Approved A W Douville
Date 2-19-87

MINUTES OF THE House COMMITTEE ON Labor & Industry.

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

9:00 a.m./p.m. on February 10, 1987 in room 526-S of the Capitol.

All members were present except:

Representative R. D. Miller - Excused

Committee staff present:

Jerry Ann Donaldson, Research Department
Jim Wilson, Revisor of Statutes' Office
Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Joan Watson, Commissioner of Rehabilitation Services
Department of Social and Rehabilitation Services

Kelly Johnston, Kansas Trial Lawyers Association

Chairman Douville called the meeting to order. He called the committee's attention to the minutes of the January 28 and February 3 meetings, asking the members to review them and if there were no objections, they would stand approved as of the next meeting.

The chairman stated that hearings on HB 2186 would not be designated for proponents and opponents, just conferees permitting a mix of opinion on those presenting testimony about the bill. Chairman Douville noted that the bill does not include rehabilitation by definition or the roles of private enterprise, the Division of Workers' Compensation, the Department of Social and Rehabilitation Services and the Department of Human Resources.

Chairman Douville then asked if there was anyone who would like to speak on rehabilitation. Joan Watson, the Commissioner of Rehabilitation Services for the Department of Social and Rehabilitation Services was recognized by the chairman. He then asked her if she were aware of the special problems before the committee: the definition of rehabilitation, the criteria for rehabilitation and the role that various people or groups should play in rehabilitation. The commissioner gave an affirmative response.

Commissioner Watson presented copies of her testimony, see attachment #1 and a statement from Robert Harder, Secretary of Social and Rehabilitation Services, in support of HB 2186, see attachment #2. The commissioner answered questions from members of the committee during and following her presentation. She thanked the chairman and the committee for the opportunity for input regarding rehabilitation legislation.

Chairman Douville asked for the criteria for services from the Department of Social and Rehabilitation Services regarding rehabilitation. Commissioner Watson listed the three under the federal rehabilitation law which are:

1. that the person does have a documented disability
2. that the disability does present a handicap to employment
3. that the division of the state vocational rehabilitation division can be predicted to make a difference in terms of employment.

Commissioner Watson also stated that in Kansas, if a person has returned to gainful employment, there are income eligibility requirements for receiving services from the Department of Social and Rehabilitation Services and they are:

1. the presence of a disability
2. the disability presenta a substantial handicap to employment
3. vocational rehabilitation services can be anticipated to result in a return to work
4. the person meets the financial eligibility of standards that are attached to "our program".

Commissioner Watson went on to say that evaluation could be provided without regard to income eligibility but if training, re-training or job modification were involved, the person would need meet the income eligibility.

Chairman Douville pointed out that the reason that rehabilitation was discussed was that even though it is not specifically addressed in the bill that there are a couple of provisions in the bill that touch on it such as the right of the Director to review and modify an award.

The chairman asked if there were others in the audience who wished to comment on rehabilitation. There being none, Chairman Douville stated that proceedings would be directed to general comments on HB 2186.

The next speaker was Kelly Johnston, a lawyer from Wichita specializing in workers' compensation cases, speaking on behalf of the Kansas Trial Lawyers Association. Mr. Johnston brought with him copies of his prepared remarks (attachment #3) as well as proposals regarding K.S.A. 44-510g (attachment #4) and K.S.A. 44-534a (attachment #5) which were distributed to the committee.

Questions were asked of Mr. Johnston during his presentation by the committee. Due to time restraints, the chairman had to call the meeting but invited Mr. Johnston to come back at a later date to complete his remarks.

The meeting was adjourned at 9:58 a.m. by the chairman.

The next meeting of the committee will be held at 9:00 a.m. on February 11, 1987.

HOUSE COMMITTEE
ON
LABOR AND INDUSTRY

GUEST LIST DATE February 10, 1987

Name	City	Representing
Bob Arbuthnot	Topeka	KTLA
Anne Moriarty	"	KTLA
Christina Dunn	Kansas City	
Jim Hall	Kansas	AFL-CIO
[illegible]	"	"
[illegible]	"	"
Wayne Marchel	"	"
Kelly W. Johnston	Wichita	KTLA
Richard Mann	Topeka	"
Melissa Beale	Wichita	
Jann Watson	Topeka	Rehab Svc/SRS
Richard Thomas	TOPEKA	Rehab Services/SRS
Ron Gaches	WICHITA	BMAC
Rob Hodges	Topeka	KCCI
Mark Beshears	Topeka	Public
Bill Morrissey	Topeka	DHR/Work. Comp.
Don Willoughby	Omaha	IBP
Bud Cowan	Topeka	IBP, inc.
Lori Callahan	Topeka	am. phys. assoc.
Tom Bell	TOPEKA	Ks. Hosp. Assn
Bill Abbott	Wichita	Boeing
Ray Petty	Topeka	KACEH/DHR
Dave Johnson	"	Ks Ins Dept
Chris Cowger	Topeka	Workers' Comp Fund
Jim Villemarette	Topeka	Workers Comp Fund

HOUSE COMMITTEE
ON
LABOR AND INDUSTRY

GUEST LIST DATE February 10, 1987

Name	City	Representing
Dan Harris	Garden City	Garden City Chamber
Bud Langston	Topeka	DHR/Work. Comp
John M. Ostrowski	Topeka	AFL-CIO
Ron Smith	"	KBA
Pete McGill	"	IBP

State Department of Social and Rehabilitation Services

Testimony in Support of H.B. 2186

Mr. Chairman, Members of this Committee, I appreciate this opportunity to support worker's compensation legislation that promotes active participation toward rehabilitation on the part of both employers and injured workers.

