Approved Arthur Douville 4-22-86
Date

MINUTES OF THE House COMMITTEE ON Labor and Industry.

The meeting was called to order by Representative Arthur Douville at
Chairperson

9:00 a.m./~~p.m.~~ on March 26, 1986 in room 526-S of the Capitol.

All members were present except:

Representative R.D. Miller, excused.

Committee staff present:

All present.

Conferees appearing before the committee:

Mr. Bud Langston, KS Dept. of Human Res., Div. of Workers' Comp.
Mr. Gabriel R. Faimon, Director of the Minninger Rehabilitation Research and Training Center on Preventing Disability Dependence
Mr. Lee Kinch, KS Trial Lawyers Association

Rep. Douville opened the meeting with some history on S.B. 365. He said that S.B. 365 was passed out last year by the Senate on a 40 to nothing vote. He said that S.B. 365 has the informal endorsement of labor and industry. It is indicated as a vocational rehabilitation bill. Rep. Douville asked the DHR what is being done in the field of rehabilitation. Mr. Bud Langston said that in the last year there were 833 active rehabilitation cases. He said that a small number were successfully rehabilitated and that 339 of those cases were involved in education or on the job training of some kind. 430 of the 833 cases were referred over to vocational rehabilitation which is with Social Rehabilitation Services, a different division. Mr. Langston said his department has a total staff of 4 people including himself. Rep. Douville said that it is his understanding that employers don't want to engage in vocational rehabilitation because of the Antwi decision.

The Chairman called Mr. Gabriel Faimon to speak as a proponent of S.B. 365 (see attachment #1). A question and answer period followed. The next speaker was Mr. Lee Kinch an opponent of S.B. 365. Mr. Kinch passed out to the committee members a detailed analysis of the bill and written testimony (see attachments #2 and #3). Mr. Kinch answered questions of the committee members.

The meeting was adjourned at 10:00 a.m.

HOUSE COMMITTEE ON
LABOR AND INDUSTRY

Guest List

Date March 26, 1986

Name	City	Representing
Rob Hodges	Topeka	KCCI
Marjorie Wright	Topeka	Menninger Foundation
Paul Dauller	Lawrence	Menninger Foundation
Gabe Faimon	Auburn	Menninger Foundation
J.A. Dodd	Wichita	Ks State [illegible]
[illegible]	Newton	Ks Assn [illegible]
Joan Watson	Topeka	Rehab Serv - SRS
Dick Thomas	Topeka	Rehab Service - SRS
Gary Fennie	Topeka	KDHR/WC
John Rathmel	"	KDHR/WC
Bill Morrissey	"	"
Bud Langston	"	"
Chris Courtwright	"	KS. Ins. Dept
Bob Eighmeteil	—	KTLA.
Lee Kinch		KTLA
Jim SKETLAR	Overland Park,	KTLA
Mike Dreiling	Topeka	Menninger Fd
John C. Bottenberg	Topeka	Mobil & Assoc
DAN MORGAN	Topeka	AGC of KS

COMMENTS REGARDING SENATE BILL NO. 365

Before the House Committee on Labor and Industry

March 26, 1986

I am Gabriel R. Faimon, director of the Menninger Rehabilitation Research and Training Center on Preventing Disability Dependence. The Center focuses research on workers who have become disabled--but who are still capable of gainful employment--and what needs to (or can) be done to prevent these workers from becoming dependent because of their disability.

Workers who become disabled and do not return to work loose their financial independence. In other words they become disability dependent. Individuals with disabilities, particularly workers who are not employed and want to work, become trapped in a world of personal frustration, insecurity, unwanted social dependence, and loss of self esteem. They are accustomed to working, contributing, and participating in the community.

Through its research, the Center estimates that 569,000 workers (ages 16 - 64) each year are leaving the work force for five or more months because of physically disabling injury or illness. The Center estimates that presently the public and private sectors combine to spend well over $100 billion annually to support workers who become disabled in the form of transfer payments, lost work days, litigation, medical expenses, replacement personnel costs, etc. In addition, the economy loses productivity of experienced workers, often at an age when they could be most productive.

