Approved [signature] 4-7-87
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./~~xxxx~~ on February 12, 1987 in room 526-S of the Capitol.

All members were present except:

Representatives Sifers and Webb - Excused

Committee staff present:

Juel Bennewitz, Secretary to the Committee

Conferees appearing before the committee:

Tom E. Hammond, International Association of Machinists and Aerospace Workers District Lodge #70, Wichita, Kansas

Robert B. Wareheim, Attorney at Law
Topeka, Kansas

Chairman Douville called the committee to order and recognized Tom Hammond, representing the International Association of Machinists and Aerospace Workers.

Mr. Hammond thanked the chairman and directed the committee's attention to the handout his firm had prepared regarding sections of H. B. 2186, see attachment #1. He stated that basically the machinists' union and the AFL-CIO of Kansas were "in the same boat" on this bill. He went on to say that while the bill, in general takes care of everything that needs to be taken care of, they feel that there are a few inequities that they were hopeful could be corrected.

The chairman asked about an employee not reporting repetitive use symptoms in the early stages and them waiting until it had progressed to the more advanced stages and then being bilateral. Mr. Hammond responded that it was difficult to actually diagnose in the early stages as the employee might respond to symptoms as he/she would a strained muscle. He also stated that it would not be fair to the employee to report symptoms if it meant that it would cost the employee his/her job.

Chairman Douville asked Mr. Hammond his feelings on page 3 of the Act dealing with the interpretation of the Act. Mr. Hammond stated that complaints from the people were not with the way that the law was being interpreted but rather with the way in which the judges were finding on the facts. His opinion was that if left in, it would not affect the factual findings of the judges.

The next question from the chairman was how he could explain to an employer a financial judgment from an administrative law judge in the claimant's favor when the employee had returned to work at the same or similar type job, with medical statements in the employee's file that to do this work would cause pain, there being a review and modification statute and the employee receiving a present work disability on the basis that there will be a future work disability.

Mr. Hammond's response was that he couldn't explain it or why it happens. He went on to state that he felt that review and modification should go back to the date that change occurs and it has to result either from a change in physical impairment or function or change in the work disability. The statute does not say that.

Representative Patrick asked Mr. Hammond how Kansas' workers' compensation law compares with other states such as Oklahoma. The answer was that generally Kansas seems to be middle of the road or a little behind while in some areas, such as bilateral repetitive use syndrome awards, Kansas seems to be a little more liberal.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE House COMMITTEE ON Labor and Industry,

room 526-S, Statehouse, at 9:00 a.m.~~p.m.~~ on February 12, 1987.

Chairman Douville also asked Mr. Hammond to share any thoughts that he had as to how litigation could be reduced to reasonable limits. Mr. Hammond responded that he thought that the Act should be allowed to do what it was structured to do and that is to let the administrative law judges handling the cases ask the people if they have had a prior offer. He also suggested that some cost containment on medical expenses would be in order.

Representative Empson asked Mr. Hammond how many claimants in his practice seek benefits on subjective symptoms. The answer was "probably 15-20%" but Mr. Hammond went on to explain that includes people who may have underlying objective problems that have not yet been identified.

Chairman Douville recognized Robert Wareheim of Topeka to address the committee. Mr. Wareheim stated that he was speaking on behalf of John Ostrowski, his partner, and himself strictly on the basis of attorneys in private practice, mainly claimants' attorneys. He also stated that he agreed with what Mr. Hammond had stated and wanted to add a few thoughts. Mr. Wareheim shared information stated on pages 14-16 of a booklet prepared by John Ostrowski and himself, attachment #2, regarding attorneys' fees.

Mr. Wareheim noted that in social security disability cases, the administration of social security withholds 25% from past due benefits, by law, for attorneys. He went on to say that those cases are based on a much more conservative and stringent standard than some of the workmens' compensation cases.

Chairman Douville asked Mr. Wareheim how many hours would be involved in a case that involved only nature and extent, ignoring exceptional circumstances. The answer was 30 hours and up. He also acknowledged, on questioning from the chairman, that there are cases that take considerably less time.

Representative Green asked Mr. Wareheim if he felt that the same factors were present in workers' compensation cases as in civil suits. The answer was, "almost". Mr. Wareheim enlarged on that by noting that there has to be "a lot of money advanced up front, subject to reimbursement".

The chairman also asked how litigation could be reduced. Mr. Wareheim referred to a mandatory pre-trial hearing which is explained in attachment #2, page 4 of the second section and stated that he felt that this process would help reduce litigation. He also stated that using the mandatory pre-trial hearing that there would be no reason for an attorney to receive a 25% fee and agreed that 15% would be a reasonable fee unless there were more than one issue involved.

Representative Patrick asked Mr. Wareheim if he would be able to supply the committee with some costs comparing Kansas with other states in benefits paid.

Representative Bideau commented on two proposals made by Mr. Wareheim to reduce litigation that he thought would be particularly helpful.

Representative Whiteman made a motion to incorporate two proposals on vocational rehabilitation submitted by Kelly Johnston (Attachments #4 and #5, February 10, 1987) into a committee bill. Representative Hensley seconded the motion.

Representative Green asked if the committee could be supplied with a breakdown of costs in a workmens' compensation case from the beginning to settlement using for an example, a back injury. The chairman said that it would be considered.

The meeting was adjourned at 9:58 a.m.

Next meeting will be February 17, 1987, at 9:00 a.m.

HOUSE COMMITTEE
ON
LABOR AND INDUSTRY

GUEST LIST DATE February 12, 1987

Name	City	Representing
Rob Hodges	Topeka	KCCI
Bob Corkhill	Topeka	KTLA
Harry W. Nelson	Wichita	Ks AFL-CIO
Wayne Maichel	Topeka	" " "
Ron Gaches	Wichita	BMAC
Bob Wareheim	Topeka	Self
Bill Morrissey	"	DHR/Work Comp
Bud Langston	"	"
Tom Hammond	Wichita	Machinist
Jim DeHoff	Lawrence	Ks AFL-CIO
Thelma Mason	Topeka	KTLA
Anne Moriarty	Topeka	KTLA
Pete McGill	Topeka	IBP
Mark Beshears	Topeka	Public
Mike Dreilins	Topeka	Menninger Fd.
Walt Scott	"	Assoc. Credit Bureaus
Tom Bell	"	Ks. Hosp. Assn.
Ron Calbert	Newton	U.T.U.
Bill Sneed	Topeka	KADC
Chris Cowger	Topeka	Ks. Ins. Dept.
Mike Unrein	Topeka	K.B.A.
Ron Smith	"	KBA
Jon Josserand	Topeka	Wichita Chamber
Jim Schwartz	Topeka	KECH
Larry Magill	"	Ind. Ins. Agents of Ks.