I will restrict my statements to specific sections of H.B. 2186 that affect the rehabilitation of Kansans injured in employment settings and offer testimony that would dovetail into the proposed changes in H.B. 2186.

Under Section 7, KSA 44-510e, the definition of partial general disability is defined as a percentage, to which the ability of the employee to return to the open labor market has been reduced, taking into consideration the employee's education, training, experience, age and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional disability which shall be the percentage of permanent partial impairment of function as determined by objective and competent medical evidence. There shall be a conclusive presumption that the employee has no work disability if the employee returns to any work for wages equal to or more than the average gross weekly wage that the employee was earning prior to the injury.

I recommend "Capacity for rehabilitation" be determined by an evaluation of vocational potential if the injured worker is pursuing a wage loss claim, under Section 44-510e. If it is determined that there is capacity for rehabilitation, the injured worker would be required to cooperate and participate in a

Attachment #1
House Labor & Industry
2/10/87

rehabilitation plan or accept only the functional loss as stated in 44-510e. Providing incentives for rehabilitation versus mandatory rehabilitation will result in more injured workers participations in a rehabilitation plan.

Using this definition would allow credit for employers who take an active role in the rehabilitation effort and give the injured worker protection if they cannot perform work at the same level as their pre-injury status.

Section KSA 44-567B(b), line 0321-0324. Employers knowledge of the pre-existing impairment establishes a reservation in the mind of the employer when deciding whether to hire or retain the employee. This is an incentive for the employer to hire injured workers and have some protection under the second injury fund. Completing form 88 would benefit the employer and be a helpful placement tool for rehabilitation counselors. I support this section of proposed H.B. 2186.

In the interest of providing effective rehabilitation incentives, I recommend H.B. 2186 be amended to include the following:

A rehabilitation fund to pay for rehabilitation cost.

The Rehabilitation Administrator should be responsible for fund expenditures and criteria for accessing the fund. Rehabilitation Services should access funds through approval of the Rehabilitation Administrator (WC) for services needed to establish eligibility, and then provide services under an Individualized Written Rehabilitation Plan. I recommend taking a close look at Nebraska's rehabilitation fund, as their experience with such a fund is positive.

Priority of services for KRS is Severely Disabled clients: the past two years only 25% of persons referred by Worker's Compensation were Severely Disabled.

Without a rehabilitation fund the non-severely disabled would be in jeopardy of not receiving services when KRS funds are tight.

Under Section 44-510g

I would recommend use of "comparable employment" in lieu of "gainful employment", and define comparable employment in terms of the following:

Reasonably attainable.

Ability to perform the duties.

Earnings comparable to pre-injury salary.

Payment of temporary total compensation during vocational rehabilitation evaluation or training. This serves as an incentive for injured workers to become involved in rehabilitation at an earlier date.

Not deducting payment of temporary total disability paid during vocational evaluation from schedule of weeks of injury. This would provide an incentive for early involvement with rehabilitation. Research has proven that early involvement increases the chances of successful rehabilitation.

Restrict the Award of Lump Sum Settlements

It is our experience that lump sum settlements are not an incentive for rehabilitation. Rehabilitation potential should be explored before a lump sum settlement is awarded. According to records of the Division of Worker's Compensation, the average settlement in Kansas is only $15,000 and that is usually spent before the injured worker ever becomes involved in rehabilitation.

Kansas Rehabilitation Services views worker's compensation as an important referral source. However, referrals from the Division of Worker's Compensation comprise only three to four percent of the total referrals KRS receives annually. The percent of successful rehabilitation for this group is not high as the attached chart indicates. Private rehabilitation agencies play a necessary role in worker's compensation. If an injured worker needs active medical management and follow-up to return to the same employer then private rehabilitation can provide immediate services. On the other hand, if a rehabilitation plan requires a variety of timely longer-term services, then Kansas Rehabilitation Services may be the best resource for the injured worker.

Thank you for the opportunity to share the perspective of the State rehabilitation agency.

Joan B. Watson
Commissioner
Rehabilitation Services

for

Robert C. Harder
Office of the Secretary
Social and Rehabilitation Services
296-3271
February 10, 1987

Kansas VR Clients Referred by Workers Compensation Closed Case Status

FFY 1985 and 1986

	FFY 1985		FFY 1986	
Number Closed Cases	250		312	
Closure Status	#	%	#	%
Successful	75	30.0	118	37.8
Unsuccessful				
Before Acceptance	126	50.4	153	49.0
After Acceptance	49	19.6	41	13.1
Reason for Closure	#	%	#	%
01 Moved/Unable to Locate	17	9.7	24	12.2
02 Too Severe	21	12.0	28	14.4
03 Refused Services	68	38.9	80	41.2
07 Failure to Cooperate	29	16.6	34	17.5
09 No Vocational Handicap	7	4.0	8	4.1
Age	#	%	#	%
- 29	16	6.4	19	5.8
30 - 39	50	20.6	56	17.9
40 - 49	79	31.6	93	20.2
50 +	105	41.4	144	46.1
Education	#	%	#	%
Below High School	71	31.4	109	36.7
High School	122	54.0	140	47.1
High School Plus	33	14.6	48	16.2
Severely Disabled	#	%	#	%
No	188	82.1	227	75.9
Yes	41	17.9	72	24.1

H.B. 2186
Comments Before
House Committee on Labor and Industry
Presented by Kelly W. Johnston
On Behalf of Kansas Trial Lawyers Association

The Kansas Trial Lawyers are one of a very few vested interest groups who are organized to speak on behalf of, and in harmony with, the injured worker. I am the current Chairman of the Workers' Compensation Committee of the KTLA. My practice is primarily, though not exclusively, devoted to representing injured and disabled workers. I graduated from the University of Kansas School of Law in 1979, and practice law with my father and brother in Wichita. I have taught continuing legal education classes on workers' compensation, and testified before the Legislative Economic Development Task Force Committee on Capital Markets and Taxation, Sen. David Kerr presiding, in October 1986. I believe that I have certain training and experience, consequently, that qualify me to advise this Committee on matters of interest to the injured worker. That H.B. 2186 contains certain proposals that will impact on my pocketbook as well as the pocketbooks of injured workers, I do not apologize for. My personal interests in providing for my family are no different than those of the Kansas Chamber of Commerce and Industry, and the insurance industry. I hope you will give my comments objective consideration.

