Approved March 15, 1989
Date

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

The meeting was called to order by Senator Alicia L. Salisbury at
Chairperson

1:35 ~~a.m.~~/p.m. on February 22, 1989 in room 527-S of the Capitol.

All members were present except:
Senator Dan Thiessen - Excused

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research Department
Gordon Self, Revisor of Statutes Office
Mary Allen, Committee Secretary

Conferees appearing before the committee:
Gabriel Faimon, Department of Social and Rehabilitation Services
Robert Anderson, Division of Workers' Compensation

The meeting was called to order by the Chairman, Senator Alicia L. Salisbury.

Senator Morris moved that the minutes of the February 8, 1989, February 9, 1989, February 15, 1989, and February 20, 1989, meetings of the Committee be approved. Senator Martin seconded the motion. The motion carried.

Jerry Ann Donaldson, Legislative Research Department, briefed the Committee on vocational rehabilitation in Kansas from 1984 to the present time. She reviewed and provided copies of the following documents in her presentation:

Report of the 1984 Interim Study on Proposal No. 29 - Workers' Compensation Act. (Attachment I)

Bill Brief on 1985 SB 365. (Attachment II)

Exerpts from the Report of the Legislative Commission on Kansas Economic Development - January 9, 1987. (Attachment III)

Report of the Task Force on Workers' Compensation dated March 16, 1987. (Attachment IV)

Bill Brief on 1987 HB 2186. (Attachment V)

1987 HB 2186 as printed in the 1987 Session Laws. (Attachment VI)

Bill Brief on 1987 HB 2573. (Attachment VII)

1987 HB 2573 as printed in the 1987 Session Laws. (Attachment VIII)

Article from Topeka Capital-Journal of March 6, 1987, concerning the change in the Kansas Workers' Compensation Act. (Attachment IX)

Outline of the 1987 Legislative Changes in Workers' Compensation and Developments in the law from 1974 to 1986. (Attachment X)

Gabriel Faimon, Commissioner of Rehabilitation Services, Department of Social and Rehabilitation Services, addressed the Committee on the general area of disability in the work force. He noted that of the approximately 140,000 Kansans of working age with a disabling condition or handicap which constitutes a limitation to employment, only about one-third are working. He observed that the vast majority of the other two-thirds want to work but have a problem finding an access to work. Mr. Faimon said the challenge of Kansas Rehabilitation Service is to empower Kansans with disabilities to achieve and sustain independence, primarily through

employment. (See Attachment XI for copy of Mr. Faimon's testimony.)

Robert Anderson, Director of the Division of Workers' Compensation, appeared before the Committee to respond to concerns and questions raised at previous meetings by Committee members. Mr. Anderson provided materials concerning recommendations for minor amendments to the Workers' Compensation Act, lists of qualified vocational rehabilitation vendors, recommendations for changes to the Kansas Administrative Rules and Regulations concerning qualifications and duties of vendors, an executive summary rebutting the previous testimony of labor lobbyists concerning vocational rehabilitation under the "new" Workers' Compensation Act, and the case of Howard v. Airwick/Airkem Professional Products. (See Attachment XII for Mr. Anderson's testimony with exhibits.)

Mr. Anderson reported that the Division of Workers' Compensation is establishing an advisory committee to study vocational rehabilitation issues. He noted that this advisory committee will serve to establish input from the various agencies and organizations interested in returning injured workers to the competitive labor market, and will also establish quality and ethical guidelines for vendors.

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

Senate Labor, Industry & Small Busir
February 22, 1989

GUEST LIST

NAME	REPRESENTING
Gabriel R Faimon	SRS / Rehabilitation Services
Marlene Forney	SRS / Adult Services
Robert A. Anderson	Director, Div. of Work Comp/DHR.
DILR TITO NAS	REHABS ADM WORK COMP
Terry Leatherman	Ks. Chamber of Commerce & Industry
Stephen Schiffelbein	SRS/Rehabilitation Servis
BURR SIFERS	M.H. K S.

RE: PROPOSAL NO. 29 — WORKERS' COMPENSATION ACT*

Proposal No. 29 directed the Special Committee on Labor and Industry to review the Workers' Compensation Act to determine whether any changes should be made and consider the effects any proposed changes would have on the injured worker, the administration of the law, and the economic cost to the employer.

As part of its charge, the Special Committee reviewed the historical development of the law, the main provisions of the law as it stands at the present time, and held five full days of hearings on workers' compensation issues. Special focus was directed toward the area of rehabilitation.

Background

Workers' compensation was last studied by the 1982 interim Special Committee on Labor and Industry when it explored the desirability of authorizing qualified employers to form self-insurance associations in order to arrive at a less costly means of providing workers' compensation for employees.

The present study request is in response to suggestions expressed by employers concerned with payments of benefits in Kansas compared to those in other states.

Kansas Law. Kansas became one of the first states to enact workers' compensation legislation with the passage of its law in 1911. From the very outset, there were major problem areas with this law. For example, limited medical benefits worked a hardship on an injured worker. Due to the exclusive remedy provision in the workers' compensation law, the injured worker could not sue the employer in order to obtain further relief from the ever increasing cost of medical care. A second weakness in the law involved coverage. The Workmen's

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* S.B. 9 accompanies this report

Senate Labor, Industry & Small Business
2-22-89
Attachment I
1-1

Compensation Act was not compulsory for types of employment not specifically mentioned in the Act. If the employment was not specifically mentioned, the employer could avoid workers' compensation by not electing to come under the Act.

Major statutory revisions in 1974 were prompted by federal concern over the adequacy of the various state workers' compensation laws. The Occupational Safety and Health Act of 1970 created the National Commission on State Workmen's Compensation Laws. After studying the different state laws, the Commission issued a report that included more than 80 specific recommendations. Of these, 19 recommendations were considered "essential" elements of workers' compensation which were regarded as imperative for the states to adopt. The 1973 interim Special Committee on Employer-Employee Relations, which studied the National Commission's report and recommendations, generally approved these 19 suggested provisions with some modifications designed to avoid placing unreasonable burdens on employers in Kansas.

Overall, the changes in the Workers' Compensation Act that resulted from action taken by the 1974 Legislature were sweeping in coverage and effect. Covered employment was broadened, benefits were increased, and new procedures for securing payment of compensation were instituted. In the ten years since the major revision of the Act, various amendments have passed that further amplify benefits to injured workers or their families.

Summary of Testimony

The major recommendations of the conferees are summarized below.

