weekly benefit amount so determined and announced for the twelve-month period shall apply only to those claims filed in that period qualifying for maximum payment under the foregoing formula. All claims qualifying for payment at the maximum weekly benefit amount shall be paid at the maximum weekly benefit amount in effect when the benefit year to which the claim relates was first established, notwithstanding a change in the maximum benefit amount for a subsequent twelve-month period. If the computed maximum weekly benefit amount is not a multiple of $1, then the computed maximum weekly benefit amount shall be computed to the nearest multiple of $1, except that for maximum weekly benefit amounts determined after June 30, 1983, the computed maximum weekly benefit amount shall be reduced to the next lower multiple of $1.

(d) *Minimum weekly benefit amount.* The minimum weekly benefit amount payable to any individual shall be 25% of the maximum weekly benefit calculated in accordance with subsection (c) and shall be announced by the secretary in conjunction with the published announcement of the maximum weekly benefit, also as provided in subsection (c). The minimum weekly benefit amount so determined and announced for the twelve-month period beginning July 1 of each year shall apply only to those claims which establish a benefit year filed within that twelve-month period and shall apply through the benefit year of such claims notwithstanding a change in said amount in a subsequent twelve-month period. If the minimum weekly benefit amount is not a multiple of $1 it shall be reduced to the next lower multiple of $1.

(e) *Weekly benefit payable.* Each eligible individual who is unemployed with respect to any week shall, except as to final payment, be paid with respect to such week a benefit in an amount equal to such individual's determined weekly benefit amount, less that part of the wage, if any, payable to such individual with respect to such week which is in excess of $8 and if the resulting amount is not a multiple of $1, it shall be computed to the next higher multiple of $1, except that for all weeks payable after June 30, 1983, it shall be reduced to the next lower multiple of $1. For the purpose of this section, remuneration received for services performed on a public assistance work project shall not be construed as wages.

(f) *Duration of benefits.* Any otherwise eligible individual shall be entitled during any benefit year to a total amount of benefits equal to whichever is the lesser of 26 times such individual's weekly benefit amount, or 1/3 of such individual's wages for insured work paid during such individual's base period. Such total amount of benefits, if not a multiple of $1, shall be computed at the next higher multiple of $1, except that for new claims filed after June 30, 1983, such total amount of benefits, if not a multiple of $1, shall be reduced to the next lower multiple of $1.

(g) For the purposes of this section, wages shall be counted as "wages for insured work" for benefit purposes with respect to any benefit year only if such benefit year begins subsequent to the date on which the employing unit by whom such wages were paid has satisfied the conditions of subsection (h) of K.S.A. 44-703 and amendments thereto with respect to becoming an employer.

Sec. 3. K.S.A. 1983 Supp. 44-710a is hereby amended to read as follows: 44-710a. (a) *Classification of employers by the secretary.* The term "employer" as used in this section refers to contributing employers. The secretary shall classify employers in accordance with their actual experience in the payment of contributions on their own behalf and with respect to benefits charged against their accounts with a view of fixing such contribution rates as will reflect such experience. If, as of the date such classification of employers is made, the secretary finds that any employing unit has failed to file any report required in connection therewith, or has filed a report which the secretary finds incorrect or insufficient, the secretary shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to the secretary at the time, and notify the employing unit thereof by mail addressed to its last-known address. Unless such employing unit shall file the report or a corrected or sufficient report as the case may be, within 15 days after the mailing of such notice, the secretary shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increase but not to reduction on t

basis of subsequently ascertained information. The secreta shall determine the contribution rate of each employer in a cordance with the requirements of this section.

(1) *New employers.* (A) No employer will be eligible for rate computation until there have been 24 consecutive calend months immediately preceding the computation date through which benefits could have been charged against such employe account.