The development and passage of workers' compensation statutes in the early 1900s was hailed as an "industrial bargain" entered into by the employee and the employer. In theory, the employee gave up the right to sue the employer for negligence and possibly receiving a potentially greater damage award, and the employer surrendered the common law defense available on negligence actions. In exchange, the employee was entitled to prompt but modest compensation for injuries (or one's dependents for death) arising out of the employment relationship, regardless of fault. The employer avoided costly litigation and faced fixed and limited liability that could be covered by insurance. An important economic and social theory underlying the workers' compensation idea was that the cost of employment related injuries, diseases, and deaths should be ultimately be borne by consumers as part of the cost of products or services. Thus, in theory, these costs would be properly distributed throughout society.

In practice, over the years, unintended consequences of law have shattered the idealistic genesis of workers' compensation in most instances. Some of the most significant unintended consequences of law include:

1. The philosophical base, built 50 or more years ago, assumes workers who become disabled cannot or should not work, failing to allow for, or respond to advances in medicine, technology, rehabilitation engineering, etc., in a timely fashion.

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Attachment #1

2. Policies and procedures governing workers' compensation generally require the worker to prove that he or she cannot work, forcing the worker to separate from the work force to establish eligibility for benefits, rather than encouraging continued participation in the work force despite disability.

3. Removal of workers who become disabled from the workplace serves to continue to reinforce fear and ignorance of disability, confirming old and obsolete perceptions that persons who are disabled cannot or should not work.

4. Traditional approaches to labor-management relations, sanctioned by statutes and regulations, promote an adversarial effort rather than foster a collaborative effort to return to work the worker who becomes disabled.

To overcome some of the unintended consequences of law, the Kansas Workmen's Compensation Act was amended in 1974 to incorporate, for the first time, provisions for a rehabilitation program. The amendment envisioned returning the worker to work. The worker who could not go back to former employment or engage in other gainful employment would benefit financially and psychologically by a program of rehabilitation, returning the worker to gainful employment and regular wages, rather than relying solely upon compensation benefits. Placing the additional burden on the employer to finance a rehabilitation program was not contested because of the obvious benefit to the employer. Theoretically, as a benefit to the employer decreased under a rehabilitation program, the benefits to the worker would also decrease, providing employers with a reason to support and encourage workers to take advantage of rehabilitation to avoid development of an adversary climate where a more strict construction of the rehabilitation statute would be applied. The insurance industry supported this concept of rehabilitation because an otherwise unproductive person could be helped to contribute to the economy by engaging in substantial and gainful employment and thus reduce overall costs. The 1979 interpretation of the Amendment by the Court in the Antwi decision scuttled the benefits that were anticipated for workers, employers, and insurers. Employers and insurers were left with no incentive or credit for efforts to rehabilitate or return to work the injured employee who became disabled.

The 1974 amendment, incorporated as K.S.A. 44-510g., states: "A primary purpose of the workmen's compensation act shall be to restore the injured employee to substantial and gainful employment." That purpose is not being met, as attested by worker, employer, and insurance carrier representatives before the Special Committee on Labor and Industry which studied Proposal No. 29 during the summer and fall of 1984. Four members of this House Committee were also members of that panel which heard the details of how and why K.S.A. 44-510g. was not working. Senate Bill No. 365 is an attempt to remedy some of the unintended consequences of law. Although the Bill encompasses some 18 pages, the central part of the remedy is included in four pages encompassing New Section 7. Most of the remaining document relates to conforming language to make New Section 7 operational.

Not only should a primary purpose of the Act be to restore the injured worker to substantial and gainful employment, the Act should be carefully designed to promote return to work in a most uncomplicated, direct, responsive, and accountable manner. The legislation should foster direct and continued communication by and among the principal parties, i.e., injured worker (union member if applicable), employer, insurance carrier (if applicable), and service provider(s). Accordingly rehabilitation should be considered as synonymous with "return to work."

Key factors to successful return to work efforts include: (1) immediacy; (2) attitudes; and (3) incentives. The immediacy of return to work efforts, just like justice, must be sure and swift or they cease to be either timely or produce a desirable result. Time is the biggest detriment to immediacy because it allows for emotional rather than psychological problems to develop that often take the form of adversarial approaches between the employee and the employer and/or family disintegration. Communication between the principals (employee, employer, insurance carrier, and provider) facilitates immediacy, erasing fears of the unknown and potential problems of blacklisting and stigma. The attitudes of all the principals must be positive, striving to achieve cooperation, communication, coordination, and mutual respect. Negative attitudes foster adversarial moods leading to litigation. Litigation takes time and polarizes the principals away from return to work efforts. Incentives must exist for all the principals, fostering a team or win-win spirit, recognizing return to work as a right, an obligation, and a responsibility held jointly by the principals.