Division of Workers' Compensation, Department of Human Resources. The Director of the Division of Workers' Compensation noted a general concern regarding rehabilitation in that there is a lack of incentives for employers to provide rehabilitation for injured workers. Specifically, he noted two other issues that merit consideration. The first issue relates to the services of a psychologist which are not compensable

under workers' compensation; however, psychiatric services are allowable. The second involves dependent children of majority, those college students who are 18 years-of-age and over when an employee/parent dies. Currently these students cannot claim workers' compensation benefits, whereas a 17-year-old dependent who is a student enrolled in higher education would be covered. The Director cited the current process of review, which involves five levels of decisions, as an area which could be modified. Elimination of the district court level would expedite matters and could limit inconsistent applications of the law.

Kansas Chamber of Commerce and Industry (KCCI) Representatives. Business conferees testified on several matters involving workers' compensation that are of concern to employers. One spokesperson cited false and perjurious claims in which an employee collects compensation although the injury was not reported when it occurred and the employee subsequently held several jobs. Double compensation, a situation in which an injured worker can collect workers' compensation as well as unemployment compensation, was identified as a costly area of concern. The spokesperson further testified that occasionally an employer will pay for correction of a congenital condition that does not pertain to the employee's job.

Another business representative testified about abuse of employers under the liberal interpretation and administration of the present workers' compensation laws. Treatment of Carpal Tunnel Syndrome injuries as a body of the whole injury and not as a scheduled injury was cited as a problem by several conferees, since awards for body of the whole injuries are much more costly for employers and insurers. Temporary total disability compensation awarded to employees who are able to remain active in other areas, such as cutting wood and traveling, creates problems for employers because temporary total disability benefits are based on the complete incapability of engaging in any type of substantial and gainful employment, on a temporary basis.

A number of employers testified regarding the injured employee who receives a substantial settlement award based

on a permanent partial disability rating and who then returns to the same or a similar job. Conferees stated that the morale of co-workers suffers in these situations.

One industry spokesperson indicated that workers' compensation costs in Kansas are out of line with costs in other states, especially Missouri. This increased cost could be an inhibiting factor in business expansion. Testimony was proffered by several industry representatives regarding work disability which under the present law requires an employee to return to work of the same type and character. Their recommendation was that the objective should be to return the injured worker to gainful employment, which may mean a return to an entirely different type of work and not a return to the former job.

Labor Representatives. Representatives from the labor segment also offered several recommendations. A union spokesperson recommended that mental reactions be included in the definition of personal injury, that unauthorized medical payments be increased from the present $350 to $500, and that the amount of payments be payable in the maximum amount in effect on the date of service rather than the date of the accident since the maximum allowable could increase by the time of service. The union spokesperson further suggested that temporary total disability awards should be allowed in the amount of two-thirds the injured worker's average weekly wage instead of being limited to 75 percent of the state's average weekly wage under current law. In addition, it was suggested that a temporary total disability award should continue for as long as the employee is reduced to light work and none is available. Further, permanent partial disability awards should not depend on the percentage of work that an injured worker can perform if the injured worker is unable to obtain a job where he or she would be able to perform that percentage of work. For example, an injured worker who could perform a percentage of a former job could be totally excluded from the position due to an inability to perform the additional tasks required by the job. Provisions need to be made for additional disability awards in these instances.

Other suggestions on behalf of labor organizations include a modification of scheduled injuries to allow a closed case involving a scheduled injury to be reopened in a situation where the injury worsens, thereby allowing adjustments to benefits and any additional medical expenses.

Failure of the employer to pay benefits and late payment of benefits when due are areas that need legislative attention. In these instances of recalcitrant actions on behalf of employers that result in late payments, the injured employee is often forced to suffer an additional penalty by being sued or forced into bankruptcy.

In addition, medical information that includes nurse's notes, dispensary notes, or information from any health care organization should be included in the information that is subject to be furnished to another party. Failure to provide this information upon request should preclude its use in evidence against the other party. A failure of the medical service establishment to supply this information would justify a forfeiture of payment of bills without a remedy until compliance is effectuated.

Attorneys. Claimant attorneys representing the Kansas Trial Lawyers Association pointed out the contradiction in the law as it presently exists regarding maximum weekly benefits which can theoretically be drawn for the 415 maximum number of weeks. In reality, if an injured worker were to collect the current weekly maximum, the total maximum limit would be reached well before the expiration of 415 weeks. Temporary total awards during recovery and an increase in weekly benefits were identified as matters that need attention.

Occupational disease compensation, which is less than compensation for an injury, was discussed.

Insurance Industry. Members of the insurance industry unanimously cited the results of the Antwi case, which stands for the proposition that despite rehabilitation efforts on behalf of an injured worker, the employer and insurance companies receive no incentive which would further support vocational

rehabilitation efforts. Representatives from the insurance companies raised questions on the issue of work disability ratings and awards as they relate to retirees and college students who are injured on a summer job. The issue of back injuries was identified as a troublesome area due to the fact that awards are often made in back injury cases without a basis of supporting evidence.

Rehabilitation Representatives. A full day was devoted to testimony from persons who are actively involved in returning injured employees to work. These vocational rehabilitation conferees emphasized the need for a team approach and prompt intervention, as well as rehabilitative efforts on behalf of the injured worker. Delay in rehabilitation and the return to work can sometimes result in "pain behavior," a psychological phenomenon which makes it much more difficult to return to the workforce. Conferees stated that rehabilitation, as it is presently incorporated into the law, does not benefit sufficiently either the employer or the employee.

One conferee stated that many times, due to financial considerations, the rehabilitation experts are taken off a case. It is sometimes less costly to agree to a settlement than it is to pursue rehabilitation, especially since no credit is given for rehabilitation services that have been provided.

A rehabilitation expert stated that not everyone wants or needs rehabilitation and, therefore, it should not be mandated. The expert further indicated an injured employee should not have to resort to taking a minimum wage job when his or her former job was a high paying one, but that many such persons would accept a somewhat lower paying job.

Other conferees testified on various issues surrounding rehabilitation. One suggestion was to further encourage the use of safety measures to prevent injury or illness as well as to initiate procedures that would insure prompt response, communication, and coordination.

The rehabilitation administrator from the Division of Workers' Compensation stated that under the current system rehabilitation is dealt with as a last priority after medical

expenses and indemnity. Rehabilitation services should occur soon after medical needs of the injured worker are met. The last step should be compensation for the resultant disability.

Conclusions and Recommendations

The Committee endorses the concept that legislation should be prepared to indicate that the Kansas Workers' Compensation Act should be liberally construed in its coverage of injured workers but otherwise the Act should be impartial to both employer and employee. The evidence submitted should be considered on an impartial basis.