ANALYSIS OF HOUSE BILL 2186
CONCERNING WORKERS' COMPENSATION BY THE
INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, DISTRICT LODGE #70

Attachment #1
House Labor and Industry
2/12/87

INTRODUCTION

Many people are advocating dramatic changes in the Kansas workers' compensation system. Three of the areas of the present workers' compensation law which have come under the most scrutiny are (1) vocational rehabilitation; (2) repetitive use syndrome (bilateral carpal tunnel); and (3) permanent partial general disability.

This analysis of House Bill 2186 states the Machinists Union's position emphasizing these three areas of concern. For any issues not covered in this document, or by oral presentation, the Machinists Union would request that you contact one of the undersigned for their specific position on that issue.

This analysis was undertaken with the hope of obtaining legislation that is fair to industry and injured workers. We feel our present system with our proposed changes is the most equitable system for all persons involved and can result in the ultimate goal of workers' compensation, which is the restoring of the injured worker to substantial and gainful employment.

We welcome any questions or discussion you might have concerning any aspect of workers' compensation legislation.

Respectfully submitted,

John C. Frank
James B. Zongker
Tom E. Hammond
345 Riverview, 7th Floor
P. O. Box 47370
Wichita, KS 67201
(316) 267-2212
Attorneys for the International Association of Machinists and Aerospace Workers, District Lodge #70

VOCATIONAL REHABILITATION

Present Law: Vocational rehabilitation for injured workers simply does not occur under the existing workers' compensation law in Kansas. This is most usely explained by the Antwi decision in which the Kansas Supreme Court refused to allow employers any credit for money they spent retraining an injured worker. As a result of this decision, respondents and insurance carriers always oppose vocational rehabilitation in any workers' compensation case.

House Bill 2186: It is our understanding that legislation is being drafted by Chairman Douville concerning vocational rehabilitation. We have not seen this bill and therefore cannot comment on it.

Proposed Legislation: The Machinists Union feels that the thrust of any new legislation in the workers' compensation field should be the retraining of injured workers so that they can return to a job of similar wage. It is obvious that the Antwi decision needs to be legislatively repealed and the employer giving credit and incentive for retraining injured workers.

BILATERAL CARPAL TUNNEL

Present Law: Carpal tunnel injury is a repetitive use syndrome that occurs in the hands and arms of individuals and usually occurs in women 7-8 times more often than men. This syndrome results in swelling, discoloration, numbness and often times surgery for the worker and prevents him from being able to grip, grasp, lift or work repeatedly with his hands. This injury is common in the meat packing industry where the workers use knives and hooks with their hands and in the aircraft industry where sheet metal workers use vibrating hand tools.

Presently, bilateral carpal tunnel injuries are defined as injuries that are compensated under the permanent partial general bodily disability definition. In other words, the effect the injury has had on the worker's ability to do the jobs he was performing at the time of the injury is the standard for determining the compensation due to the worker.

House Bill 2186: The proposal in House Bill 2186 is one heavily lobbied for by the meat packing industry and requests that you make an unfair exception for them. The passage of this language would be detrimental to every worker in the state of Kansas and particularly detrimental to females in the work force.

Proposed Legislation: The Machinists Union proposes that bilateral carpal tunnel injuries continue to be compensated for on the basis of permanent partial general bodily disability as opposed to the proposed language in House Bill 2186.

PERMANENT PARTIAL GENERAL DISABILITY

Present Law: Presently, permanent partial general disability is determined by the standard set forth in the case of Ploutz v. Ell-Kan, which provides that it is "the portion of the injured worker's job that he is unable to perform as a result of his injuries."

This interpretation of the law has caused inequities to both employers and injured workers. Employers rightfully complain that an injured worker they have retained at the same or higher wage in a different job should not be entitled to a 70%-80% permanent partial general disability award, which results in a $75,000 payment. Likewise, injured workers who cannot perform 10% of their jobs but because of that lose their jobs and are unable to find other employment, should not be limited to a 10% permanent partial general disability, which could be as little as $2,000-$3,000 in compensation.

House Bill 2186: House Bill 2186 adopts the following definition:

> "The extent of permanent partial general disability shall be the extent, expressed 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."

The Machinists Union opposes the portion of this definition that provides that an injured worker's ability to be rehabilitated should be considered in determining the permanent partial general disability award he should receive in the workers' compensation case. If an employer retrains an injured employee to the same or higher wage, then the permanent partial general disability should be limited to the permanent partial impairment of function, but this should be handled through the vocational rehabilitation statute and should not be considered in determining what effect the worker's injuries have had on his ability to make a living.

Likewise, the portion of the definition requiring "objective and competent medical evidence" is particularly troubling. Many times people have received injuries which are not demonstrable by any x-ray or other objective tests, but these people are injured and their injuries have affected their ability to work. The net result of the passage of this language would be that many injured workers who are entitled to workers' compensation benefits will be denied those benefits. The issue of whether or not a worker has sustained an injury should be left to competent medical opinions.

House Bill 2186 also includes an unnecessary provision limiting the weekly compensation rate to 50% of the state's average weekly wage (p. 18, ll. 675-676), which represents a

33 1/3 reduction as compared to present law. The Machinists Union opposes this unnecessary and unexplainable reduction in benefits to injured workers. Any such reduction would obviously have the greatest effect on workers who are so severely injured that they are unable to return to their previous occupation.

Proposed Legislation: We would propose returning permanent partial general disability to the definition that existed before the *Ploutz* decision. We also recognize the employee should be limited to his impairment of function in cases where the employer has retained him at the same wage, hour and day's work. We propose the following definition of permanent partial general disability:

> "Permanent partial general disability is hereby defined as either functional impairment or work disability. Functional impairment is the extent, expressed as a percentage, of the loss of a part of the total physiological capabilities of the human body. Work disability shall be the extent, expressed as a percentage, by which the ability of a worker has been reduced from obtaining or performing work of a type and character that the worker was reasonably able to obtain or perform, considering the worker's age, education, training, previous work experience and physical abilities. Post injury earnings are not determinative of such percentages. The extent of permanent partial general work disability shall in no event be less than the extent of permanent partial impairment of function.
>
> In cases in which a percentage of work disability is awarded, the employer shall be entitled to reduce its weekly payments to the level of the workers' functional impairment during all weeks when:
>
> (A) The employer retains the employee in its employment at, or above, the wage rate that the employee would have earned in the employee's employment with the employer if the employee had not been injured; and
>
> (B) The employee is paid for the same number of hours and days per week that were in effect for the employee at the time of injury; and

(C) The employee is employed on the same shift or at the same time of day or night that the employee customarily worked at the time of injury."

This is the same definition contained on page 11 of specific proposals relative to the Kansas Workers' Compensation law submitted to you by the law firm of Wareheim, Ostrowski and Foerster.