The return to work process entails consideration of six elements, including: (1) identification; (2) recovery; (3) management; (4) work options; (5) work content; and (6) retention. Identification includes timely and accurate identification of the worker, the disability and other determining factors, such as insurance provisions or labor-management contract provisions. Recovery includes appropriate medical management for review and objective interpretation of the injured worker's medical record, consultation with the physician for clarification of medical aspects of the prognosis and recovery process, discussion with the injured worker to explain the medical plan and determine the worker's attitude toward recovery and return to employment, contact with the employer to determine work requirements of the job and acceptance of possible employee limitations, and narrative reports to assist the insurer to monitor the case. Rehabilitation management entails organizing the information and insuring continual flow by and among the principals, development and initiation of the rehabilitation (return to work) plan, and identification of resources to be devoted to the effort. Work options include considering (depending upon the extent and type of disability) the amount of time the worker may need for the transition back to work, whether the worker can endure part or full time activity, whether the worker will pursue the same or a different occupation, and where the work will be done. Work content should be based upon an objective analysis of the mental and physical demands of the job, combined with an objective analysis of the residual mental and physical capacities of the injured worker. Once these analyses are completed, the possibilities of job, equipment, time, and/or worksite modification should be taken into account to ensure that the work continues to get done. The retention element of the process should ensure that a communications system is maintained between the

principals to identify and resolve problems before they become major incidents once the disabled worker returns to work.

To avoid and/or overcome unintended consequences of law, to restore an injured employee to substantial and gainful employment, the Act should not promote dependence because of disability. New Section 7 presents return to work in an elective manner, while also permitting for either private or public providers to become involved in the return to work process. It must reestablish primacy of the job--of returning to the job--through a win-win orientation for all principals involved in the return to work process.

While Senate Bill No. 365 may not be a flawless piece of legislation, it is a step in the right direction, a step in the direction of preventing disability dependence due to work related injury.

Respectfully submitted,

Gabriel R. Faimon
Director
Research and Training Center
The Menninger Foundation
Division of Rehabilitation Programs

913 233 2051

March 26, 1986

GRF:eb

K.T.L.A. TASK FORCE ANALYSIS OF SENATE BILL NO. 365

E. L. Lee Kinch, Chairperson

This analysis will describe the changes to the existing law proposed by Senate Bill No. 365 and will comment upon its practical implications.

Section 1 is an amendment to K.S.A. 44-510d, commonly called "the schedule of injuries" and hereinafter referred to as the "schedule of disabilities." The only substantive change proposed by Section 1 is in Subsection (b) which provides that temporary total disability benefits paid during the period of vocational rehabilitation evaluation or training will not be deducted from the number of weeks provided for in the schedule for the disability in question.

The workers' compensation law classifies disabilities as scheduled and non-scheduled. Scheduled disabilities consist of, for example, the loss of or the permanent partial loss of use of a finger, hand, forearm, arm, toe, foot, lower leg, leg and eye. Non-scheduled disabilities consist of disabilities not covered by the schedule of disabilities, e.g., back disability, and, in addition, disability arising from injury to combination of certain scheduled disabilities, e.g., both eyes, both hands, both arms, both feet, both legs or any combination thereof.

An example may serve to clarify the proposed amendment. Assume that a carpenter sustains an injury resulting in the loss of his right hand. The schedule of disabilities presently provides 150 weeks of compensation plus a healing period of not to exceed 15 weeks for the loss of a hand payable at not to exceed $239.00 a week. Assume that after a six-month period of medical rehabilitation, the carpenter is unable to resume his trade or other comparable gainful employment and undertakes a six-month period of vocational rehabilitation evaluation and training. Under this amendment the six-month period of vocational rehabilitation evaluation and training will not be deducted from the 65 weeks. The amendment does not, however, change the present practice under the law of crediting the weeks of temporary total disability paid during medical rehabilitation against the scheduled period. The carpenter under the example would be paid a total of 191 weeks of compensation for the loss of his hand.

It should be noted that this amendment applies only to scheduled disabilities. It will not change the present practice of crediting temporary total disability benefits paid during vocational rehabilitation against the period provided for permanent partial disability in cases of non-scheduled disability. It is difficult to discern what rational basis there may be for drawing this kind of discriminatory distinction between scheduled and non-scheduled disabilities with respect to vocational rehabilitation. It is this kind of irrational distinction that invites litigation.