Self-serving and hearsay evidence, while admissible, is not sufficient to meet the employee's burden of proof but must be supported by independent, supporting, and corroborating evidence.

Matters that are recommended for further study include the following:

1. tax credit issues for employers who modify equipment or work requirements;

2. a legal advisor system, on a pilot program basis, aimed at cutting down on litigation; and

3. coverage of permanent total disabilities to extend beyond the current $100,000 maximum, to age 65; however, work disability will terminate at age 65 but functional disability will not terminate at age 65.

Specific recommendations of the Committee are as follows:

1. Repetitive Use Conditions. Repetitive use conditions simultaneously occurring in opposite extremities shall be compensated as due for each extremity under the permanent

partial disability schedule and additional compensation not to exceed 20 percent of the total period allowed for both extremities.

2. Review. Review of workers' compensation cases at the district court level shall be stricken. The recommended review sequence from a ruling of the director of workers' compensation will be to the court of appeals.

3. Dependent Children of Majority. The Act shall be amended to allow dependent children of majority in higher education of an employee who dies to receive compensation until age 23.

4. Evaluation. Payment of benefits to an injured worker during the evaluation period shall be allowed. Any payments made during the evaluation, vocational rehabilitation, reeducation or training period will not be deducted from a final award.

5. Failure to Pay. Service of written demand, upon failure to pay medical or disability compensation, shall be required only once. Subsequent failures to pay compensation or medical expenses shall entitle the injured worker to apply for penalty without demand.

6. Awards. The maximum permanent and temporary total awards will be increased from the present 75 percent to 100 percent of the state's average weekly wage. Maximum compensation benefits when death results from an injury should be raised from the current $100,000 to $250,000.

7. Healing Period. There shall be an adjustment of the percentage, from the present 10 percent to 20 percent, used in formulating the healing period following scheduled injuries to allow for a maximum healing period of 40

weeks, as contrasted with the present 15 weeks allowed.

8. Permanent Partial Disability Test. The test for permanent partial disability should be changed to include the ability to engage in work that the employee is reasonably able to perform based on age, education, training, experience, physical ability, and potential for rehabilitation.

The above recommendations are incorporated in S.B. 9 which accompanies this report.

In conclusion, the Special Labor and Industry Committee has instructed the ad hoc committee, which is composed of business and labor representatives, to meet and make recommendations to the Labor and Industry Committees regarding rehabilitation issues. In addition, the Special Committee on Labor and Industry would encourage recommendations of the ad hoc committee concerning the Workers' Compensation Fund.

Respectfully submitted,

December 4, 1984

Sen. Bill Morris, Chairperson
Special Committee on Labor
and Industry

Rep. Arthur Douville,
Vice-Chairperson
Sen. Bert Chaney
Sen. Norma Daniels
Sen. Dan Thiessen
Sen. Ben Vidricksen

Rep. Kenneth Green
Rep. Anthony Hensley
Rep. Dorothy Nichols
Rep. Lawrence Wilbert

SESSION OF 1985

SUPPLEMENTAL NOTE ON SENATE BILL NO. 365

As Recommended by Senate Committee on Labor, Industry, and Small Business

Brief of Bill*

S.B. 365 amends the Workers' Compensation law regarding vocational rehabilitation. Major amendments are as follows:

1. Payment of benefits during vocational rehabilitation evaluation or training shall not be deducted from a final award of a scheduled injury.

2. The time allowable for a healing period is extended from the current 15 weeks maximum to 21 weeks.

3. Permanent partial disabilities shall be determined as the extent, expressed as a percentage, by which the ability of the worker has been reduced from obtaining or performing work of a type and character the worker was reasonably able to obtain and perform considering the worker's age, education, training, previous work experience and physical abilities. Permanent partial general work disability shall not be less than the extent of permanent partial impairment of function.

4. The director may modify awards based on a consideration on whether the impairment or work disability of the employee has increased

* Bill briefs are prepared by the Legislative Research Department and do not express legislative intent.

Senate Labor, Industry & Small Business
2-22-89
Attachment II
2-1

or diminished. Under current law such modifications also take into account whether an award was based on fraud, undue influence, lack of authority, serious misconduct, or whether the award was excessive or inadequate.

Modifications of awards shall be effective as of the date the change actually occurred. Procedures for an increase as well as a decrease in awards are provided.

5. The bill deletes the provision whereby the director would be able to cancel compensation if the employee returned to work or engaged in a trade and was capable of earning the same or higher wages as before the accident.

6. Lump-sum awards, after October 1, 1985, will not be allowed unless, (1) the employee does not need vocational rehabilitation, (2) the employee has completed a rehabilitation program, or (3) the employee elects not to participate in a rehabilitation program.

7. After October 1, 1985, the issues upon which an employee may request a preliminary hearing are expanded to include the payment of temporary total compensation during the vocational rehabilitation evaluation or training or the advisability of the vocational rehabilitation plan.

8. Temporary total compensation awarded as a result of a preliminary hearing shall be paid on a weekly basis. If payments are made by the Workers' Compensation Fund and later determined to be the responsibility of the respondent, the respondent shall reimburse the fund.

If compensation has been paid to an employee which is later disallowed, upon a full hearing, the Workers' Compensation Fund will reimburse the payor, either the employer or the insurance carrier.

9. An employer's knowledge of the employee's preexisting condition shall constitute a reservation in the employer's mind as to whether to hire or retain the employee. Knowledge of a physician who examined or treated the employee on behalf of the employer shall be imputed to the employer.

10. Provisions are included which allow for a vocational rehabilitation administrator who shall direct and approve vocational rehabilitation of employees.

11. Creation of the Workers' Compensation Fund in the state treasury is provided. Expenses of vocational rehabilitation evaluation, testing, and training shall be paid from the Fund. The Director of Workers' Compensation will administer the Fund.

An assessment against all insurance carriers, self-insurers and group funded workers' compensation pools, imposed by the Director of Workers' Compensation, shall be credited to the Workers' Compensation Fund. The maximum amount shall be 1/2 to 1 percent of the Workers' Compensation benefits paid or payable by a carrier, self-insurer, or group-funded Workers' Compensation pool.

This Act shall take effect upon publication in the Kansas Register.