ATTORNEY FEES

The Machinists Union agrees that there are instances when attorneys should not receive 25% attorney fees in workers' compensation cases. On the one hand, no one wants an injured worker to be taken advantage of, yet we cannot deny injured workers the right to just as good as legal representation as employers or insurance companies. Litigated cases must be decided on their facts and not because one side has a better attorney.

The provision in House Bill 2186 for adjusting attorney fees around the issue of whether an accident is admitted completely fails in either protecting claimants or in allowing them competent counsel. The majority of litigation in workers' compensation cases occurs on other issues such as nature and extent of disability, written claim and scheduled injury versus general bodily injury.

Any reduction of attorney fees as provided in House Bill 2186 will eventually result in respondents being represented by competent counsel and claimants being unrepresented or incompetently represented. Some respondent attorneys have already indicated they would use such legislation as a bargaining chip in settlement negotiations, which seems to be border on illegal, and is obviously unethical and unfair and would result in an obvious conflict of interest between claimant attorneys and the injured workers they represent. This proposal could result in no one in the workers' compensation system having the best interest of the injured worker in mind.

ADDITIONAL PROPOSALS

The Machinists Union also supports the following proposals:

1. Temporary total benefits and medical expenses should be ordered paid from the date of injury forward instead of from the date of application for preliminary hearing.

2. When an employee is released to light duty or with restrictions and the employer doesn't return him to a job with the same wage, the worker should be allowed to draw temporary total until an award is entered and any over payment would be credited against the end of any award granted.

3. Benefits should be paid to the worker from the date of the Administrative Law Judge's award instead of from the date of the Director's order.

COMMENTARY ON HOUSE BILL NO. 2186

BEFORE THE COMMITTEE ON LABOR AND INDUSTRY

AND

SPECIFIC PROPOSALS RELATIVE TO

KANSAS WORKERS' COMPENSATION LAW

February 9, 1987

Attachment #2
House Labor and Industry
2/12/87

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COMMENTARY ON HOUSE BILL NO. 2186
BEFORE THE COMMITTEE ON LABOR AND INDUSTRY
BY
ROBERT B. WAREHEIM
JOHN M. OSTROWSKI
BETH REGIER FOERSTER

INTRODUCTION

The recommendations for changes in the Workers' Compensation Act presented by House Bill 2186 are commented upon from our perspective as attorneys who represent a substantial number of injured workers in the State of Kansas. Our perspective is based upon our experience in dealing primarily with the needs and concerns of those persons hurt on the job; but also the concerns of employers and carriers as witnessed by us and as expressed to us by opposing counsel and by the employers and carriers themselves.

It is our understanding that the impetus for the proposed legislation in the area of Worker's Compensation is based on employers' concerns for cost containment and legislative concerns for protecting injured workers and enabling their return to the work force as soon as practicable following rehabilitation. In a separate section, we have presented additional specific recommendations to further the same intent.

In this section, we will only review substantive changes presented by House Bill 2186.

INTENT OF THE LEGISLATURE: Page 3; lines 0089-0106

A specific statutory provision supposedly "changing" the intent of the legislature to state that the Workers' Compensation Act is "not to be given a broad liberal construction in favor of the claimant" is not needed within the context of other provisions of the Workers' Compensation Act. Specifically: "In proceedings under the workmen's compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends." (p.1, line 0033-0037)

As we see it, this change adds no new protection for employers or insurance carriers. It will change claimant's burden of proof from "more probably true than not" to "clear and convincing evidence". This is usually accomplished by claimants by taking more evidence. The taking of cumulative evidence by claimants and respondents will have little, if any, effect on ultimate decisions. It will most certainly mean added expense to the parties. In today's negative political atmosphere for redress for injury victims, alleged liberal construction holds little pragmatic effect among the Courts.

Also, workers' compensation from the beginning has been recognized as social legislation. The thrust of this has been to ultimately place the cost upon the consumers of the products and services of the affected employers; and not on the public generally. It is for these reasons , the laws of the various states have universally been liberally construed.

The change is unnecessary, and will only cause further delays in an already overburdened system.

WHOLLY DEPENDENT CHILD DEFINITION: Pages 5-6; lines 0193-0198

For dependents of a worker who is killed, benefits are expanded to include children who are less than twenty-three years of age and/or not physically or mentally capable of earning wages or who are enrolled as a full time student. These changes are needed to enact the intent of the legislature to provide benefits to children under these circumstances. We support this provision.

DATE OF ACCIDENT: Page 6; lines 0202-0205

The proposed change in the definition of the date of accident for repetitive use syndrome cases can only have one purpose; i.e., to defeat claims. It will greatly affect the claimants' time limits for filing written claims and applications for hearing. Furthermore, workers are compensated for "permanent disability" and not "symptoms". One has absolutely nothing to do with the other.

For most people with repetitive use trauma, it is usually not immediately apparent that they have suffered any permanent disability for at least several months after the onset of symptoms, often many months. They normally keep working for as long as they possibly can. The date symptoms first arise may sometimes be as long as six months to two years before there is apparent disability, permanent or

temporary. By then, under the proposed definition, they are barred from enforcing their claim.

Under current Kansas Law, the date of accident is when the trauma results in disability. This is usually a time certain and identifiable, such as when the person quits work or first goes to the doctor.

Furthermore, it appears that a specific change is being made for people with repetitive use syndrome as opposed to other types of injuries by a "series of trauma". All others that are injured in a series of trauma would still find their date of accident to be the last date of trauma. This creates confusion in the law since the term "repetitive use syndrome" is not a legal term or a specific medical term. It is unclear whether the worker that repeatedly lifts heavy boxes and suddenly feels a "pop" in the back is injured by a sudden event, or by the repetitive lifting. For this individual, which date of accident is legally and consistently to be applied? Theoretically every manual laborer that makes one complaint about lifting or any repetitive activity starts the time clock ticking for making timely written claim.

Finally, many workers have temporary symptoms which subsequently are relieved by rest and/or exercise. If forced to make a written claim against their employer immediately on occurence on symptoms, they are likely to be terminated from employment. They would not even receive compensation, again since they have symptoms and not disability.

We do not see a demonstrated need for a change to redefine date of accident for repetitive use syndrome. It can only add confusion because of the dichotomy between disability and symptoms and can only be used to defeat valid claims on a timeliness argument. It would also establish a lower rate of temporary total compensation if the initial onset of symptoms precedes a rise in the compensation rate.

STAY OF CIVIL ACTION BY MEDICAL PROVIDER: Page 8; lines 0282-0291

It is a frequent problem that injured workers are provided with medical care, and then the insurance carrier or employer refuses to pay for the treatment. Ultimately, the medical provider sues the injured worker for services rendered.

The bill may be ultimately ordered paid by the Administrative Law Judge or Director, but in the meantime, the employee experiences duress due to collection efforts, gets taken to court, and has his credit ruined.