(B) (i) Effective January 1, 1983, employers who are n eligible for a rate computation shall pay contributions at a assigned rate equal to the sum of 1% plus the greater of th average rate assigned in the preceding calendar year to a employers in such industry division or the average rate assigne to all covered employers during the preceding calendar yea except that in no instance shall any such assigned rate be le than 2%. Employers engaged in more than one type of industri activity shall be classified by principal activity. All rates assigne will remain in effect for a complete calendar year. If the sale acquisition of a new establishment would require reclassific tion of the employer to a different industry division, the em ployer would be promptly notified, and the contribution ra applicable to the new industry division would become effectiv the following January 1.

(ii) For purposes of this subsection (a), employers shall b classified by industrial activity in accordance with standar procedures as set forth in rules and regulations adopted by th secretary.

(C) "Computation date" means June 30 of each calendar ye with respect to rates of contribution applicable to the calenda year beginning with the following January 1. In arriving a contribution rates for each calendar year, contributions paid o or before July 31 following the computation date for employmer occurring on or prior to the computation date shall be considere for each contributing employer who has been subject to this ac for a sufficient period of time to have such employer's rat computed under this subsection (a).

(2) *Eligible employers.* (A) A reserve ratio shall be computed for each eligible employer by the following method: Total benefits charged to the employer's account for all past years shall be deducted from all contributions paid by such employer for all such years. The balance, positive or negative, shall be divided by the employer's average annual payroll, and the result shall constitute the employer reserve ratio.

(B) Negative account balance employers as defined in subsection (d) shall pay contributions at the rate of 5.4% for calendar year 1983 and all years thereafter.

(C) Eligible employers, other than negative account balance employers, who do not meet the average annual payroll requirements as stated in subsection (a)(2) of K.S.A. 44-703 and amendments thereto, will be issued the maximum rate indicated in subsection (a)(3)(C) of this section until an average annual payroll can be obtained. Contribution rates effective for each calendar year thereafter shall be determined as prescribed below.

(D) As of each computation date, the total of the taxable wages paid during the twelve-month period prior to the computation date by all employers eligible for rate computation, except negative account balance employers, shall be divided into 21 approximately equal parts designated in column A of schedule I as "rate groups." The lowest numbered of such rate groups shall consist of the employers with the most favorable reserve ratios, as defined in this section, whose combined taxable wages paid are less than 4.76% of all taxable wages paid by all eligible employers. Each succeeding higher numbered rate group shall consist of employers with reserve ratios that are less favorable than those of employers in the preceding lower numbered rate groups and whose taxable wages when combined with the taxable wages of employers in all lower numbered rate groups equal the appropriate percentage of total taxable wages designated in column B of schedule I. Each eligible employer, other than a negative account balance employer, shall be assigned an experience factor designated under column C of schedule I in accordance with the rate group to which the employer is assigned on the basis of the employer's reserve ratio and taxable payroll. If an employer's taxable payroll falls into more than one rate group the employer shall be assigned the experience factor of the lower numbered rate group. If one or more employers have reserve ratios identical to that of the last employer included in the next lower numbered rate group, all such employers shall be assigned the experience factor designated to such last employer, notwithstanding the position of their taxable payroll in column B of schedule I.

SCHEDULE I — Eligible Employers

Column A Rate group	Column B Cumulative taxable payroll	Column C Experience factor (Ratio to total wages)
1	Less than 4.76%	.025%
2	4.76% but less than 9.52	.1
3	9.52 but less than 14.28	.2
4	14.28 but less than 19.04	.3
5	19.04 but less than 23.80	.4
6	23.80 but less than 28.56	.5
7	28.56 but less than 33.32	.6
8	33.32 but less than 38.08	.7
9	38.08 but less than 42.84	.8
10	42.84 but less than 47.60	.9
11	47.60 but less than 52.36	1.0
12	52.36 but less than 57.12	1.1
13	57.12 but less than 61.88	1.2
14	61.88 but less than 66.64	1.3
15	66.64 but less than 71.40	1.4
16	71.40 but less than 76.16	1.5
17	76.16 but less than 80.92	1.6
18	80.92 but less than 85.68	1.7
19	85.68 but less than 90.44	1.8
20	90.44 but less than 95.20	1.9
21	95.20 and over	2.0