Background

This bill reflects the joint efforts of representatives from the employer and employee sectors. A representative from the Department of Human Resources expressed support for the bill. A spokesman from the Division of Workers' Compensation stated that the bill is designed to look at the whole person and not merely whether the injured worker can return to a prior job. A spokesperson representing a labor union in Kansas City expressed concern with some provisions in the bill. A representative of the independent insurance agents expressed support of the provision in the bill which reverses the appellate court decision in Hines v. Taco Tico which held that employer's knowledge of an employee's prior injury was insufficient to create a liability against the Workers' Compensation Fund. A spokesperson for Boeing Aircraft expressed support for the bill and noted that the goal of the bill is to return an injured employee to his/her preinjury economic status.

A conferee from the Insurance Department stated that the bill would drastically increase the liability of the Workers' Compensation Fund.

REPORT OF THE LEGISLATIVE COMMISSION ON KANSAS ECONOMIC DEVELOPMENT

January 9, 1987

Senate committee on Labor, Industry & Small Business
2-22-89
Attachment III 3-1

JAMES D BRADEN
RM 380-W, CAPITOL BLDG
TOPEKA, KANSAS 66612-1591
(913) 296-3113

State of Kansas

House of Representatives

HOME ADDRESS
1122 FIFTH STREET P O BOX 58
CLAY CENTER, KANSAS 67432-0058
(913) 632-3601

Speaker of the House

January 16, 1987

To All Members of the Kansas Legislature:

Pursuant to the 1986 HCR 5034 and 1986 HB 3122, I am transmitting to you the final recommendations of the Legislative Commission on Kansas Economic Development.

The charge to the commission was to be bold, the commission's recommendations embody a large collection of forward looking provisions. In a spirit of cooperation we have attempted to emphasize the general interest over special interests. Each member of the Commission may have had certain recommendations they did not endorse. However, the commission has unanimously approved the final report.

It is our hope that during the 1987 session of the Legislature we can continue the bipartisan cooperation which has existed to this time. It is with pride in our accomplishments and great hope for the future recommendations we transmit these recommendations to you.

Sincerely,

James D. Braden, Chairman
Legislative Commission of
Economic Development

JDB/hma

LEGISLATIVE COMMISSION ON KANSAS ECONOMIC DEVELOPMENT

Rep. Jim Braden, Chairman
Rep. Marvin Barkis
Rep. David Heinemann
Rep. Phil Kline
Rep. Don Mainey

Sen. Wint Winter, Jr., Vice-Chairman
Sen. Paul Feleciano, Jr.
Sen. Mike Johnston
Sen. Dave Kerr
Sen. Alicia Salisbury

CONSULTANTS

Belden Daniels, Counsel for Community Development, Inc., Cambridge, Massachusetts
Dr. H. Edward Flentje, Hugo Wall Center for Urban Studies, Wichita, Kansas
Dr. Charles Krider, Institute for Public Policy and Business Research, Lawrence, Kansas
Dr. Anthony Redwood, Institute for Public Policy and Business Research, Lawrence, Kansas

STAFF

Kansas Legislative Research Department

Tom Severn
Paul West
Chris Courtwright
Ben Barrett
Julian Efird
Raney Gilliland
Carolyn Rampey

Revisor of Statutes

Norman Furse
Don Hayward
Bruce Kinzie
Gordon Self
Avis Swartzman

HH86-304

INTRODUCTION

The Legislative Commission on Kansas Economic Development, established pursuant to 1986 H.C.R. 5034, was charged with overseeing the implementation of the economic development initiatives and with conducting an in-depth analysis, through study task forces, of major areas of economic development requiring legislative action in the 1987 Session.

The Task Force on Agriculture, the Task Force on Business Training, the Task Force on Capital Markets and Taxation, and the Task Force on Higher Education were created by the Legislative Commission on Economic Development pursuant to 1986 H.B. 3122 (L. 1986, Ch. 194). That legislation directed the Commission, for the purpose of conducting an in-depth analysis of major areas of economic development requiring legislative action in the 1987 Session, to appoint advisory committees and task forces as were deemed necessary. Early in July, the appointments to the Task Forces were announced. Task forces created pursuant to H.B. 3122 were composed of 13 members representing the business community, financial institutions, institutions under the control of the State Board of Regents, and the Legislature. A majority of the members of each task force were representatives of the business and financial communities. All task forces completed their work and made their reports, including policy and funding recommendations, to the Commission on December 2.

TASK FORCE ON CAPITAL MARKETS AND TAXATION

Legislators	Non-Legislators
Sen. Dave Kerr, Chairman	Charles Becker, Campbell-Becker (Lawrence)
Rep. Clyde Graeber, Vice-Chairman	Ben Craig, Metcalf State Bank (Overland Park)
Sen. Paul "Bud" Burke	Nancy Hiebert, Douglas County Commissioner (Lawrence)
Sen. Frank Gaines	Lee Peakes, George K. Baum and Co. (Kansas City)
Rep. Clint Acheson	Daryl Schuster, First National Bank (Liberal)
Rep. Joan Adam	Shelby Smith, Former Lieutenant Governor (Wichita)
	Montie Taylor, Peoples Savings and Loan (Parsons)

The Task Force on Capital Markets and Taxation was charged to evaluate the appropriateness of Kansas capital markets and tax structure to the rapidly changing needs of the Kansas economy, to undertake a benefit-cost analysis of Kansas tax incentives, and to review the adequacy and structure of the Kansas risk capital system.

The Task Force held five two-day meetings and received testimony from major interest groups as well as several individual firms affected by the financial and tax structure. Dr. Charles Krider was commissioned to conduct the benefit/cost analysis, and Belden Daniels was retained as consultant on capital markets issues.

structure, coupled with an aggressive marketing strategy by the Department of Commerce to convince outside firms of the numerous advantages of locating in Kansas, can reverse the trend and serve as a crucial tool in Kansas' economic development.

WORKERS' COMPENSATION IN KANSAS

The amount of workers' compensation premiums paid by Kansas employers, as measured by direct premiums earned, increased by 21.9 percent for calendar year 1985 over 1984. Payment of the premiums effectively constitutes a "tax" on Kansas businesses, and the annually increasing rates therefore are disincentives for economic development.

The Commission has concluded that there are a number of problems with the workers' compensation system in Kansas that need to be addressed by the 1987 Legislature.

The system literally has become swamped in recent years, with over 5,000 pending claims, representing a 48 percent increase since 1984, now facing the seven administrative law judges. Labor, industry, the Division of Workers' Compensation, and the legal profession proposed a wide variety of possible solutions to the backlog, including the following:

-- increasing the number of administration law judges;

-- redefining existing geographic areas of jurisdiction;

-- empowering the Director to mandate venue for certain cases;

-- making any additional judges "roving";

-- increasing judges' pay to reduce turnover; and

-- finding ways to relieve backlog beyond increasing the number of judges.