The intent of this new provision is appropriate. There is some question about whether or not a stay of a civil action is constitutional, particularly if it is later determined that the medical bill sued upon was not covered by the Workers' Compensation Act. The constitutionality problem potentially could be cured by the granting of a remedy to the creditor beyond statutory interest.

A method of resolving medical bills that are covered by the Workers' Compensation Act without the medical provider suing for a

civil judgment is appropriate. Part of the problem is due to the current length of time it takes to resolve a disputed workers' compensation case.

UNAUTHORIZED MEDICAL: Page 8; lines 0302-0307

The recommended provision allowing an employee to consult a physician of the employee's choice for examination, diagnosis, or treatment to the statutory limit of $350.00 is a codification of current case law. At one time there was a dispute relative to the intent of this provision and while the dispute has currently been resolved in the Supreme Court, the provision is "a clean-up" and should stand.

DEATH BENEFIT MAXIMUM: Page 11; line 0415

We are in support of a provision increasing the death benefits payable when an injured worker suffers death in the course of employment, to the maximum of $200,000.00.

TEMPORARY TOTAL DISABILITY MAXIMUM: Page 13; line 0486

The maximum weekly amount paid to injured workers is increased from 75% of the State's average weekly wage to 125% of the State's wage. This is a beneficial change which raises significantly the "cap" on maximum temporary total rates.

All injured workers are entitled to temporary total disability at 66 2/3% of their own average gross weekly wage. However, no matter what their average weekly wage, they are capped at a predeterminated rate. Currently, this rate is $247.00 per week.

Although the provision does raise significantly the previous artificial level, all caps for temporary total should be removed. Temporary total disability rarely, if ever, exceeds one year in duration. Most people spend what they earn, and plan their budgets without taking into account decreased or lost earnings. In essence, by receiving two-thirds of their wages tax-free, they are close to preinjury level; but there is still incentive to return to work. Again, complete removal of the caps would have small monetary impact on insurance carriers, and serve to carry workers past a crisis.

In conclusion, we do support this proposal, but believe that it does not go far enough.

REPETITIVE USE CONDITIONS TO BE SCHEDULED INJURIES: Page 17; lines 0609-0613

This provision is the effect of massive lobbying by the meat-packing industry. The difficulty we see with this provision is the carving of an exception for a singular group. We feel first of all it would be more appropriate to cure the problem rather than treat the symptoms. The simple fact is that the meat-packing industry, as its production lines are currently set up, inflicts massive and widespread damage on individuals by way of carpal tunnel syndrome.

Most of those affected are young females who, once having incurred carpal tunnel syndrome, are forever precluded from returning to work or other activities which involve repetitive use of their upper extremities. This is usually the case whether or not they undergo surgery for the condition. It is our understanding that remedies exist, but said remedies would slow production.

Additionally, it is the current definition of work disability under the Act which should be modified to account for unique situations where low functional impairments result in high work disability awards for young workers who can relocate within the job industry. Accordingly, rather than acquiescing to a rather unique special interest group with strong lobbying dollars, a remedy should be formulated which is beneficial to industry and workers statewide. In that regard, we refer to our proposed work disability definition.

The effect of adopting the proffered provision is to change a whole body injury into two scheduled injuries, which results in a significant loss of benefits to the affected worker. On its face, the wink and nod approach cannot be accepted. If anything, the worker with significant impairment in both hands has less transferable skills and has more difficulty being retrained than a worker with impairment of both legs, back, or neck. To show the severe and bizarre inconsistency brought about by this provision, consider the worker who injures both hands but not by repetitive use. Under this proposal, that worker would receive whole body benefits and more compensation with potentially less impairment than the worker from IBP or Val-Agri.

As indicated above repetitive use syndrome, at least as far as carpal tunnel is concerned, most often affects women, which suggests a disproportionate impact of this legislation on a particular segment of the work force.

In conclusion, the legislature should not carve out a singular exception for a significant problem brought about by the industry's own production methods. A more equitable definition of work disability is appropriate for all workers, particularly if the employer is willing to retain the injured worker. For that reason, we stand by our suggested modification to K.S.A. 44-510e.

PERMANENT PARTIAL DISABILITY DEFINITION: Page 18; lines 0655-0666

If the proposed language of H.B. 2186 is adopted relative to work disability it will cause a severe negative effect for industry, workers, and the State of Kansas. Most significantly, the proposed language encourages workers to remain out of the work force until conclusion of any workers compensation claim. Specifically, the proposed legislation states:

> "There shall be 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."

Prior legislation has never penalized the worker for returning to work, and has recognized the permanency of the physical impairments. Furthermore, wages earned after injury are often

misleading relative to disability due to the effects of inflation and other matters. Encouraging workers not to return to work is detrimental in terms of unemployment and welfare benefits to be paid, and creates an idle work force. Such a legislative enactment would only enhance present beliefs that injured workers do not work based on presumed secondary gains. By far, most injured workers desire a rapid return to their jobs. They should not have legislative barriers frustrate this desire.

Until now, claimants could safely be told to return to any employment within their physical limitations, and that they would not forfeit nor jeopardize their workers' compensation. In fact, the entirety of the present Workers' Compensation Act is geared to getting workers back to work. For these reasons we propose a work disability formula set forth in our proposals which encourages a return to employment, and provides a benefit to the employer for retaining an injured worker. We also encourage a strengthening of vocational rehabilitation legislation with benefits to both employer and worker alike.

The expansion of work disability to include a review of the worker's ability to return to the open market considering the employee's education, training, experience, age, and capacity for rehabilitation is beneficial. However, it does not offset the "conclusive presumption" which is simultaneously proposed.

PERMANENT PARTIAL GENERAL DISABILITY MAXIMUM: Pages 18-19; lines 0675-0677

Under this proposed change, the maximum weekly rate for permanent partial disability will be reduced. In reality, unless the $75,000.00 maximum for permanent partial disability is raised, this proposal has little effect.

The current maximum for permanent partial disability is $247.00 per week. $247.00 times 415 weeks is $102,505.00, or stated another way, a $75,000.00 Award can be paid out in as little as 5.84 years (303.64 weeks). Thus, this proposed change will reduce benefits for only a few, but will force the benefits to be taken over the full 415 weeks.

We do propose that the $75,000.00 cap be raised, as it is unrealistic in today's economy. The $75,000.00 maximum has been in effect since 1979. So long as the $75,000.00 cap remains in effect, this proposal has little pragmatic effect.

PERMANENT TOTAL DISABILITY MAXIMUM: Page 20; line 0730

The maximum rate for permanent total is increased to $200,000.00 which is a needed change. The maximum applies only for those who are unable to perform any substantial gainful employment as a result of their injury. The previous maximum was $100,000.00.

However, we propose that for those very few individuals who become permanently totally disabled there should be no maximum. They

should receive the temporary total rate fixed at the time of their injury for the length of their disability.