(E) Negative account balance employers shall, in addition to paying the rate provided for in subsection (a)(2)(B) of this section, pay a surcharge based on the size of the employer's negative reserve ratio, the calculation which is provided for in subsection (a)(2) of this section. The amount of the surcharge shall be determined from column B of schedule II of this section. Each negative account balance employer who does not satisfy the requirements to have an average annual payroll, as defined by subsection (a)(2) of K.S.A. 44-703 and amendments thereto, shall be assigned a surcharge of 1%. Contribution payments made pursuant to this subsection (a)(2)(E) shall be credited to the appropriate account of such negative account balance employer.

SCHEDULE II — Surcharge on Negative Accounts

Column A Negative Reserve Ratio	Column B Surcharge as a percent of taxable wages
Less than 2.0%	0.10%
2.0% but less than 4.0	.20
4.0 but less than 6.0	.30
6.0 but less than 8.0	.40
8.0 but less than 10.0	.50
10.0 but less than 12.0	.60
12.0 but less than 14.0	.70
14.0 but less than 16.0	.80
16.0 but less than 18.0	.90
18.0 and over	1.00

(3) *Planned yield.* (A) The average required yield shall be determined from schedule III of this section, and the planned yield on total wages in column B of schedule III shall be determined by the reserve fund ratio in column A of schedule III. The reserve fund ratio shall be determined by dividing total assets in the employment security fund provided for in subsection (a) of K.S.A. 44-712 *and amendments thereto*, excluding all moneys credited to the account of this state pursuant to section 903 of the social security act, as amended, which have been appropriated by the state legislature, whether or not withdrawn from the trust fund, and excluding contributions not yet paid on July 31 by total payrolls for contributing employers for the preceding fiscal year which ended June 30.

SCHEDULE III — Fund Control Ratios to Total Wages

Column A Reserve Fund Ratio	Column B Planned Yield
5.00% and over	0.40%
4.75 but less than 5.00%	.50
4.50 but less than 4.75	.60
4.25 but less than 4.50	.70
4.00 but less than 4.25	.80
3.75 but less than 4.00	.85
3.50 but less than 3.75	.90
3.25 but less than 3.50	.95
3.00 but less than 3.25	1.00
2.75 but less than 3.00	1.05
2.50 but less than 2.75	1.10
2.25 but less than 2.50	1.15
2.00 but less than 2.25	1.20
1.75 but less than 2.00	1.30
1.50 but less than 1.75	1.40
1.25 but less than 1.50	1.50
1.00 but less than 1.25	1.60
Less than 1.00%	1.70

(B) *Adjustment to taxable wages.* The planned yield as a

percent of total wages, as determined in this subsection (a)(3), shall be adjusted to taxable wages by multiplying by the ratio of total wages to taxable wages for all contributing employers for the preceding fiscal year ending June 30.

(C) *Effective rates.* Except with regard to rates for negative account balance employers, employer contribution rates to be effective for the ensuing calendar year shall be computed by adjusting proportionately the experience factors from schedule I of this section to the required yield on taxable wages. For the purposes of this subsection (a)(3), all rates computed shall be rounded to the nearest .01% and for calendar year 1983 and ensuing calendar years, the maximum effective contribution rate shall not exceed 5.4%.

(b) *Successor classification.* (1) For the purposes of this subsection (b), whenever an employing unit, whether or not it is an "employing unit" within the meaning of subsection (g) of K.S.A. 44-703 and amendments thereto, becomes an employer pursuant to subsection (h)(4) of K.S.A. 44-703 and amendments thereto or is an employer at the time of acquisition and meets the definition of a "successor employer" as defined by subsection (dd) of K.S.A. 44-703 and amendments thereto and is controlled substantially either directly or indirectly by legally enforceable means or otherwise by the same interest or interests, shall acquire the experience rating factors of the predecessor employer. These factors consist of all contributions paid, benefit experience and annual payrolls of the predecessor employer.