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Finally, Section 1 increases the maximum number of weeks provided for healing periods from 15 to 21.

Section 2 amends the present standard of disability evaluation applicable in permanent partial non-scheduled disability cases. If enacted, it will have a profound affect upon the administration of the Workers' Compensation Act and the amount of compensation paid to disabled workers in this state.

Non-scheduled disability, it will be recalled, consists of disabilities not covered by the schedule of disabilities. This amendment relates to the standard of assessing disability in permanent partial non-scheduled cases. The present standard has come to be known as an occupational or work standard because it fixes the amount of compensation by assessing the extent to which the workers' ability to engage in the same type of employment performed at the time of the injury has been impaired. The occupational standard of disability evaluation was formulated by the Supreme Court in a line of cases having their roots in the 1930's and culminating in a definitive statement of the standard by the Court in 1966 in Puckett v. Minter Drilling Co., 196 Kan. 196 (1966). In 1974 the legislature announced its approbation of the standard by codifying it in K.S.A. 44-510e.

The practical application of the present standard is shown by the following example. Assume a journeyman carpenter who sustains a compensable injury to his low back resulting in a ruptured disc and surgery followed by 15% permanent partial impairment and work restrictions which render him incapable of performing 50% of the duties of a journeyman carpenter. An appropriate application of the occupational standard would fix the amount of compensation by determining the extent to which the impairment renders the carpenter unable to perform the duties of a carpenter. In this case the award should be a 50% permanent partial disability.

The proposed amendment would repeal the present standard and replace it with a standard which fixes the amount of compensation by establishing to what extent the worker's ability to obtain or perform work of a type that he or she was reasonably able to obtain or perform has been reduced, taking into consideration the worker's age, education, training, previous work experience and physical abilities. Moreover, post-injury earnings are not determinative of the worker's disability and in no event shall the workers' disability be less than the percentage of his or her permanent partial impairment of function.

The proposed standard represents a fundamental departure from the most enlightened and time tested provision of our law. It unrealistically broadens the frame of reference beyond the employee's chosen trade and assesses the extent to which the employee may be disabled from "obtaining or performing" all types of employment which the employee might be able to obtain or perform. It accordingly references not only employment the

employee may have performed in the past but also includes any employment which the employee may have been able to perform in the past and that which he may be able to perform in the future. The proposed standard and the uncertainty of its application will most certainly precipitate a spate of litigation to define its meaning. It will, in addition, dramatically prolong the trial of workers' compensation cases since the workers' disability is to be defined in the context of a multitude of jobs rather than the worker's chosen occupation.

The application of the proposed standard may be illustrated by the following example. Assume a 45-year old journeyman ironworker with a high school education who sustains multiple injuries consisting of a fracture to his right heel and a head injury resulting in an inner ear disturbance and positional vertigo. His combined permanent partial impairment of function is 15%. His doctors, however, admonish him never to work above ground level again. Sixty percent of his work as an ironworker is performed above ground level. His average weekly wage at the time of injury is $550.00. The evidence further shows that the ironworker could reasonably perform the work of a clerk in an automobile parts shop, a self-service station attendent and a used car salesman. Although this ironworker is 60% disabled from his trade as an ironworker, the application of the proposed standard will result in an award for only the impairment of function,15%. The amount of compensation to which the ironworker is entitled under the existing standard and the proposed standard is as follows: (assume 25 weeks of temporary total disability benefits are paid)

Present Standard		Proposed Standard	
550		550	
.60	% of disability	.15	% of disability
330		82.50	
.6667		.6667	
220.01	weekly comp. rate	55.00	weekly comp. rate
390	weeks	390	weeks
*85,803.90		21,450	over 390 weeks

*Maximum award is $75,000 so ironworker would receive an additional $69,025 at the rate of $220.01 a week

The implications of this amendment are ominous for the rights of disabled workers in Kansas. It eviscerates the finest feature of the existing law and replaces it with a standard which, while masquerading as work disability, will in truth result in compensation being based upon impairment of function ratings given by doctors. It eliminates any incentive insurance companies may have to settle claims for compensation in excess of the impairment of function rating and strips the injured worker of his bargaining power to negotiate such settlements. It will precip-

itate a temporary spasm of litigation and over-burdened dockets and will ultimately produce an even more parsimonious workers' compensation system than presently exists.