EMPLOYER TAXES ADDED INTO AVERAGE WEEKLY WAGE: Pages 21-22; lines 0784-0787

A provision disallowing the employer taxes to be figured into the average weekly wage when a person has been terminated from employment is a policy decision. It is clear that payments by the employer for the benefit of the employee into a pension plan or into the old age and survivor's insurance system are a fringe benefit to the employee. It has not been settled by case law whether these employer taxes are conclusively to be included in the average weekly wage. By legislative intent, it would appear that the current language would require their inclusion.

WRITTEN DEMAND FOR COMPENSATION AND COLLECTION OF PAST DUE DISABILITY: Page 27; lines 0055-0064

The legislative proposal that would require written demand to be only served once after an award is a needed provision. Current law requires that any time the insurance carrier or employer is late in payment that the employee is required to file a written demand for payment, wait twenty days, and then file an application for penalty, and then prosecute the application for penalty to get past due

benefits paid. It would be a much simpler procedure to only file one written demand to keep compensation current and to be able to quickly enforce back due ordered payments.

The ability to enforce the cause of action of back due compensation is clarified jurisdictionally to the county where the cause of action arose. However, we propose that the Director of Workers' Compensation have jurisdiction over attorneys' fees as well so as to avoid the necessity of two separate actions.

HEALTH CARE PROVIDER; STATEMENT OF CHARGES: Page 28; lines 0085-0100

The intended change is to relax the rules of evidence relative to medical bills which arise for treatment of work-related injuries. Penalties are assessed for introducing objectionable bills, as well as for objecting to reasonable bills.

The provision is useful and appears workable in its present form.

EMPLOYEE EARNING THE SAME OR HIGHER WAGES: Page 29; lines 0122-0132

The legislative proposal adds the language when an employee "is earning or" is capable of earning the same or higher wages. This appears to be a clarification of the previous language and not a substantive change.

A substantive change does allow the Director to modify the award and reduce compensation, when previously the Director only had jurisdiction to cancel the award and end compensation.

WORKERS' COMPENSATION FUND REIMBURSEMENT FOR EXCESS PAYMENTS BY EMPLOYER: Page 30; lines 0168-0172

A substantive change is proposed that when the insurance company paid in excess of what is determined to be the employer's liability, that the Workers' Compensation Fund is responsible for reimbursing the employer. This is a substantive change as previously the insurance company was only reimbursed for overpayments made under order.

This beneficial provision which will allow insurance companies to make temporary total payments when there exists "some doubt" as to compensability; without awaiting full investigation. By making these payments the insurance carrier is protected if it is later determined that the claim was not compensable.

Little impact on insurance carriers or the Workers' Compensation Fund would be expected as payments would only continue for a short period of time while the investigation is underway.

CLAIMANTS' ATTORNEYS' FEES REDUCED: Page 31; lines 0203-0207

Currently, claimants' attorneys under specific statutory authority may charge a contingency fee in the amount of 25% of certain compensation. A fee is not allowed to be charged when temporary total disability is paid voluntarily and without refusal

at any point in the course of a given case.

Historically, contingency fees of any amount have been the subject of great debate. No matter what percentage they are set at, it is a sword that cuts both ways. Workers' compensation is becoming an area of expertise for practicing attorneys, much the same as any other area of law. For those attorneys that represent multiple clients presumably there will be a balance between so-called "good cases and bad cases".

Limiting attorneys' fees to 15% when the issue of whether or not the claimant sustained personal injury by accident arising out of and in the course of employment is removed does not take into consideration the fact that other issues are often litigated in cases which require substantial time and expertise to litigate. In fact, in most cases the issue litigated is the nature and extent of disability. To simply indicate that there is "no question" as to a recovery does not take into account multiple other issues, any one of which could defeat claimant's cause of action.

For instance, an entire claim may be litigated because there are issues relative to timely written claim, coverage under the Act, or whether the worker is an independent contractor. The simple admission of industrial accidents in these cases is no guarantee that a claimant will receive any compensation.

Furthermore, simply evaluating the time involved does not take into account the overhead and expenses which are carried by claimants' attorneys in prosecuting these cases. Quite obviously, few, if any injured workers could afford to finance the cost of their case which

often includes medical depositions, travel, obtaining medical records, etcetera.

Finally, the flat lowering of claimants' attorneys' fees from 25% to 15% will in the long run adversely affect claimants themselves. We will see more lump sums in which the claimant is undersold because the fee involved will not justify substantial time efforts by attorneys for claimants. As noted in our proposals, we do not feel it would be unreasonable to cap attorney's fees at 15% if the case does not go beyond the mandatory pretrial stage. In that regard, the attorney's time and expenses would be limited, and a valid argument could be made that the case was "uncomplicated".

However, the blanket 15% proposal in its present form is unjust and would limit the number of attorneys available to assist claimants. Furthermore, if there are fewer attorneys representing claimants, they will logically occupy their time with the most profitable cases leaving many people unrepresented.

KNOWLEDGE OF PHYSICIAN ATTRIBUTED TO EMPLOYER AND EMPLOYER'S KNOWLEDGE OF PREEXISTING IMPAIRMENTS: Page 34; lines 0314-0324

The provisions regarding knowledge of the physician being attributed to the employer is specifically aimed at lessening the employer's burden of proof regarding knowledge of injury in order assess liability against the Workers' Compensation Fund. The Fund was created as an encouragement for employers to hire workers with impairments or retain workers with impairments.

It is only when the employer can prove his benevolent intent that he is allowed to take advantage of the Fund. This serves industry and worker alike. The provision relative to physician's knowledge being imputed to the employer does not appear to further these purposes. In other words, the employer may have no desire to have an impaired worker on his premises, and yet be allowed a credit.

On the other hand, the amendment which states that a preexisting impairment establishes a "reservation" in the mind of the employer is entirely appropriate and should be enacted. Employers should not be required to understand all implications and natural consequences of a medical impairment in order to take credit against the fund.

In conclusion, we disagree with the first portion of this proposal, but agree with the remainder.

PREAMBLE

Under our present Workers' Compensation Act actual payments for injuries to workers have not increased in recent years considering inflation and other factors. In fact, the maximum for permanent partial disability has remained at $75,000.00 since 1979. However, premium payments by employers have increased, and obviously, cost containment is of concern in order to continue to encourage industry within the State of Kansas.

We can only conjecture as to why premiums have greatly increased, while benefits have not, as this has traditionally been knowledge guarded by insurance carriers. It is not too difficult to assume that some of the same factors which affected the massive rise of medical malpractice premiums, also affected workers' compensation premiums. As the legislature is well aware, many of the current insurance problems were self-created.

It is suggested that modification of the Workers' Compensation Act is possible without cutting overall benefits to injured workers and also without increasing costs. We feel the following are the areas which most require legislative attention:

a) administrative costs and procedures;

b) work disability;

c) vocational rehabilitation;

d) temporary total disability;

e) controlling death benefits;

f) scheduled injuries (amputations);

g) right to review and modify;

h) penalty provisions;

i) permanent total disabilities.