Repetitive use injuries, including carpal tunnel syndrome, represent a significant part of the recent flood of claims. The Commission believes that the way these injuries are now treated represents one of the most obvious inequities in the system, with maximum awards often being issued to claimants who have sustained only minimal loss of overall function. A number of recommendations again were offered by conferees.

-- Amending the definition of disability to incorporate the capability of the injured worker to retain and perform all kinds of employment, not just employment of the same type and character.

-- Adding a specific definition of repetitive use injuries to the functional disability schedule.

-- Creating a specific legislative limitation on carpal tunnel awards.

The static statutory cap on liability for partial and total disability, in place since 1974, has combined with steadily increasing maximum weekly benefits to create another inequity in the system. Injured workers qualifying for the maximum weekly benefit can run up against the caps long before the term of payment provided for in K.S.A. 44-510e(a). The recommendation of one conferee would increase the present caps, $75,000 for partial disability and $100,000 for total disability, to compensate for the increased cost of living since 1974.

There is also a lack of incentive for both labor and industry to engage in good faith vocational rehabilitation, according to conferees. The Task Force believes that substantial steps need to be taken to encourage both parties to undertake rehabilitation, through changes initiated by the Director, the Legislature, or both.

Since overall rates have increased by 10 and 9 percent in 1985 and 1986 respectively, the question of how rates are established in Kansas came under some scrutiny. Various options may need to be explored in the future, including giving the Insurance Commissioner additional authority to assure that the rates, including the medical cost trend factors, accurately reflect Kansas experience, and the authority to mandate premium rollbacks.

These are just a few of the numerous workers' compensation issues that need to be addressed. Of the $116 million paid out in FY 1986, a significant portion may have ended up in the hands of those not deserving it rather than in the hands of those being under-compensated.

Besides the existing inequities within the system, the avalanche of claims and steadily increasing premiums represent a serious threat to economic development in Kansas. However, the Commission decided not to make specific recommendations regarding workers' compensation, but instead to establish a special task force to study all aspects of the system and its administration in Kansas. The task force will consist of seven members, with no lobbyists, presidents of trade organizations, paid professional representatives of interest groups, consultants, or lawyers with significant workers' compensation practices, and will be empowered to hire a consultant. Because it is critical that significant progress be made toward resolving the workers' compensation issues during the next session, the task force should hold hearings throughout January and February, before reporting back to the standing Committees on Economic Development in early March.

March 16, 1987

Representative James D. Braden
Room 380-W
Capitol Building
Topeka, Kansas 66612-1591

Dear Speaker Braden:

Pursuant to the charge from the Legislative Commission on Economic Development, the Task Force on Workers' Compensation has held an organizational meeting and three full days of hearings devoted to the study of workers' compensation. The primary aim of the Task Force is to make positive contributions regarding recommendations for improving the Workers' Compensation Act. Topics that were covered included the areas of: (1) inequities within the workers' compensation system; (2) the burden or backlog within the system; and (3) vocational rehabilitation.

1. Inequities Within the System. At the February 27, 1987 meeting, the Task Force voted to make two recommendations concerning specific issues on workers' compensation. First, the Task Force endorsed the provision contained in H.B. 2186 which would specify that repetitive use conditions occurring in opposite upper extremities will be compensated as two scheduled injuries, plus up to 20 percent of the loss of use to each extremity. A second recommendation relates to the liability of the Workers' Compensation Fund for subsequent injuries to handicapped employees. Specifically, it was recommended that K.S.A. 44-567 be amended to contain the provision that: "If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes a reservation in the mind of the employer when deciding whether to hire or retain the employee."

2. The Burden or Backlog Within the System. As indicated earlier, one of the main areas that is causing the workers' compensation system to be overloaded is the substantial, permanent, and growing backlog of cases that prevents the Workers' Compensation Act from achieving one of its purposes; that is, to provide the employee with prompt compensation for injuries. Recommendations that the Task Force wishes to make in this regard, although concurrent, are aimed at more than one level of operation.

Senate Labor, Industry & Small Business
2-22-89
Attachment IV 4-1

For short-term purposes, to help resolve this dilemma which could undermine the delicate balance of trade-offs between employee and employer, the Task Force recommends consideration of the use of retired district court judges, either on a full-time or part-time basis, to hear cases until the backlog is resolved. Another possible solution would be to explore the use of paralegals or interns who might be available through either Washburn University Law School or the University of Kansas Law School. The Task Force believes that the interns or paralegals would be useful in condensing the facts of a case awaiting hearing and thereby relieve the workload of the administrative law judges. In order to ensure a sense of continuity and supervision, a system which would encourage the use of full-time paralegals who would supervise interns, in addition to clinic supervision, would be the most advantageous. Such a system, using a combination of paralegals and interns, could be feasible for long-range purposes as well.

The Task Force concludes the Director of Worker's Compensation should continue to explore and implement internal procedures that will streamline and expedite the process so that the question of how quickly an injured worker receives compensation does not depend on the employee's location in the state. Testimony indicates that Administrative Law Judges differ widely in their ability to handle and advance cases, which results in considerable disparity in the backlog of cases. The Task Force believes that those procedures currently being used by Administrative Law Judges that are the most successful and effective should be examined for use and possible adaptation for those Administrative Law Judges who are experiencing the greatest backlog of cases. The Task Force encourages that any procedural differences occurring among Administrative Law Judges be resolved in order to maintain the basis of the workers' compensation system which rests on a delicate balance of rights between the employee and the employer.

Additional Administrative Law Judges should be added to the Division of Workers' Compensation on an "as needed" basis if the paralegal/intern system proves to be inadequate. The Task Force is aware of budgetary and administrative issues that need to be considered in this regard. Because of these considerations, the Task Force concludes that increasing the number of Administrative Law Judges be accomplished using a serial procedure in order to not compound the situation.

3. Vocational Rehabilitation. Basic to the vocational rehabilitation program is the recommendation of the Task Force that participation in vocational rehabilitation should not be mandatory for either the employee or the employer. Cognizant of the fact that a minute portion of workers' compensation cases involve the potential for vocational rehabilitation, the Task Force concludes that, according to a consensus among conferees, the area of vocational rehabilitation is one that requires intensive, aggressive emphasis and immediate legislative attention. Currently, there is a lack of incentive for either the employer or employee to engage in good faith vocational rehabilitation. In making recommendations in this area, the Task Force believes that in order to accomplish the goals of vocational rehabilitation, the following should be guiding factors:

a. the employee should get back into the workforce and productivity through medical and vocational rehabilitation as quickly as possible;

b. the employer should have sufficient economic incentives to participate in meaningful vocational and medical rehabilitation;

c. the employee should have an early and impartial evaluation of the injury involved, with impartial evaluators; and

d. the economic advantages of avoiding rehabilitation should be eliminated or reduced.