Section One

On page three, lines 0089 - 0106, are found the provisions of H.B. 2186 that are designed to repeal the so-called liberal construction rule. Around the time of World War I, the Kansas Legislature as well as legislatures around this country decided that too many injured workers were unable to successfully redress their injuries and medical meeds through civil actions for monetary damages. Defenses such as assumption of the risk and contributory negligence more often than not enabled employers to avoid any legal responsibility for the consequences of work-related injury. Many injured workers in those days before welfare and Social Security, simply went without. Such a crisis arose over the plight of these workers that it became the public policy of this state that the consequences of work-related injury, and the resulting costs, would be reflected in the cost of the manufactured product.

Our Supreme Court recognized early the remedial nature of our workers' compensation act. See Roper v. Hammer, 106 Kan. 374 (1920). H. B. 2186 proposes to undermine more than 65 years of case law that has consistently recognized the remedial nature of our workers' compensation act. Many of these case precedents are still vital today. If new subsection g of Section 1 is enacted, a great deal of havoc will result. Attorneys trying to advise employers and workers alike are going to have a great deal of difficulty deciding what precedents will no longer be authoritative and what precedents will survive repeal of the liberal construction rule. This confusion and unpredictability will necessarily have to be resolved in the courts. A large increase in the number of litigated claims is the logical result as is also

a significant increase in the number of cases appealed to the Kansas Court of Appeals and the Kansas Supreme Court. Perhaps most important, no one has demonstrated that repeal of the liberal construction rule will have any affect whatsoever on claim costs and premium rates. Its value as a feature of H.B. 2186 is doubtful.

Section Two

K.S.A. §44-520a requires every injured worker to file written claim for compensation on the employer within 200 days of the "date of accident" or stand to lose all rights they may have had to worker compensation benefits. New subsection d proposes to arbitrarily designate in repetitive use claims like carpal tunnel syndrome "the date of accident" (line 0203) to be "the date of onset of the symptoms (line 0204). In my experience, workers often continue to work despite the onset of symptoms for long periods of time before the symptoms become intolerable and disabling. People suffering from conditions such as this, if they're motivated to continue to keep working (an attitude we certainly shouldn't discourage), are thus in jeopardy of losing their rights to compensation benefits.

This language also ignores physiologic reality in that these conditions continue to worsen and become more and more debilitating the longer the afflicted worker continues overusing the extremities. Under current law, the "date of accident" often is acknowledged to be the last date, not the first date, that the worker traumatizes the extremity in the course of employment. Passage of this proposed language will, in essence, only inure to the benefit of the employer by giving them another defense not presently available under our law to otherwise valid claims. It should not be the public policy of this state to disallow claims because the worker waits until he is no longer capable of working to seek to protect his rights - and by then it may be too late.

Section Three

The new language found at lines 0282 - 0291 (page 8) will be of benefit to the injured worker in that health care providers will be disabled from obtaining civil judgments against the injured worker - judgments that can be collected forcibly by garnishment and attachment - for unpaid medical expenses incurred due to work-related injury until such time as liability under the workers' compensation act has been resolved.

Section Four

The language proposed on line 0415 (page 11) will increase the maximum liability of the employer in death cases only, from $100,000 to $200,000. While this is also a quite justified proposal, it will not mean that a great deal more money is going to change hands. In the first place, there are comparatively few death cases arising in our state from year to year. Moreover, lines 0336 - 0338 remain unchanged! That language limits the amount

the decedent's survivors can recover in the event of death to 66 2/3% of the decedent's wage at the time of injury. Very few workers earn enough per week to require anything close to $200,000 being paid to the widow(er) and children when the weekly benefit level is capped at two-thirds of the weekly wage.

Section Five

The only change proposed herein that is of significance is found in line 0486. This change will increase the maximum amount of temporary total disability compensation an injured worker may receive per week. The current law caps the weekly benefit for temporary total compensation at $247 and this figure is based upon 75% of the state's average weekly wage. This proposal would increase the cap by raising the weekly cap to 125% of the state's average weekly wage. While this change would benefit a number of injured workers, it is only the high-wage earner who will benefit. As with Section 4, the weekly benefit amount is determined at 66 2/3% of the worker's weekly wage. There is no proposed language to raise this percentage. Only those workers whose wages are substantial will, thus, be affected by the raise in the cap. The minimum wage earner ($3.35/hr.) currently receives only $89.34 per week and WILL CONTINUE TO RECEIVE ONLY $89.34 PER WEEK UNDER THIS PROPOSAL! Line 0479 should be amended to increase to 85% of the worker's weekly wage at the time of injury.

Section Six

The only significant change proposed herein is found on page 17, lines 0609 - 0613. This language proposes to arbitrarily classify "repetitive use conditions" like carpal tunnel syndrome as scheduled injuries. Under current law, a person suffering bilateral carpal tunnel syndrome is entitled to be compensated for a general bodily disability under K.S.A §44-510e. This has been the law of Kansas for several decades. Much has been said about the serious nature of this affliction, and I can attest to the seriousness of this problem inasmuch as I have represented a number of women who contracted carpal tunnel syndrome in the course of their employments. A person suffering from this problem has the same work disability and same work restrictions as someone suffering a back injury requiring surgery. To single out this kind of injury for classification as a scheduled injury is not only unfair, but it also discriminates against women who are well known to suffer this problem four or five times more often than men. This proposal cannot be justified, unless it is to be the public policy of this state that the unsafe work practices of a very few industries are to be encouraged. I would think that it would be better public policy to encourage those industries to reduce the exposure of their work force to overuse injury.