The proposals set forth are designed to more nearly equalize benefits among workers, to get additional benefits to workers when most needed by them, to increase benefits to amputees, to strengthen vocational rehabilitation, and to cut the overall costs of administering the Workers' Compensation Act.

I N D E X

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PROPOSAL NO. I

PROBLEM:

There is a tremendous backlog of cases at every procedural stage and level of the Workers' Compensation Act. This backlog is due, only in part, to the increased number of claims being presented for decision. This backlog defeats every stated purpose of the Act. Most often, despite the complexity or lack of complexity of the case, no serious attempt at resolution is made until litigation is at hand or has been completed. This is especially true in any case where a claimant is unwilling to forego future medical expense payment by not accepting a lump sum settlement. The protracted and often unnecessary litigation adds costs to the parties and frustrates many workers into settlement.

PROPOSAL:

Director's Rule 51-3-8 states that:

> "An informal pre-trial conference shall be held in each contested case prior to testimony being taken in case. At these conferences the administrative law judge shall determine from the parties what issues have not been agreed upon. If the issues cannot be resolved and an informal award entered, the stipulations and issues shall be made a part of the record."

This Rule has never been utilized. The Rule should be enacted and expanded to allow expeditious resolutions with penalties for noncompliance and for failing to proceed in good faith. We suggest the following as a framework for future legislation:

At the time of filing of an Application for Regular Hearing, claimant must advise in writing to the Director any known basis for impleading the Kansas Workers' Compensation Fund. Within twenty (20) days from the filing of an Application for Regular Hearing, the Workers' Compensation Fund must be implead. Within forty (40) days of the filing of any Application for Hearing the Director or Administrative Law Judge shall advise as to the setting of a regular hearing in writing to all parties. At the time of said notification the Director or Administrative Law Judge shall also advise as to the setting of a mandatory pretrial conference, to be held at least fifteen (15) days prior to the Regular Hearing.

This pretrial conference shall be held by the Director or the Administrative Law Judge assigned to the matter, and shall be attended by claimant's representative (or claimant, if pro se) and a representative of the respondent and insurance carrier and a representative from the Kansas Workers' Compensation Fund (if appropriate).

Not later than five (5) days prior to the holding of the pretrial conference mandated by this section, each party shall be required to file with the Director or Administrative Law Judge a pretrial analysis. Said analysis shall include each party's summary of the issues presented and whether said issues are in dispute; a witness list, including anticipated testimony, the date, place, and time of the taking of each witness' testimony set in advance of the pretrial (with claimant's evidence to be completed first); and proposed findings of fact as to all justiciable issues. The pretrial analysis shall become a part of the record, and shall not exceed four (4) typewritten legal pages.

At the pretrial conference, the Director or Administrative Law Judge shall attempt to define the issues, evaluate the anticipated testimony, and explore the possibilities of amicable resolution of the issues. In the event of any party's failure to substantially comply with the pretrial guidelines, as regards the admitting or denying of issues

and the scheduling of testimony, the Director or Administrative Law Judge shall be empowered to grant judgment pursuant to the proposed findings of fact as presented by the party in compliance; unless said findings are deemed unreasonable. In the event said proposed findings are deemed unreasonable, the pretrial conference shall be reconvened within fifteen (15) days, with appropriate notice.

Upon a showing of good cause, the Director or Administrative Law Judge assigned to the case may allow the impleading of the Workers' Compensation Fund after the pretrial conference, may allow additional witnesses, or may allow any amendments as justice may require. It is specifically understood that the intent of this section is to expedite proceedings under the Workers' Compensation Act by the full and free exchange of information. As such, if at the time of final Award following an evidentiary hearing, the Administrative Law Judge determines that any party has acted unreasonably in pursuing or presenting a claim, or in failing to

cooperate fully with the pretrial conference procedure, including the proposed findings for nature and extent of disability, the Administrative Law Judge shall have the authority to:

i) assess costs, or a portion thereof, against any party including but not limited to court reporter fees and expert witness fees, and/or;

ii) assess attorney's fees, or a portion thereof, against any party, and/or;

iii) award interest on past due compensation not to exceed ten (10%) percent, compounded daily.

PROPOSAL NO. II

PROBLEM:

Under the current law, work disability is defined as: "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of his injury, has been reduced." Prior to the decision of _Ploutz v. Ell-Kan,_ 9 Kan App 2d 9 (1983) and in cases like _Anderson v. Kinsley Sand & Gravel,_ 221 Kan 191 (1976), the trier-of-facts could take into account the "whole man" concept of the injured worker before the Court. With _Ploutz_ work disability has been reduced to a mathematical formula. Furthermore, there is no incentive for the employer to retain an individual in employment after injury.

Assume the following simplistic example: Worker A is a college student studying to be an accountant, but takes work as a bricklayer for the summer "for exercise". Worker B has been a bricklayer for the past 15 years, has a high school education, and uses the employment to support his family while living paycheck to paycheck. Both workers suffer back injuries which require surgery, and both are advised by their doctors not to lift over 30 pounds nor be involved in repeated stooping and bending. Under _Ploutz_ both workers would receive identical compensation based on identical average weekly wage, injuries, and job functions. Humanistically, the full-time bricklayer is obviously more "impaired" than the "casual" employee.

As an additional example, assume a nurse's aide injures herself while working in a hospital. She receives admonitions from her doctor not to be involved in an employment requiring lifting. The employer hospital in an effort to utilize her medical background and in-house familiarity makes effort to make her a medical transcriptionist. Under the current workings of the compensation Act, the hospital would receive no benefit for doing so, and as a pragmatic matter would release her from employment. Not only is the injured worker then out of work, she is out of work with the additional handicap of a back injury, and the stigma of having filed a workers' compensation claim. Her future employment possibilities are extremely diminished.

PROPOSAL:

The definition of work disability should return to a broader framework which allows for a recognition of each individual's particular situation at the time of industrial accident. Additionally, an incentive should be formulated for the employer to keep the injured workers on the job if at all possible so their earnings and self-worth are not destroyed. While it is impossible to write a definition or law that will be perfectly equitable to all, we propose the following as a framework for legislative language. A portion of this definition was written by Gary Jordan, Esq., and a portion by John M. Ostrowski, Esq., as part of Senate Bill 365 (1986):

> Permanent partial general disability is hereby defined as either functional impairment or work disability. Functional impairment is the extent, expressed as a percentage, of the loss of a part of the

total physiological capabilities of the human body. Work disability shall be the extent, expressed as a percentage, by which the ability of a worker has been reduced from obtaining or performing work of a type and character that the worker was reasonably able to obtain or perform, considering the worker's age, education, training, previous work experience and physical abilities. Post-injury earnings are not determinative of such percentages. The extent of permanent partial general work disability shall in no event be less than the extent of permanent partial impairment of function.