Section 3 (a) amends the present modification statute by eliminating fraud, undue influence, lack of authority and serious misconduct as grounds for modifying an award. It adds language giving the director authority to modify awards of "impairment or work disability." Subsection (b) repeals language relative to post-injury earnings and earning capacity which is superfluous and makes no change in the existing law. It also gives the director specific authority to suspend payment of compensation ordered paid under an award. Subsection (d) provides that modification of awards shall take effect as of the date of the change of circumstances leading to the modification.

Section 4 (c) provides that no lump sum awards shall be made unless: (1) it is determined that the employee is not in need of vocational rehabilitation, (2) the employee has completed an approved rehabilitation program, or (3) the employee has elected not to participate in rehabilitation.

Section 5 amends the preliminary hearing statute by providing for two additional issues which may be subject to resolution in a preliminary hearing, vis., the payment of temporary total compensation during vocational rehabilitation evaluation or training and the advisability of the vocational rehabilitation plan approved by the rehabilitation administrator. It also gives the director authority to make a preliminary award of medical and temporary total disability compensation against the Workers' Compensation Fund. It also gives the director authority to make appropriate adjustments in medical benefits and temporary total as between the employer and the Fund at the time of the final award.

Section 6 amends the Workers' Compensation Fund Statute by repealing language in Subsection (a) (B) and adding language in subsection (b) which will facilitate shifting liability for compensation from employers and insurance companies to the Workers' Compensation Fund. More particularly, it eliminates medical evidence as a requisite for the director's decision apportioning an award between the insurance company and the Fund. In addition, it provides that an employer's knowledge of an employee's preexisting impairment shall constitute the requisite reservation of the employer with respect to hiring or retaining the employee and, finally, that a treating or examining physician's knowledge of an employee's impairment shall be imputed to the employer.

New Section 7 replaces the existing vocational rehabilitation statute.

Subsection (e) provides that an employee who sustains a compensable injury or occupational disease which prevents him or her from returning to comparable gainful employment shall be entitled to vocational rehabilitation services and shall be referred to the rehabilitation administrator.

Subsection (b)(1) defines "comparable gainful employment" as employment which is reasonably attainable, which the employee can reasonably perform and which returns the employee as close as is feasible to pre-injury economic status.

Subsection (f) provides that the rehabilitation administrator may refer an eligible employee to a facility for an evaluation and a report concerning the questions of the practicability of and need for as well as the most appropriate type of rehabilitation services for the employee in question. Referral by the rehabilitation administrator must be to the Kansas Division of Rehabilitation Services unless its services are unavailable within a period of 60 days in which event the referral may be made to private evaluation facilities. The cost of evaluations by private facilities is paid by the Workers' Compensation Rehabilitation Fund.

Subsection (g) provides that the rehabilitation counselor to whom the employee is referred will formulate and submit a rehabilitation plan to the rehabilitation administrator who shall approve or disapprove the plan within 30 days. An employee or insurance company may apply for a hearing before the director if they disagree with the approval or disapproval of the plan by the rehabilitation administrator.

Subsection (h) provides that, after affording the parties an opportunity to be heard, the director may (1) approve the plan, (2) refer the claim back to the rehabilitation administrator for a further recommendation, (3) order a different plan, or (4) disallow vocational rehabilitation.

New Section 7 provides for three types of vocational rehabilitation training: (1) "Vocational education" which consists of classroom instruction designed to equip the successful pupil with a new marketable skill in comparable gainful employment, (2) "on-the-job training" which consists of training in the workplace designed to equip the successful pupil with a new marketable skill in comparable gainful employment, and (3) "job placement" which consists of 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.

Subsection (k) provides that the employer shall pay temporary total disability compensation during the period of vocational evaluation and during the completion of the plan approved by the rehabilitation administrator.

However, if on-the-job training is approved and implemented,

compensation shall be paid, in the case of non-scheduled disability, based upon the greater of the impairment of function rating or 80% of the difference between "pre-injury wage and post-injury wage earning capability." The language here will invite further litigation to define the perimeters of "post-injury wage earning capability." The employer will, of course, wish to see post-injury wage earning capability inflated so that the compensation will be correspondingly deflated. The employee's interest will be served by a lesser post-injury wage earning capability. The statute is silent with respect to how this issue is to be resolved.