Section Seven

There are several changes of significance proposed herein. The first change is found in lines 0655 - 0658, and constitutes the enactment of a new definition of work disability. I think the current definition of work disability is quite adequate, and provides an easily determinable standard for determining the amount of work disability sustained by an injured worker. There seems to be quite an overflow of desire, however, to reduce and limit the amount of disability compensation to which an injured worker might be entitled. It should be emphasized that this language on these lines is designed to do NOTHING MORE THAN REDUCE THE AMOUNT OF COMPENSATION AN INJURED WORKER WILL RECEIVE! I don't agree that this should be done. If this is the aim of this Committee, however, I would suggest two minor changes. First, the worker's "capacity for rehabilitation" should be deleted. After all, expected proposals to amend the rehabilitation statute, K.S.A §44-510g, will themselves limit the amount of permanent partial disability benefits to be received by the worker. Second, another factor that should be a consideration in determining the percentage of work disability is the worker's "physical capacity to work". I cannot imagine why this would be left out of this definition. The second proposed change is found in lines 0659 - 0662. Our law already provides that a worker is at least entitled to disability benefits based upon the percentage of permanent impairment of function, so this language would not change the law in that regard. This language further requires, however, that the extent of permanent impairment of function must be capable of being evaluated by objective evidence. There is no such requirement under present law, and for good reason. This language would eliminate from consideration for permanent partial disability compensation any worker who has a permanent impairment that is primarily evidenced by chronic pain. All physicians will agree the sensation of pain is a warning that something is wrong or abnormal. All physicians will also agree that it would constitute malpractice for an examining physician to routinely ignore complaints of pain in attempting to diagnose an injury. Yet this proposed language would <u>mandate</u> that chronic pain be ignored unless some objective evidence - radiological finding, myelogram, CAT scan, etc. - is available to corroboroate that the sensation of pain is likely. Though some workers may feign pain and injury and receive compensation, this proposal would throw the baby out with the bath water. It would be like trying to kill a pesky fly with a shotgun. This language is an extreme overreaction to a problem of unknown magnitude. It will penalize more workers with valid injuries than it will weed out malingerers.

The third change of significance that is proposed is found in lines 0662 - 0666. While I recognize that there are good arguments to justify limiting the permanent partial disability recovery of a worker who has returned to work at an earnings level comparable to that which was being earned prior to injury, do we really want to encourage injured workers to remain off work or unemployed until such time as litigation has been completed? I would suggest, instead, that another factor be added to the definition of work disability found in lines 0655 - 0658. In addition to age, educational background, training and experience and physical ability, simply add "post-injury wage level".

The last change proposed in lines 0675 - 0677 is indefensible. Under present law, the maximum an injured worker can receive a week for permanent partial disability benefits is 2/3 of the average weekly wage at the time of injury, not to exceed 75% of the state's wage. Other provisions of present statutory law permit the injured worker to receive permanent partial compensation for 415 weeks. At the current maximum weekly rate of $247 per week, an injured worker will exceed the $75,000 cap found in K.S.A. §44-510f(a)(3) in only 304 weeks. In other words, a worker who has a high weekly wage and is significantly disabled does not receive anything close to 415 weeks of compensation because the cap is too low. The Director of Worker's Compensation, John B. Rathmel, recommended to the Economic Development Task Force's Capital Markets and Taxation Commiittee that the caps be increased to reflect inflation since 1979 (when the $75,000 cap was imposed) and, more importantly, to permit a worker such as this to be able to receive 415 weeks of compensation. This language does the exact opposite. Not only does H.B. 2186 not raise the $75,000 cap, but it also proposes to LOWER the amount such an injured worker can receive on a weekly basis. Under this proposal, the maximum weekly benefit currently available to injured workers would DROP from $247 per week to $164.67 per week. This is inexcusable, and can only be justified as a bold attempt to substantially reduce the amount of money changing hands from the insurance carrier to the disabled worker.

Section Eight

The only change proposed herein is found at line 0730. As with death benefits, the maximum amount of compensation recoverable by a permanently and totally disabled worker would increase from $100,000 to $200,000. Again, we think the proposed increase in the cap is appropriate, but the amount of money that will actually be paid under this language will not be significantly higher than what is already paid under present law, and for the same reasons I discussed under Section Four.

Section Nine

The only change of significance is found in lines 0784 - 0787. It is not a proposal, however, that will have much impact on the amount of benefits received by injured workers under present law. Although I have argued that employer F.I.C.A. contributions should be considered to qualify as an employer contribution to pension or profit sharing plans (line 0783), I have never won this argument. Consequently, I cannnot get very excited about a legislative proposal that will also have the same result.

Section Ten

This language is proposed to amend K.S.A. §44-512a - the so-called penalty statute. The changes proposed herein are found at lines 0055 - 0061 (page 27). This change, if enacted, would have very little if any impact on the promptness of an insurance carrier's payment of benefits. If this Committee wishes to amend K.S.A. §44-512a in a manner which will speed the delivery of court-awarded

benefits to an injured worker, then DOUBLE the available penalties found in line 0038 and 0040. The Committee might also consider amending K.S.A. §44-512 which provides an 8% interest penalty in cases where no court order is disregarded, but where the administrative law judge finds that the insurance carrier has failed to pay compensation without just cause or excuse. Since insurance carriers can easily earn much more that 8% on money withheld from the injured worker, this statute provides absolutely no incentive to pay benefits in controversy with the injured worker.