To foster these goals, the Task Force concludes that cooperation between the public sector and private sector involved in vocational rehabilitation is essential. In those instances where it is appropriate, privatization of vocational rehabilitation is encouraged. Similarly, employers are urged to develop internal programs designed to help injured workers return to the work environment as soon as possible. Further, the Task Force believes that cost containment as a result of medical management should be promoted simultaneously with vocational rehabilitation efforts. The Division of Workers' Compensation is encouraged to explore the feasibility of establishing cost containment measures regarding medical expenses that involve the possible use of fee schedules or caps on certain medical expenses.

The Task Force concludes that, in most cases, lump sum payments can be counter-productive and can become a social problem involving a third party, namely society at large. In a typical lump sum settlement scenario, an injured worker can dissipate the lump sum award and end up on the welfare rolls as a noncontributing member of society. For these reasons, the Task Force believes that payment of lump sum amounts should be discouraged.

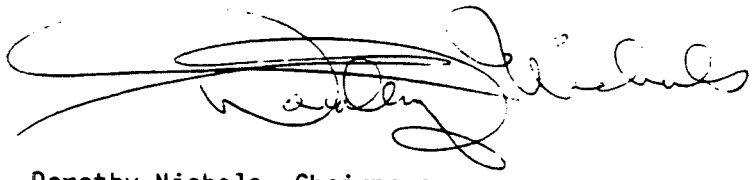
From an overall long-term perspective, the Task Force concludes that a system of gathering information regarding vocational rehabilitation is necessary so that a variety of meaningful suggestions might be made. Although the Task Force believes that specific, long-term recommendations that impact on vocational rehabilitation are important, due to the lack of data available at this time, the Task Force declines to make additional suggestions in this regard. An area of concern that deserves further study is the issue of preexisting conditions as it relates to the aging process.

Recognizing that faster, satisfactorily resolved cases moving through the Workers' Compensation system will result in a more productive workforce and create a nonadversarial climate in which society will ultimately benefit, the Task Force believes that there should be created an objective entity, such as an Advisory Council, designed to conduct an ongoing study of workers' compensation. It is the conclusion of the Task Force that such a study would result in more comprehensive solutions to an area of the law that has grown to be very complex.

In light of its charge, the Task Force on Workers' Compensation has endeavored to take a scrutinizing look at the current workers' compensation climate and, in terms of the time allowed, to make constructive suggestions to

the Legislative Commission on Economic Development. For these reasons, the Task Force submits the preceding recommendations for consideration by the Commission.

Respectively submitted,



Dorothy Nichols, Chairperson
Task Force on Workers' Compensation

W. O. "Bill" Barnes
Bill DeGarmo
Jack McGlothlin
Tom L. Schwinn
William Websterbeke

DN/pb

Enclosure

cc: Senator Robert V. Talkington
Senator Dan Thiessen
Representative Arthur Douville
W. O. "Bill" Barnes
Bill DeGarmo
Jack McGlothlin
Tom L. Schwinn
William Websterbeke

H.B. 2180 makes substantial changes to the Workers' Compensation Act. Major changes contained in the bill are as follows:

1. The liberal construction provisions of the Act are for the purpose of bringing employees and employers under the Act. Once within the provisions of the Act, however, the Act shall be applied impartially.

2. Maximum death benefits are increased from $100,000 to $200,000.

3. Repetitive use conditions in opposite upper extremities will be compensated on the basis of two scheduled injuries with an increase in compensation allowed of 20 percent of the loss of use to each extremity. Previously these types of injuries are compensated as an injury to the body as a whole.

4. A presumption is established that no work disability exists if the employee engages in work for wages comparable to the average gross weekly wage the employee was earning at the time of the injury.

5. The prior test for permanent partial general disability is replaced with a new test of the employee's ability to perform work in the open labor market, taking into account the employee's education, training, experience, and capacity for rehabilitation except that the percent of permanent partial disability shall not be less than the percentage of functional impairment established by competent medical evidence.

6. A prohibition is instated on the entering of a judgment for medical services or materials provided until final adjudication.

7. An injured employee is limited regarding unauthorized medical benefits which will be paid only for examination, diagnosis, or treatment.

Senate Labor, Industry & Small Business
2-22-89
Attachment 5-1

8. The definition of wholly dependent child is changed to include persons less than 23 years of age and either not physically or mentally capable of earning wages or attending full time as a student of an accredited institution of higher education or vocational education.

9. Maximum compensation for permanent total disability is increased from the present $100,000 to $125,000.

10. Maximum compensation for temporary total disability is increased from the present $75,000 to $100,000.

11. Maximum compensation for permanent or temporary partial disability is increased from $75,000 to $100,000.

12. Employer-paid Social Security taxes are not to be considered additional income and therefore not to be used in setting an employee's weekly benefit amount.

13. Employees, after one service of written demand following a final award, may apply for civil penalties without further demand.

14. Upon review and modification, the Workers' Compensation Director may modify an award and reduce compensation in addition to the current possible findings.

15. Attorney fees in lump sum payment situations shall be reviewed by the Director who shall consider the criteria included in the statute.

CHAPTER 187

House Bill No. 2186

(Amended by Chapters 188 and 189)

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, 44-528, 44-534a, 44-536, 44-556, 44-567 and 44-574 and repealing the existing sections.

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

Section 1. K.S.A. 44-501 is hereby amended to read as follows: 44-501. (a) If in any employment to which the ~~workmen's~~ *workers* compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the ~~workmen's~~ *workers* compensation act. In proceedings under the ~~workmen's~~ *workers* compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation ~~by proving~~ *and to prove* the various conditions on which the claimant's right depends. *In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.*

(b) Except as provided in the ~~workmen's~~ *workers* compensation act, no employer, or other employee of such employer, shall be liable for any injury for which compensation is recoverable under the ~~workmen's~~ *workers* compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which ~~workmen's~~ *workers* compensation is payable by such employer.

(c) Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the ~~workmen's~~ *workers* compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed.