In cases in which a percentage of work disability is awarded, the employer shall be entitled to reduce its weekly payments to the level of the worker's functional impairment during all weeks when:

(A) The employer retains the employee in its employment at, or above, the wage rate that the employee would have earned in the employee's employment with the employer if the employee had not been injured; and

(B) The employee is paid for the same number of hours and days per week that were in effect for the employee at the time of injury; and

(C) The employee is employed on the same shift or at the same time of day or night that the employee customarily worked at the time of injury.

PROPOSAL NO: III

PROBLEM:

Under the current Workers' Compensation Act there is no credit for an employer rehabilitating an injured worker due to the Antwi decision (5 Kan. App. 2d 53, aff. 228 Kan. 692 (1980)). Prior to Antwi there were an exceedingly small number of rehabilitated workers in the State of Kansas. Today, not only are few workers rehabilitated, but rehabilitation plans are opposed by insurance carriers and employers.

It is our position that if an incentive can be given to the employer for rehabilitation of the injured worker, it will be beneficial to industry, insurance carriers and workers.

PROPOSAL:

We would suggest that in any case where work disability is awarded to a worker that review and modification be allowed by the respondent/insurance carrier in the event they were instrumental in having the worker rehabilitated. In this situation, post rehabilitation earnings can serve as a guide. In no case will the worker be awarded less than his functional impairment following the review and modification procedure.

If the employer is not insturmental in the rehabilitation of the worker, then logically, no credit should be given. The difficult objective is to simultaneously provide incentives for the employer and

the worker. As such, we propose the following language as a framework for future legislation:

> In any case where the employer or its representative is instrumental in returning the injured worker to substantial and gainful employment through the rehabilitation process, said employer shall have the right to request review of claimant's previously awarded permanent partial disability. Said review and modification shall be effective from the time the worker is actually rehabilitated and returned to employment, but in no event shall said review and modification result in the worker receiving a modified award for less than the worker's anatomical functional impairment.
>
> In said cases the Director shall evaluate the worker's actual earnings following rehabilitation and compare said earnings considering inflation, interest, and any other relevant factors to the claimant's average weekly wage at the time of the initial industrial accident. Based on these considerations, if the worker is earning the same or higher wages, the Award shall be modified to award claimant the then present anatomical functional disability . Based on the same

considerations, if the worker is earning less than the wages earned at the time of the initial accident, he shall receive two-thirds of the difference between pre- and post-injury wages.

Following any such review and modification, either party can request further reviews; however, if the claimant remains substantially and gainfully employed for one year as a result of the rehabilitative process and without requesting further reviews and modifications for one year it shall be conclusively presumed that said worker has no work disability.

PROPOSAL NO. IV

PROBLEM:

Injured workers who suffer temporary loss of income often cannot survive serious credit problems based on the current temporary total rates. If their wage earning capacity is interrupted for a period of several months or more, their recovery is often complicated by the psychological damage due to duress and other complications in not being able to meet their ordinary living expenses. Specifically, it is noted that most individuals budget their needs based on their current income without taking into consideration the possible loss or decrease in income due to an unexpected interruption of that income, for whatever reason.

Additionally, the needs of injured workers arise spontaneously relative to the need for temporary total disability and medical treatment. Under current procedural rules it is not clear when a preliminary hearing may be had for the institution of these benefits. At the current time a claimant may be awaiting a decision on his case for a substantial period of time and have the need for temporary total or medical treatment arise. It should be clear that a claimant does have the right to file for preliminary hearing under these circumstances. Additionally, Director's Rule 51-3-5a should be abolished as it relates to awarding benefits only prospectively from the filing of an application. This would present no prejudice to insurance carriers as any erroneous payments made are recoverable from the Kansas Workers' Compensation Fund.

PROPOSAL:

All workers should be paid at sixty-six and two-thirds percent (66 2/3%) of their actual loss of earnings while classified temporarily totally disabled. All payments made for temporary total will be credited towards the maximum in effect at the time of the injury. Temporary total rarely exceeds a period of one year, so the net effect of these payments is to give injured workers the most benefits when needed the most, i.e. when they are unable to work, ineligible for Social Security disability, and ineligible for unemployment. It is furthermore suggested that any worker released to "light duty" when there is no light duty available with his regular employer be entitled to temporary total disability. Finally, it is suggested that the seven (7) day rule relative to preliminary hearings and the back dating of preliminary awards only in the case of "unusual circumstances" be abolished. Accordingly, we suggest the following as a framework for implementation by the legislature:

> In any case where an individual is temporarily total disabled by reason of injury or occupational disease, said individual shall receive temporary total disability in the amount of sixty-six and two-thirds percent (66 2/3%) of his average weekly wage as defined by K.S.A. 44-511. There is a rebuttable presumption that temporary total disability does not extend beyond one (1) year.

In the event an injured worker is released to light duty by the treating physician, and the employer at the time of the injury is unable to provide light duty to the injured worker, and the worker has not returned to substantial and gainful employment, the period of temporary total disability shall continue until such time as the worker finds employment or reaches maximum medical improvement.

It is specifically understood that a preliminary hearing can be held at any time when the issues relate to the payment of temporary total disability (including requests for temporary total disability relative to vocational rehabilitation) and/or medical treatment. Furthermore, the awarding of said benefits shall not be dependent upon the time of filing an Application for Preliminary Hearing, but rather shall be based on the evidence presented regarding the onset of temporary total disability and/or need for medical treatment.

PROPOSAL NO. V

PROBLEM:

The cost of litigation in workers' compensation claims is extremely detrimental to carriers and claimants. Previously, only a fraction of claims were actually forced to the litigation process. Litigation is becoming increasingly more the norm, based in part on the carrier's inability to promptly deal with claims, which in part is caused by the delay certain to exist once litigation is started, and also by the failure of employers to report claimed accidents promptly to their insurers. Admittedly, too, litigation is profitable for attorneys, expert witnesses, and court reporters. No changes will or should eliminate all litigation. The total elimination of litigation would be an indication that all individuals were being treated identically regardless of their individual situation. However, needless litigation and cost incurrence should be avoided so that injured workers' benefits are not further reduced.

PROPOSAL:

In an effort to make litigation in and of itself less profitable for all involved, we propose the following language to be used as a framework for the legislature:

> In all cases decided at the mandatory pretrial conference stage, claimant's attorney's fees shall not exceed fifteen (15%) percent of the amount of compensation

recovered and paid, in addition to actual expenses incurred, and subject to the other provisions of this Act. Any attorney representing a qualified self-insured or insurance carrier under the Kansas Workers' Compensation Act shall be limited to the same hourly rate as in effect for those attorneys defending the Kansas Workers' Compensation Fund. Furthermore, no attorney shall charge greater than $3,000.00 to defend any case hereunder without specific permission from the Director.