Section Eleven

In lines 0084 - 0100 you will find the changes proposed to K.S.A. §44-519. This proposal will permit the awarding of costs and attorney fees against the injured worker or counsel for the injured worker, or both, if it is found that a statement for the services of a health care provider offered into evidence by the injured worker contains unreasonable or unnecessary charges. Conversely, if a defense attorney makes an objection to the statement of services that is overruled, then that attorney or the employer will also be subject to paying attorney fees and costs to the injured worker, BUT ONLY IF it is found that the objection was not made in good faith. I fail to understand why the injured worker should be subject to sanctions if he offered the medical bill into evidence in good faith also. It seems that most of the burden is being placed on the worker, and there is no justification for such dissimilar treatment. Also, I fail to understand why the director or administrative law judge cannot be given authority to assess attorney fees and costs against the health care provider who attempts to collect unreasonable or unnecessary charges.

Section Twelve

The only change proposed herein is found at page 29, line 0131. this is a relatively insignificant change, although a change that I support.

Section Thirteen

If an employer or insurance carrier voluntarily pays compensation to the injured worker, and it is later determined that the claim was noncompensable or the benefits overpaid, the change proposed herein will permit the administrative law judge to award to the employer an amount equal to the excess benefits to be paid from the workers compensation fund. Since it will benefit injured workers to encourage voluntary payments of compensation, this proposal I support.

I should also point out that this proposal will also tend to reduce litigation since insurance carriers might be a little less concerned about making a mistake in the evaluation of a claim.

Section Fourteen

The important change proposed herein is found at lines 0203 - 0207, and proposes to limit attorney fees in cases where the employer admits personal injury by accident arising out of and in the course of employment to fifteen percent of the disability recovery. This proposal cannot be justified from the standpoint of increasing benefits to the injured worker. After all, at the same time this legislation proposes to cut by one-third (75% to 50%) the permanent partial disability benefit ceiling recoverable per week by the injured worker. This proposal cannot be justified from the standpoint of reducing litigation costs or backlogs because there are no limits or caps placed on the fees that can be charged by the defense attorneys. If you want to accomplish a reduction in litigation, then you should enact substantial disincentives for insurance carriers to litigate valid claims, and for defense attorneys to protract the litigation. An idea that would accomplish this end would be to require the insurance carrier to pay all or a part of the attorney fees of the injured worker if the award is less than the last offer of settlement prior to the commencement of litigation. It is not fair, however, to limit the attorney fees that can be charged the injured worker while at the same time allowing defense counsel to charge $85 - $100 per hour defending these claims. Indeed, a fee contract that is predicated upon an hourly rate will tend to increase litigation time precisely because there is a financial incentive to do so. There is absolutely no financial incentive for an injured worker's attorney to protract litigation.

This proposal will also quite possibly create a shortage in certain parts of the state of attorneys who are well-versed in worker compensation law. How likely will it be that a general practitioner in rural Kansas will be willing to take on a difficult claim if is going to have to spend a lot of time researching the law, financing the litigation, and out of which he will only earn 15%? IF you also consider that the value of a disability claim involving only an arm or a leg or a hand or foot, or a claim on behalf of a minimum wage-earner, is not going to be significant even with a servere disability, the prospects are good that this type of enactment will create a dearth of well-qualified and experienced attorneys in western Kansas especially.

Another problem with this proposal is that it will allow defense counsel to put the injured worker's attorney in a difficult position during the pretrial stage of the case. It will happen that defense counsel will offer an amount of money to settle but only if the offer is accepted prior to the first hearing. Any offer or settlement agreement reached thereafter will net the attorney only 15% since the defense attorney will threaten to admit accidental injury at the first hearing. Thus, the injured worker's attorney will be placed in a potential conflict of interest because this proposal will allow him to charge 25% of the pretrial settlement offer if accepted, even though the claim may have more value. Consequently, the welfare of the injured worker may be in jeopardy.

For example, 25% of a $5000 offer will net the attorney a fee of $1250 whereas 15% of a $10,000 will net only $1,500. There is very little incentive for the attorney to take the time and make the effort to increase the recovery to the injured worker. I do not think that this Committee wishes to create this kind of environment.

If this Committee wishes to restrict the ability of the injured worker's attorney to do very little on behalf of the client and still collect a 25% fee, then consider limiting attorney fees to 15% in those cases where the attorney is hired after the permanent impairment of function percentage has already been announced by the attending physician, and the subsequent settlement is based upon the same percentage rating. This would limit the fee to be charged by the opportunistic attorney who actually does very little for the client, yet takes out of the pocket of the injured worker 25% of his recovery.

Finally, I would like to say that I earn my fees, and I doubt you would find very many of my clients who would doubt that my services were worth it. Some of these cases require the investment of $1,000 in expenses and two years to complete. Some of these cases are appealed FOUR TIMES! The 25% fee currently allowed by K.S.A. §44-536 is still quite a bit below the standard contingency fees charged for civil injury litigation (33% - 40%), and both Nebraska and Kansas permit fees of 25% to be charged injured workers by their attorneys in worker compensation claims.

Section Fifteen

In order to impose liability on the Workers' Compensation Fund, an employer is required to prove that he or she hired, or made a decision to retain, an employee, despite actual knowledge that that employee suffered from a handicap, impairment or disability of such a nature that that employer had a good faith reservation in his or her mind as to whether that employee or applicant, because of the handicap, was fit to handle the work. If such an employee later suffers another injury which can be established by medical testimony would not have occurred but for that pre-existing handicap, then that employer is allowed to shift liability for medical and disability compensation onto the Knasas Worker's compensation Fund. The original intent behind the creation of this Fund was to encourage the employment, or retention in employment, of handicapped or disabled workers, the thought being that relieving the employer of worker compensation liability under these circumstances would remove a substantial problem the disabled and handicapped suffer when seeking work.