(2) A successor employer as defined by subsection (h)(4) or subsection (dd) of K.S.A. 44-703 and amendments thereto may receive the experience rating factors of the predecessor employer if an application is made to the secretary or the secretary's designee in writing within 120 days of the date of the transfer.

(3) Whenever an employing unit, whether or not it is an "employing unit" within the meaning of subsection (g) of K.S.A. 44-703 and amendments thereto, acquires or in any manner succeeds to a percentage of an employer's annual payroll which is less than 100% and intends to continue the acquired percentage as a going business, may acquire the same percentage of the

predecessor's experience factors if: (A) The predecessor employer and successor employing unit make an application in writing on the form prescribed by the secretary, (B) the application is submitted within 120 days of the date of the transfer, (C) the successor employing unit is or becomes an employer subject to this act immediately after the transfer, (D) the percentage of the experience rating factors transferred shall not be thereafter used in computing the contribution rate for the predecessor employer, and (E) the secretary finds that such transfer will not tend to defeat or obstruct the object and purposes of this act.

(4) If the acquiring employing unit was an employer subject to this act prior to the date of the transfer, the rate of contribution for the period from such date to the end of the then current contribution year shall be the same as the contribution rate prior to the date of the transfer. An employing unit which was not subject to this act prior to the date of the transfer shall have a newly computed rate based on the transferred experience rating factors as of the computation date immediately preceding the date of acquisition. These experience rating factors consist of all contributions paid, benefit experience and annual payrolls.

(5) Whenever an employer's account has been terminated as provided in subsections (d) and (e) of K.S.A. 44-711 and amendments thereto and the employer continues with employment to liquidate the business operations, that employer shall continue to be an "employer" subject to the employment security law as provided in subsection (h)(8) of K.S.A. 44-703 and amendments thereto. The rate of contribution from the date of transfer to the end of the then current calendar year shall be the same as the contribution rate prior to the date of the transfer. At the completion of the then current calendar year, the rate of contribution shall be that of a "new employer" as described in subsection (a)(1) of K.S.A. 44-710a and amendments thereto.

(6) No rate computation will be permitted an employing unit succeeding to the experience of another employing unit pursuant to this section for any period subsequent to such succession except in accordance with rules and regulations adopted by the secretary. Any such regulations shall be consistent with federal

requirements for additional credit allowance in section 3303 of the internal revenue code, and consistent with the provisions of this act.

(c) *Voluntary contributions.* Notwithstanding any provision of this act or the act of which this act is amendatory, any employer may make voluntary payments for the purpose of reducing or maintaining a reduced rate in addition to the contributions required under this section. Such voluntary payments may be made only during the thirty-day period immediately following the date of mailing of experience rating notices for a calendar year. All such voluntary contribution payments shall be paid prior to the expiration of 120 days after the beginning of the year for which such rates are effective. The amount of voluntary contributions shall be credited to the employer's account as of the next preceding computation date and the employer's rate shall be computed accordingly, except that no employer's rate shall be reduced more than two rate groups as provided in schedule I of this section as the result of a voluntary payment. An employer not having a negative account balance may have such employer's rate reduced not more than two rate groups as provided in schedule I of this section as a result of a voluntary payment. An employer having a negative account balance may have such employer's rate reduced to that prescribed for rate group 21 of schedule I of this section by making a voluntary payment in the amount of such negative account balance or to that rate prescribed for rate group 20 of schedule I of this section by making an additional voluntary payment that would increase such employer's reserve ratio to the lower limit required for such rate group 20. Under no circumstances shall voluntary payments be refunded in whole or in part.

(d) As used in this section, "negative account balance employer" means an eligible employer whose total benefits charged to such employer's account for all past years have exceeded all contributions paid by such employer for all such years.

(e) If an employer's account has not been charged with any benefits paid for the past two years, the employer's contribution

rate shall be the same as it was in the previous year, unless the contribution rate for all employers is increased.

Sec. 4. K.S.A. 1983 Supp. 44-703, 44-704 and 44-710a are hereby repealed.

Sec. 5. This act shall take effect and be in force from and after its publication in the statute book.