If vocational education is approved and implemented, temporary total compensation shall be paid until completion of the education. Thereafter compensation for non-scheduled disability shall be of the difference between pre-injury wage and post-injury wage earning capability. The issue of "post-injury wage earning capability" will again provoke litigation.

If a worker is maintained in job placement in comparable gainful employment, compensation shall be paid only for the impairment of function rating. It will be recalled that inability to resume comparable gainful employment is that which renders one eligible for vocational rehabilitation. Job placement, by definition, contradicts the eligibility requirement.

Job placement is certain to become a fertile source of new litigation. If an employer, for example, retains an employee to comparable gainful employment following an injury, it will argue that job placement has occurred and its liability is limited to the impairment of function rating. The employee could then settle based upon the impairment rating or litigate the issue of his disability to an award. If the employee elected to settle, the employer could then terminate the employee with impunity. If the employee elected to try his case, he would receive a running award of periodic compensation based upon the impairment rating. The employer could then nevertheless terminate the employee in which event the employee could file an application to modify the award and the issue would then become whether the employee was terminated for good cause or because his disability rendered him incapable to performing comparable gainful employment.

Vocational rehabilitation implies the acquisition of new marketable skills followed by job placement. Under the proposed statute, job placement is treated as a form of vocational rehabilitation even though it provides no new marketable skill. Job placement, moreover, denies the employee of compensation for work disability and relegates him to the status of a recipient of compensation based on a functional impairment rating without any real assurance of job security. While it may be argued that job placement, by definition, means a permanent job, there is not and could not be a statutory guarantee of employment. In truth, the employee's job security is left at the mercy of the market place and the capriciousness of employer paternalism. Meanwhile, he has lost the right to compensation for work disability.

It is important to note that vocational rehabilitation is compulsory for all employees who are unable to resume comparable gainful employment. The refusal of an employee to participate in vocational rehabilitation evaluation and training results in the payment of compensation based only upon the functional impairment rating. The only exception to this onerous rule is when the employee is found to be physically or mentally incapable of receiving vocational rehabilitation.

As presently drafted, Section 7 provides no real advances or advantages over the existing law. The significant change is that it incorporates an incentive for employers to at least temporarily encourage job placement so that their liability for work disability will be eliminated.

Section 7 is no more designed to assure permanency in vocational rehabilitation than is the present law. It is, however, designed to abolish compensation for work disability for all employees who are unable to resume comparable gainful employment. While it is conceivable that some employees whose vocational rehabilitation plan features vocational education or on-the-job training may temporarily receive more than compensation for functional impairment, when job placement finally occurs, however ephemeral it may be, work disability benefits are lost.

New Section 8 creates a workers' compensation rehabilitation fund which will pay the cost of vocational rehabilitation services not paid for by the state. It will be funded by annual assessment against insurance carriers, self-insurers and group-funded workers' compensation pools. The Director of Workers' Compensation will be responsible for administering the fund.

Summary

If enacted as presently drafted, S.B. 365 will have a profound impact on the administration of the law as well as the compensation benefits paid to disabled workers in Kansas. KTLA's objections to the bill are summarized as follows:

1. Section 2 abolishes a humane and well-settled standard of disability evaluation which has been the law in Kansas for 45 years and replaces it with a new standard which will precipitate a spate of litigation, over-burdened dockets, delay and dramatically decrease compensation benefits.

2. New Section 7 represents no real advantage for injured workers over the existing law. It promises, however, plenty of oppressive disadvantages which consist of the following:

    a. Compulsory vocational rehabilitation for all employees unable to resume comparable employment.

b. Job placement which is inconsistent with the eligibility requirement for vocational rehabilitation, which does not assure a new marketable skill, which does not assure a permanent employment but which does assure loss of compensation for work disability.

c. Provisions for vocational education and on-the-job training which feature a new formula for calculating disability compensation which is certain to provoke further litigation.

d. No further assurance than exists in the present law that employees who acquire a new marketable skill will have their earning capacity restored by job placement.

e. Employees who are employed in comparable employment, even temporarily, are assured of the loss of compensation for work disability.

f. Loss of compensation for work disability for all employees who decline to participate in vocational rehabilitation evaluation or training.

g. An unknown number of new employees in the Division of Workers' Compensation and Kansas Division of Rehabilitation Programs necessary to administer this new compulsory vocational rehabilitation law and the new litigation it will provoke.

h. A workers' compensation system which is skewed against the best interests of Kansas employees.