Any person giving expert testimony in any proceeding hereunder shall not be permitted to charge greater than $250.00 per hour for said testimony; and $125.00 for each additional hour. It is specifically understood that testimony given by telephonic means is acceptable and encouraged under this Act, regardless of whether said testimony is in state or out of state. The person arranging for said telephonic testimony is responsible for its quality and accuracy.

All medical providers or health practitioners shall not charge greater than $15.00 for reproduction of medical records which are

less than 10 pages; and 50 cents for each additional page.

Whenever proceedings are taken which require the presence of a court reporter, said proceedings shall not be transcribed until request is made by the Administrative Law Judge when all parties have submitted their cases. The Administrative Law Judge shall be advised in writing by the final submitting party that transcripts are needed. Nothing in this section shall prohibit any party from requesting at their own cost the entirety or any portion of recorded materials from the court reporters.

PROPOSAL NO. VI

PROBLEM:

It is recognized that there are relatively few death cases under our Kansas Workers' Compensation Act. However, in cases of this magnitude, all efforts must be made to insure maximum use is made of benefits paid for surviving widows, widowers and minors. Additionally, maximum efforts should be made to reduce any litigation costs. Too often, benefits are taken in a lump sum on these claims, which defeats the intent of the legislature. Following an often rapid disbursement of funds, the survivors are forced to seek State aid. It is suggested that the benefits of lump summing these cases are few.

PROPOSAL:

In all cases which come before the Director wherein death has occurred or the claimant is permanently totally disabled, lump summing should be the unusual method of resolving the case. With the increasing use and availability of annuities, all efforts should be made to purchase the same with the available funds considering the available monies and the needs of the survivors. Additionally, attorney's fees should be reviewed by the Director and approved by him on a case by case basis considering the complexity of the issues involved. Accordingly, we propose the following language as a framework for the legislature:

> It is understood that there is a statutory limit on benefits paid for the death of a worker in the

State of Kansas. The expressed legislative intent is that said benefits be utilized to provide daily assistance to the dependents of the deceased worker. Additionally, the minors of any deceased wage earner should utilize said benefits for their welfare including education, recognizing their loss. As such, it is intent of the legislature not to lump sum said death benefits. Accordingly, it shall be the duty of Director, or his designee, to educate himself as fully as possible relative to structured settlements and annuities, and to review all death cases with a view towards effectuating legislative intent. In appropriate cases, the Director or his designee can approve a lump sum settlement based on the finding that it is in the best interests of the survivors. Furthermore, the Director shall specifically approve or disapprove claimants' attorneys fees in any death case.

PROPOSAL NO. VII

PROBLEM:

It is grossly inequitable that the loss of a body part by complete amputation should be valued disportionately based upon a worker's earnings at the time of injury.

PROPOSAL:

It is suggested that a maximum dollar amount be obtained for amputation by multiplying the then in effect temporary total rate by the number of weeks on the schedule, and paying that amount to the individual worker regardless of average weekly wage at the time of the accident. Kansas rates are disportionately low when compared to those of sister states for similar injuries.

Accordingly, the following language is suggested as a framework to be enacted by the legislature:

> Notwithstanding any provision to the contrary, in any case where 100% loss of a body member occurs by reason of amputation, the injured worker shall receive the maximum temporary total rate then in effect times the weeks allowed for said scheduled injury.

PROPOSAL NO. VIII

PROBLEM:

The cost of medical care is not regulated under the Workers' Compensation Act at the current time. Medical costs represent a significant portion, if not the most significant portion, of benefits to the injured worker in Kansas. In recent years, caps have been placed on all medical providers by health insurers. Similar caps should be imposed on those providing medical services to the injured worker. There is no reason why any medical provider should receive a different fee for services rendered dependent upon whether or not a person was injured on the job.

PROPOSAL:

We propose the following language as a framework for the legislature to be coordinated with K.S.A. 44-510:

> "... All fees, transportation costs and charges under this section shall be subject to regulations by the director and shall be limited to such as are fair and reasonable." The director and any subsequent tribunal shall specifically look to prevailing charges by major medical providers within the State, and set charges accordingly. It shall be conclusively presumed that the charges set by major medical providers within the State are fair and reasonable. "The director shall have

jurisdiction to hear and determine..." (K.S.A. 44-510).

PROPOSAL NO. IX

PROBLEM:

The Workers' Compensation Act currently recognizes that medical conditions change over time, and usually a worsening takes place. Accordingly, the present law allows for "review and modification". Unfortunately, the Supreme Court has determined that modification should date prospectively only from the time of final decision. Ostensibly, the Supreme Court was attempting to protect workers from abuse by insurance carriers. Under the present law, given the current substantial backlog for hearings and decisions, a worker could be unable to work, or suffer a severe worsening from the initial injury and linger for a substantial period of time without a change in benefits from the original award.

PROPOSAL:

K.S.A. 44-528 should be amended to make it clear that review and modification should date from the time of occurrence of the change of condition. We propose the following language as a framework for the legislature:

> In any case wherein a request for review and modification is filed by any of the parties, said review and modification shall date from the occurrence of the change of condition as the evidence may show, without regard to the date of filing of the Application.

PROPOSAL NO. X

PROBLEM:

The penalty provision of K.S.A. 44-512a does not achieve its intended purpose since it only provides for a $25.00 penalty per bill, or $100.00 per week and in either case requires the filing of a separate District Court action for attorneys' fees.

SOLUTION:

It is suggested that the medical bills be assessed penalties at $25.00 per bill, per week. Additionally, the penalties for past due compensation should be raised to $150.00 per week. In either case the Director should have authority to assess attorneys' fees.

Accordingly, we propose the following language as a framework for modification of K.S.A. 44-512a:

> "... and assessed against the employer or insurance carrier liable for such compensation, of not more than one hundred fifty dollars ($150.00) per week for each week any disability compensation is past due, and in the sum of twenty-five dollars ($25.00) for each past due medical bill..." per week...
>
> . . .
>
> "...The workman may maintain an action..." before the Director "...for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section, and the reasonable attorneys' fees incurred in connection with the action."

PROPOSAL NO.: XI

PROBLEM:

There are few cases of permanent total disability which arise as a result of industrial accidents. In said cases, compensation should be unlimited for the duration of the disability. If there exists any concept of "wage replacement" then there cannot be a cap on a disability which renders a worker completely and totally unable to engage in any occupation.

SOLUTION:

In cases of permanent total disability, compensation should be paid for life at the then existent temporary total maximum rate not to exceed sixty-six and two-thirds percent (66 2/3%) of the injured worker's earnings at the time of injury. Accordingly, we propose the following framework for legislative enactment:

> In cases of permanent total disability, and notwithstanding any provision to the contrary, compensation shall be paid at the rate of two-thirds of the workers' average weekly wage not to exceed the weekly temporary total maximum for the duration of the disability.