If it is the public policy of this state to encourage the employment of handicapped employees in this manner, it is only logical that employers who make decisions to hire or retain without personal knowledge of the preexisting handicap should not be permitted to shift liability for the compensation to that employee who is subsequently injured. Yet one of the proposed changes (0314 - 0316) is designed to accomplish just that result. Under the new

language, any knowledge of a handicap or disability acquired by a company physician during a company authorized examination would be imputed to the employer or representative of the employer making the decision to hire or retain. In other words, an employer who never sees the findings of the examining physician will still be deemed possessed of the required "knowledge". This proposal is, obviously, designed to make it easier for employers to relieve themselves of liability for the consequences of work-related injury. Enacting this proposal, however, will not promote or further the ostensible purpose of this statute to encourage the hiring of handicapped workers.

Another proposed change would be to eliminate the language found at line 0301 which has always in the past required medical testimony to provide the basis for the conclusion that the work-related injury would not have occurred "but for" the prior handicap or impairment. Again, this proposed change is designed to do nothing more than make it easier for employers to avoid liability for the consequences of industrial injury. Enactment of this change will do nothing to advance the chances of an applicant with a handicap being hired. It is also ironic that employers feel justified in supporting a change such as this that will ease their burden of proof, yet at the same time support amending K.S.A. §44-510e to make it more difficult for injured workers to sustain their burden of proving permanent impairment of function. See line 0662, and my comments concerning Section Seven. It seems that employers and the insurance industry want the best of both worlds: more stringent proof requirements on the injured worker but less stringent proof requirements upon themselves. This is not fair!

The third recommended change is found at page 34, lines 0321 - 0324. Under present law, the employer must not only prove that he or she was aware of the fact that the employee or job applicant suffered a handicap, impairment or disability, but that that handicap, impairment or disability be of such a degree that the employer in good faith is concerned that this employee may be at risk of reinjury. If the nature of the handicap is so minor, or the type of physical tasks so light, that there is no realistic need to provide these employers with special incentives to hire or keep such employees, then it makes perfect sense that such an employer should not be permitted to avoid liability for the consequences of accidental injury. The proposed new language would, however, not make a distinction between "knowledge" and "reservation". Proof of knowledge of the handicap will be all that is required. Obviously, the effect of enactment of this proposal will be to make it easier, again, for employers to relieve themselves of liability under the Kansas Workers' Compensation Act. This is also ironic in that, at the same time, H.B. 2186 is proposing at page 3, lines 0089 - 0106 to repeal the liberal construction rule on the justification that the "workers compensation act is based upon a mutual renunciation of rights and defenses by employer and employee alike." There is nothing "mutual" about restricting and limiting benefits to the victims of carpal tunnel syndrome,

the minimum wage worker, and those displaced from their job skills on the one hand, and the eroding and gradual elimination of liability on the part of employers for industrial accidents on the other hand.

Thank you very much.

HOUSE BILL NO. _____

By Committee on Labor and Industry

AN ACT relating to vocational rehabilitation under the Kansas Workers' Compensation Act, amending K.S.A. 44-510g and repealing the existing section.

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

Section 1. K.S.A. 44-510g is hereby amended to read as follows: 44-510g. (a) A primary purpose of the workers' compensation act shall be to promptly restore the injured employee to substantial and gainful employment. To this end, the director shall appoint, subject to the approval of the secretary, a specialist in medical, physical and vocational rehabilitation, who shall be referred to as the "rehabilitation administrator." The rehabilitation administrator shall be in the classified service. The rehabilitation administrator shall: (1) Continuously study the problems of physical and vocational rehabilitation; (2) investigate and maintain a directory of all rehabilitation facilities, public or private, in this state, and, where such rehabilitation administrator determines necessary, in any other state; and (3) be fully knowledgable regarding the eligibility requirements of all state, federal and other public medical, physical and vocational rehabilitation facilities and benefits. With respect to private facilities and agencies providing medical, physical and vocational rehabilitation services, the director shall approve as qualified such facilities, institutions and physicians as are capable of rendering competent rehabilitation services. No such facility or institution shall be considered qualified unless it is specifically equipped to provide rehabilitation services for persons suffering from either some specialized type of disability or some general type of disability within the field of occupational injury or disease, and is staffed with trained and qualified personnel and, with respect to medical and physical rehabilitation, unless it is supervised by a physician qualified to render such service. No

Attachment #4
House Labor & Industry
2/10/87

physician shall be considered qualified unless such physician has had such experience and training as the director may deem necessary.

(b) Under the direction of the director, and subject to the director's final approval, the rehabilitation administrator shall have the duties of directing and auditing medical, physical and vocational rehabilitation of employees in accordance with the provisions of this section.

(c) An employee who has suffered an injury shall be entitled to prompt medical and physical rehabilitation services, as may be reasonably necessary to restore such employee to substantial and gainful employment and as provided in this section.

(d) When as a result of an injury or occupational disease which is compensable under the workers' compensation act, the employee is unable to perform work for which such employee has previous training, education, qualifications or experience, or when such employee is unable to perform other substantial and gainful employment, such employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore such employee to substantial and gainful employment and as provided in this section.