(d) If it is proved that the injury to the employee results from the employee's deliberate intention to cause such injury, or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, or substantially from the employee's intoxication, any compensation in respect to that injury shall be disallowed. The employer shall not be liable under the ~~workmen's~~ *workers* compensation act where the injury, *disability* or death was substantially caused by the employee's use of any drugs, chemicals or any other compounds or substances, including but not limited to, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens, except such drugs or medications which are available to the public without a prescription from a physician and which are used for the treatment of an illness, or which were obtained and used by the employee pursuant to and in accordance with such a prescription.

(e) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

(f) Except as provided in the ~~workmen's~~ *workers* compensation act, no construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under the ~~workmen's~~ *workers* compensation act, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications.

(g) It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

Sec. 2. K.S.A. 44-508 is hereby amended to read as follows: 44-508. As used in the ~~workmen's~~ *workers* compensation act:

(a) "Employer" includes (1) any person or body of persons, corporate or unincorporate, and the legal representative of a deceased employer or the receiver or trustee of a person, corporation, association or partnership; (2) the state~~,~~ or any depart-

Senate Labor, Industry & Small Business
2-22-89
Attachment II

ent, agency or authority of the state, any city, county, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof; and (3) for the purposes of community service work, the entity for which the community service work is being performed and the governmental agency which assigned the community service work, if any, if either such entity or such governmental agency has filed a written statement of election with the director to accept the provisions under the ~~workmen's~~ *workers* compensation act for persons performing community service work and in such case such entity and such governmental agency shall be deemed to be the joint employer of the person performing the community service work and both shall have the rights, liabilities and immunities provided under the ~~workmen's~~ *workers* compensation act for an employer with regard to the community service work, except that the liability for providing benefits shall be imposed only on the party which filed such election with the director, or on both if both parties have filed such election with the director; for purposes of community service work, "governmental agency" shall not include any court or any officer or employee thereof and any case where there is deemed to be a "joint employer" shall not be construed to be a case of dual or multiple employment.

(b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes; persons serving on a volunteer basis as duly authorized law enforcement officers, ambulance attendants, mobile intensive care technicians, firemen or firefighters, but only to the extent and during such periods as they are so serving in such capacities; persons employed by educational, religious and charitable organizations, but only to the extent and during the periods that they are paid wages by such organizations; persons in the service of the state, or any department, agency or authority of the state, any city, school district, or other political subdivision or municipality or public corporation and any instrumentality thereof, under any contract of service, express or implied, and every official or officer thereof, whether elected or appointed, while performing official duties; volunteers in any employment, if the employer has filed an election to extend coverage to such volunteers; minors, whether such minors are legally or illegally employed; and persons performing community service work, but only to the

extent and during such periods as they are performing community service work and if an election has been filed an election to extend coverage to such persons. Any reference to an employee who has been injured shall, where the employee is dead, include a reference to the employee's dependents, to the employee's legal representatives, or, if the employee is a minor or an incapacitated person, to the employee's guardian or conservator. Unless there is a valid election in effect which has been filed as provided in K.S.A. 44-542a and amendments thereto, such terms shall not include individual employers, limited or general partners or self-employed persons.

(c) (1) "Dependents" means such members of the employee's family as were wholly or in part dependent upon the employee at the time of the accident.

(2) "Members of a family" means only surviving legal spouse and children; or if no surviving legal spouse or children, then parents or grandparents; or if no parents or grandparents, then grandchildren; or if no grandchildren, then brothers and sisters. In the meaning of this section, parents include stepparents, children include stepchildren, grandchildren include stepgrandchildren, brothers and sisters include stepbrothers and stepsisters, and children and parents include that relation by legal adoption. In the meaning of this section, a surviving spouse shall not be regarded as a dependent of a deceased employee or as a member of the family, if the surviving spouse shall have for more than six months willfully or voluntarily deserted or abandoned the employee prior to the date of the employee's death.

(3) "Wholly dependent child or children" means:

(A) A natural or adopted child of the employee except such a child whose relationship to the employee has been severed by adoption;

(B) a stepchild of the employee who lives in the employee's household; ~~or~~

(C) any other child who is actually dependent in whole or in part on the employee and who is related to the employee by marriage or consanguinity*; or*

(D) any child as defined in subsections (3)(A), (3)(B) or (3)(C) who is less than 23 years of age and who is not physically or mentally capable of earning wages in any type of substantial and gainful employment or who is a full-time student attending an accredited institution of higher education or vocational education.

(d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate

nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the ~~workmen's~~ *workers* compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.

(f) The words "arising out of and in the course of employment" as used in the ~~workmen's~~ *workers* compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer.

(g) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true *on the basis of the whole record.*

(h) "Director" means the director of workers' compensation as provided for in K.S.A. 75-5708 and amendments thereto.

(i) The words "physician," "surgeon" or "doctor" shall mean and include any person licensed, by the proper licensing authority of this state, another state or the District of Columbia, to practice medicine and surgery, osteopathy, chiropractic, dentistry, optometry or podiatry.

(j) "Secretary" means the secretary of human resources.

(k) "Construction design professional" means any person who is an architect, professional engineer, landscape architect or land surveyor who has been issued a license by the state board of technical professions to practice such technical profession in Kansas or any corporation organized to render professional services through the practice of one or more of such technical professions in Kansas under the professional corporation law of Kansas or any corporation issued a certificate of authorization

under K.S.A. 74-7036 and amendments thereto to practice one or more of such technical professions in Kansas.

(l) "Community service work" means *(1)* public or community service performed as a result of a contract of diversion or of assignment to a community corrections program or suspension of sentence or as a condition of probation or in lieu of a fine imposed by court order; *or (2) public or community service or other work performed as a requirement for receipt of any kind of public assistance in accordance with any program administered by the secretary of social and rehabilitation services.*

Sec. 3. K.S.A. 44-510 is hereby amended to read as follows: 44-510. Except as otherwise provided ~~in this act~~ *therein*, medical compensation under the ~~workmen's~~ *workers* compensation act shall be as follows: (a) It shall be the duty of the employer to provide the services of a physician, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation to and from the home of the injured employee to a place outside the community in which such employee resides, and within such community if the director in the director's discretion so orders, as may be reasonably necessary to cure and relieve the employee from the effects of the injury. *In every case,* all fees, transportation costs and charges under this section *and all costs and charges for medical records and testimony* shall be subject to ~~regulations~~ *approval* by the director and shall be limited to such as are fair ~~and~~, reasonable *and necessary*. The director shall have jurisdiction to hear and determine all disputes as to such charges and interest due thereon.