KTLA TESTIMONY CONCERNING
SENATE BILL NO. 365

Mr. Chairman and Members of the Committee. My name is Lee Kinch and I rise on behalf of the Kansas Trial Lawyers Association in opposition to Senate Bill 365. We appreciate very much this opportunity to share with you our views concerning this legislation. Our handout consists of a written copy of my testimony and, in addition, a detailed analysis of the bill.

Sometime during the 1985 legislative session, two men met behind closed doors for the purpose of negotiating a bill that will, if enacted, profoundly impact the rights of approximately 950,000 employees and 63,000 employers. SB 365 is the product of those negotiations.

On March 22, 1985, the bill was introduced in the Senate. Abbreviated hearings were held before the Senate Committee on Labor, Industry and Small Business on March 26 and April 2 of 1985. The bill was represented to the Senate as an "agreed to bill" and was promptly passed out of committee on April 2, 1985. On April 3, 1985, without the slightest application of legislative thoughtfulness, the Kansas Senate, like an obedient robot, placed its imprimatur upon SB 365 by a unanimous vote.

We are grateful to you, Mr. Chairman, for your insightful decision not to proceed in haste concerning this legislation. Your decision has provided other interested parties an opportunity to study and analyze this bill and its implications in a much more deliberative forum.

The bill makes the following significant changes in the existing law:

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Attachment #3

1. Temporary total disability benefits paid during vocational rehabilitation evaluation and training will not be deducted from the number of weeks provided for in schedule of disabilities when calculating the amount of compensation due for permanent disability. (Section 1)

2. The maximum healing period for scheduled disabilities is increased from 15 weeks to 21 weeks. (Section 1)

3. Section 2 abolishes the work standard of disability evaluation, a humane and well settled standard, which has been the law of Kansas for 45 years and was codified by the legislature in 1974. It replaces the present law with a standard which, while using the language of work disability, will in fact result in compensation being based upon functional impairment. The new standard will precipitate a spate of litigation, over-burdened dockets, delay, dramatically decreased compensation benefits and more employees in the Division of Workers' Compensation to administer the new law.

4. Awards will be modified as of the date of an actual change in the extent of disability. (Section 3)

5. Lump-sum settlements are prohibited unless it is determined that the employee is not in need of vocational rehabilitation or has completed a rehabilitation program or has elected not to participate in a vocational rehabilitation program. (Section 4)

6. The Director is given authority to hear and consider additional issues in a Preliminary Hearing consisting of the advisability of a vocational rehabilitation plan and the payment of temporary total disability benefits during vocational rehabilitation evaluation and training. Moreover, a preliminary Award of medical and temporary total disability compensation may be assessed against the Workers' Compensation Fund. (Section 5)

7. The existing law is changed to faciliate shifting the liability of an employer and its insurance carrier to the Workers' Compensation Fund. The changes with respect to the Fund will no doubt increase the work load of the

Insurance Commissioner as well as the Fund's liability for medical and disability benefits.

8. New Section 7 represents a sweeping change of our vocational rehabilitation law the true implications of which are presently unknown. We believe that there is nothing fundamentally wrong with the present vocational rehabilitation statute. The problems that occur in vocational rehabilitation do not result from the language of the law but rather from the manner in which vocational rehabilitation is administered.

The new law does not provide for true wage earning capacity restoration. It does provide for compulsory vocational rehabilitation for all employees, regardless of age, who are deemed to be unable to resume comparable employment. Job placement is treated as a type of vocational rehabilitation but does not assure the acquisition of a new marketable skill. It does, however, assure loss of compensation for work disability. Employees, for example, who are employed in comparable employment, even temporarily, lose the right to be compensated for work disability. Provisions for vocational education and on-on-job training feature a new formula for calculating disability compensation which is certain to provoke additional litigation. All employees who decline to participate in vocational rehabilitation evaluation or training similarly lose the right to be compensated for work disability. Additional hearings are provided for concerning issues of the adequacy of the vocational rehabilitation plan and for review and modification of a vocational rehabilitation plan.

New Section 7 will substantially increase the work load of the Division of Workers' Compensation. An unknown number of new employees in that Division and in the Kansas Division of Rehab-

ilitation Programs will be required to administer this new compulsory vocational rehabilitation law and the additional litigation it will provoke.

Thank you for your consideration.