(e) The director, on such director's own motion or upon application of ~~the employee or employer~~ any party, ~~and after affording the parties an opportunity to be heard and to present evidence, may~~ shall refer the employee to a qualified physician or facility for evaluation and for a report of the practicability of, need for, and kind of service, treatment, training or rehabilitation which is or may be necessary and appropriate to render such employee fit for substantial and gainful employment. The costs of such evaluation and report shall be at the expense of the employer. The report shall be directed within ten (10) days to the rehabilitation administrator. Within

ten (10) days of receipt by the rehabilitation administrator, the rehabilitation administrator shall deliver copies of the report to each party and to the assigned administrative law judge in an active docketed claim. Upon receipt of such report, and after affording the parties an opportunity to be heard and present evidence, the director: (1) May order that any treatment, or medical and physical rehabilitation, as recommended in the report or as the director may deem necessary, be provided at the expense of the employer.

(2) Where the employee is unable to engage in ~~any-type-of~~ substantial and gainful employment, and vocational rehabilitation, reeducation or training is recommended in the report, or is deemed necessary by the director to restore the employee to ~~some-type-of~~ substantial and gainful employment, the director may direct the employee to the appropriate federal, state or other public facility or agency where such services will or may be provided at no cost to the employer, except as hereinafter provided in this section; and

(3) If the employee is not eligible for such vocational rehabilitation, reeducation or training through any such state, federal or other public facility or agency, or where such services through such facilities or agencies are not available to the employee within a reasonable period of time, the director may order that such services be provided at the expense of the employer at any qualified facility in this state or any state contiguous to this state. Any such services to be provided at the expense of the employer under this paragraph (3), shall not extend for a period of more than ~~twenty-six-(26)~~ fifty-two (52) weeks, except that in extremely unusual cases, after a hearing and the presentation of evidence, the director, by special order, may extend the period for not more than an additional ~~twenty-six-(26)~~ fifty-two (52) weeks. The employer shall have a right to appeal to the district court any such special order by the director for any extension of the initial

~~twenty-six-(26)~~ fifty-two (52) week period, within the time and in the manner provided in K.S.A. 44-556, and amendments thereto, and any such special order shall be stayed until the district court has determined the appeal. There shall be no right of appeal to the Kansas supreme court or court of appeals from a judgment of the district court sustaining or overruling any such special order of the director. Following vocational rehabilitation, reeducation or retraining as herein provided, if an employee suffering a compensable non-scheduled disability is restored to substantial and gainful employment, and remains substantially and gainfully employed for a continuous period of no less than six (6) months, then the employer, pursuant to K.S.A. 44-528, and amendments thereto, may apply for a reduction equal to twenty (20) percent of the employee's permanent partial weekly rate. The reduction shall continue for only so long as the employee remains substantially and gainfully employed. The reduction shall be assessed against permanent partial weekly compensation payments received, or to be received, from and after the six month anniversary date of the employee's restoration to substantial and gainful employment. If an award of permanent partial compensation is later reduced as provided by this section, any payments of permanent partial weekly compensation received by the employee at a weekly rate that exceeds the reduced weekly rate shall be reimbursed to the employer by the workers' compensation fund. In no event shall the employee's permanent partial weekly rate be reduced to an amount less than the employee's percentage of permanent impairment of function. Except following lump sum settlement pursuant to K.S.A. 44-531, and amendments thereto, the director shall retain continuing jurisdiction pursuant to K.S.A. 44-528, and amendments thereto, over all rehabilitation claims.

(f) Where vocational rehabilitation, re-education or training is to be furnished at the expense of the employer under this section, and such services

require that the employee reside at or near a facility or institution, away from the employee's customary county of residence, either in or out of the state of Kansas, the reasonable costs of the employee's board, lodging and travel, not to exceed a maximum total of ~~two~~ five thousand dollars ~~($2,000)~~ ($5,000) for any ~~twenty-six (26)~~ fifty-two (52) week period, shall be paid by the employer, except that, in unusual cases where, after a hearing and the presentation of evidence the director finds that the costs are clearly reasonable and necessary, the director may require by special order that the employer pay an additional amount for the costs of the employee's board, lodging and travel, of not more than ~~one~~ two thousand dollars ~~($1,000)~~ ($2,000).

(g) The employer shall pay temporary total disability compensation during any period of vocational rehabilitation, reeducation or training, computed as provided in K.S.A. 44-510c, and amendments thereto, but the employer shall receive credit for any weekly, monthly or other monetary payments made to the employee or such employee's family by any state, federal or other public agency during any such period, exclusive of any such payments for the board, lodging, and travel expenses of the employee. The number of weeks during which temporary total disability compensation is paid during vocational rehabilitation, reeducation or training shall not be deducted from the maximum number of weeks available for the payment of disability compensation under the schedule of weeks provided in K.S.A. 44-510d.

(h) The director shall cooperate with federal, state and other public or private agencies for vocational rehabilitation, reeducation or training, or medical or physical rehabilitation. The employer shall not be required to pay the reasonable costs of the employee's board, lodging and travel where such costs are borne by any federal, state or other public agency, nor shall

any costs for vocational rehabilitation, reeducation or training be assessed to the employer if such vocational rehabilitation, reeducation or training is in fact furnished by and at the expense of any federal, state or other public agency.

(i) Whenever the director determines that there is a reasonable probability that with appropriate medical, physical or vocational rehabilitation or reeducation or training, a person who is entitled to compensation for permanent total disability, partial disability, or any other disability under the workers' compensation act, may be rehabilitated to the extent that such person can become substantially and gainfully employed or increase his or her earning capacity, and that it is for the best interests of such person to undertake such rehabilitation or reeducation or training, if the injured employee without good cause refuses to undertake the rehabilitation, educational or training program determined by the director to be suitable for such employee, or refuses to be evaluated under the provisions of subsection (e) of this section, the director shall suspend the payment of any compensation until the employee consents to undertake such program or to be so evaluated, and the director shall cancel the compensation otherwise payable if any such refusal persists for a period in excess of ninety (90) days.

(j) At such time as any medical, physical or vocational rehabilitation or reeducation or training has been completed under this section, the employer shall have the right, by the filing of an application with the director, to seek a modification of any award which has been rendered granting any compensation to the emloyee for any disability. Upon at least twenty (20) days notice by registered mail to all parties, the director shall set the application for hearing and the parties shall present all material and relevant evidence. In the event that the director determines that the employee is rehabilitated medically, physically or vocationally, so that such employee is able

to engage in substantial and gainful employment, the director shall cancel any award of compensation for temporary total or permanent total disability, subject to review and modification pursuant to K.S.A. 44-528, and amendments thereto, and shall modify any existing award of partial disability, or, if no such award has been made, the director shall make an award of partial disability, to reflect only such partial disability, if any, as exists at the conclusion of such rehabilitation, reeducation or training. Any award of partial disability made pursuant to this subsection shall be subject to the provisions of K.S.A. 44-510d, and amendments thereto, and K.S.A. 44-510e, and amendments thereto.

(k) If an incumbent rehabilitation administrator has served in such office for one year or more on the effective date of this act, such rehabilitation administrator shall be considered as having attained permanent status as a rehabilitation administrator.

(l) As used in the workers' compensation act:

(1) "Percentage of permanent impairment of function" means the measurement, expressed as a percentage, of the extent to which the ability of an injured body part to perform physiologic functions, has been reduced.

(2) "Substantial and gainful employment" means actual employment service at a wage level equal to the state's averae weekly wage on the date of the compensable injury, computed as provided in K.S.A. 44-511, and amendments thereto, or seventy-five (75) percent of the employee's average weekly wage on the date of the compensable injury, computed as provided in K.S.A. 44-511, and amendments thereto, whichever is greater.

Section 2. K.S.A. 44-510g is hereby repealed.

Section 3. This act shall take effect and be in force from and after its publication in the statute book.

HOUSE BILL NO. _____

By Committee on Labor and Industry

AN ACT concerning Workers' Compensation; relating to preliminary hearing; application; notice; medical and temporary total disability compensation; vocational rehabilitation; reimbursement from workers' compensation fund; amending K.S.A. 44-534a and repealing the existing sections.

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

Section 1. K.S.A. 44-534a is hereby amended to read as follows: 44-534. (a) After filing an application for a hearing pursuant to K.S.A. 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; or the advisability of the vocational rehabilitation plan as approved by the rehabilitation administrator. At least seven 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 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 workers' compensation act. Upon a preliminary

Attachment #5
House Labor & Industry
2/10/87

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 to be in effect pending the conclusion of a full hearing on the claim.~~ medical expense compensation, temporary total disability compensation during the healing period and while the worker has not yet returned to work, temporary total disability compensation during the period of vocational rehabilitation evaluation or training, or any other benefits provided by K.S.A. 44-510g and amendments thereto. In addition, the director or administrative law judge may rule upon the advisability of a plan of vocational rehabilitation as approved by the rehabilitation administrator. Any award of benefits or approval of a vocational rehabilitation plan entered hereunder shall be in effect pending the conclusion of a full hearing on the claim. The decision in such preliminary hearing shall be rendered within five 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 has been paid by the employer or the employer's insurance carrier pursuant to a preliminary award entered under this section and the amount of compensation so awarded is reduced or totally disallowed upon a full hearing on the claim, the employer and the employer's insurance carrier shall be reimbursed from the workers' compensation fund established in K.S.A. 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.

(c) Except in highly unusual circumstances, the administrative law judge shall award all medical and temporary total disability compensation to which the injured worker is entitled. Highly unusual circumstances that may justify less than a completely retroactive award of benefits are as follows: (1) A substantial, good faith issue as to the compensability of the claim; (2) where the worker did not provide notice of injury pursuant to K.S.A. 44-520; or (3) where the employee has failed without just cause or excuse to appear for examination by a physician at the request of the employer as provided in K.S.A. 44-515; provided, that the employer or employer's insurance carrier must have also complied with K.S.A. 44-515.

Section 2. K.S.A. 44-534a is hereby repealed.

Section 3. This act shall take effect and be in force from and after its publication in the statute book.

State Department of Social and Rehabilitation Services

Statement Regarding H.B. 2186

TITLE - AN ACT relating to workers compensation; concerning legislative intent; medical compensation; compensation for death and temporary and permanent disabilities; definitions; limitations on compensation and attorney fees; failure to pay compensation due; medical evidence; review of awards; citation of act; amending K.S.A. 44-501, 44-508, 44-510, 44-510b, 44-510c, 44-510d, 44-510e, 44-510f, 44-511, 44-512a, 44-519, 44-528, 44-534a, 44-536, 44-567, and 44-574 and repealing the existing sections.

PURPOSE - To clarify the legislative intent that workers compensation cases be decided on their merits and that liberal construction in favor of the claimant or the employer not be given.

BACKGROUND - Kansas workers compensation legislation has been reviewed for major revisions stemming from studies of a Special Committee on Labor and Industry Findings in 1984.

House Bill 2186 is an incremental part of the total revision needed in Kansas workers compensation legislation.

EFFECTIVES OF PASSAGE - Passage of H.B. 2186 without necessary rehabilitation legislation would do little to increase the number of Kansans injured at the work site returning to competitive employment.

If appropriate Rehabilitation incentives for both the injured worker and the employer who makes rehabilitative measures available to injured workers are added, then the rehabilitation emphasis of H.B. 2186 would be strengthened.

Robert C. Harder
Office of the Secretary
Social and Rehabilitation Services
296-3271
February 9, 1987

Attachment #2
House Labor & Industry
2/10/87