(b) Any physician, nurse, medical supply establishment, surgical supply establishment, ambulance service or hospital who accept the terms of the ~~workmen's~~ *workers* compensation act by providing services or material thereunder shall be bound by the fees approved by the director and no injured employee or dependent of a deceased employee shall be liable for any charges above the amounts approved by the director. If the employer has knowledge of the injury and refuses or neglects to reasonably provide the benefits herein required, the employee may provide the same for such employee, and the employer shall be liable for such expenses subject to the regulations adopted by the director. *No judgment may be entered by any district court in any action for the payment of an amount for medical services or materials provided under the workers compensation act and such action shall be stayed until final adjudication of any claim for compensation for which an application for hearing is filed with the*

director under K.S.A. 44-534 and amendments thereto. In the case of an action stayed hereunder, any award of compensation shall require any amounts payable for medical services or materials to be paid directly to the provider thereof plus an amount of interest at the rate provided by statute for judgments.

(c) If the services of the physician furnished as ~~above~~ provided *in subsection (a)* are not satisfactory to the injured employee, the director may authorize the appointment of some other physician subject to the limitations set forth in this section and the regulations adopted by the director. ~~If the services of a physician furnished as above provided are not satisfactory to the injured employee, such employee may consult, without the approval of the director, another physician of the employee's own choice, and the employer shall pay the fees and charges therefor. If such fees and charges are for examination, diagnosis, or treatment, such fees and charges shall not exceed~~ *Without application or approval, an employee may consult a physician of the employee's choice for the purpose of examination, diagnosis or treatment, but the employer shall only be liable for the fees and charges of such physician up to* a total amount of $350.

(d) An injured employee whose injury or disability has been established under the ~~workmen's~~ *workers* compensation act may rely, if done in good faith, solely or partially on treatment by prayer or spiritual means in accordance with the tenets of practice of a church or religious denomination without suffering a loss of benefits subject to the following conditions:

(1) The employer or the employer's insurance carrier agrees thereto in writing either before or after the injury;

(2) the employee submits to all physical examinations required by the ~~workmen's~~ *workers* compensation act;

(3) the cost of such treatment shall be paid by the employee unless the employer or insurance carrier agrees to make such payment;

(4) the injured employee shall be entitled only to benefits that would reasonably have been expected had such employee undergone medical or surgical treatment; and

(5) the employer or insurance carrier that made an agreement under paragraph (1) or (3) of this subsection may withdraw from the agreement on 10 days' written notice.

Sec. 4. K.S.A. 44-510b is hereby amended to read as follows: 44-510b. Where death results from injury, compensation shall be paid as provided in K.S.A. 44-510 and amendments thereto, and as follows:

(a) If an employee leaves any dependents wholly dependent upon the employee's earnings at the time of the accident, all compensation benefits under this section shall be paid to such dependent persons. Such dependents shall be paid weekly compensation, except as otherwise provided in this section, in a total sum to all such dependents, equal to 66⅔% of the average gross weekly wage of the employee at the time of the accident, computed as provided in K.S.A. 44-511 and amendments thereto, but in no event shall such weekly benefits exceed, nor be less than, the maximum and minimum weekly benefits provided in K.S.A. 44-510c and amendments thereto, subject to the following:

(1) If the employee leaves a surviving legal spouse or a wholly dependent child or children, or both, who are eligible for benefits under this section, then all death benefits shall be paid to such surviving spouse or children, or both, and no benefits shall be paid to any other wholly or partially dependent persons.

(2) A surviving legal spouse shall be paid compensation benefits for life or until remarriage, except as otherwise provided in this section.

(3) Any wholly dependent child of the employee shall be paid compensation, except as otherwise provided in this section, until such dependent child becomes 18 years of age, except that any such dependent child who is not physically or mentally capable of earning wages in any type of substantial and gainful employment, or who is enrolled as a full-time student in an accredited institution of higher education or vocational education shall be paid compensation until such dependent child becomes 23 years of age.

(4) If the employee leaves no legal spouse or dependent children eligible for benefits under this section but leaves other dependents wholly dependent upon the employee's earnings, such other dependents shall receive weekly compensation benefits as provided in this subsection until death, remarriage or so long as such other dependents do not receive more than 50% of their support from any other earnings or income or from any other source, except that the maximum benefits payable to all such other dependents, regardless of the number of such other dependents, shall not exceed a maximum amount of $18,500.

(b) Upon the remarriage of a surviving legal spouse receiving compensation under this section, the benefits being paid to such spouse shall terminate, except that upon such remarriage 100 weeks of benefits at the highest rate paid to such spouse under this section shall be paid to such spouse in one lump sum, *except that such lump-sum payment shall be subject to the maximum*

amount of compensation payable under this section as prescribed by subsection (h).

(c) Where the employee leaves a surviving legal spouse and dependent children who were wholly dependent upon the employee's earnings and are eligible for benefits under this section 1/2 of the maximum weekly benefits payable shall be apportioned to such spouse and 1/2 to such dependent children.

(d) If an employee does not leave any dependents who were wholly dependent upon the employee's earnings at the time of the accident but leaves dependents, other than a spouse or children, in part dependent on the employee's earnings, such percentage of a sum equal to three times the employee's average yearly earnings but not exceeding $18,500 but not less than $2,500, as such employee's average annual contributions which the employee made to the support of such dependents during the two years preceding the date of the accident, bears to the employee's average yearly earnings during the contemporaneous two-year period, shall be paid in compensation to such dependents, in weekly payments as provided in subsection (a), not to exceed $18,500 to all such dependents.

(e) The director, except as otherwise provided in this section, shall have the power and authority to apportion and reapportion the compensation allowed under this section, either to wholly dependent persons or partially dependent persons, in accordance with the degree of dependency as of the date of the accident, except that the weekly payment of compensation to any and all dependents shall not exceed the maximum weekly benefits provided in subsection (a).

(f) In all cases of death compensable under this section, the employer shall pay the reasonable expense of burial not exceeding $3,200.

(g) The marriage or death of any dependent shall terminate all compensation, under this section, to such dependent, but shall not increase or decrease the compensation allowed to any other dependents except that, upon the marriage or death of the surviving legal spouse or a dependent child, the compensation payable to such spouse or child shall be reapportioned to those, among the surviving legal spouse and dependent children, who remain eligible to receive compensation under this section.

(h) Notwithstanding any other provision in this section to the contrary, the maximum amount of compensation benefits payable under this section to any and all dependents by the employer shall not exceed a total amount of ~~$100,000~~ *$200,000* and when such total amount has been paid the liability of the employer for any further compensation under this section to dependents, other than minor children of the employee, shall cease except that the payment of compensation under this section to any minor child of the employee shall continue for the period of the child's minority at the weekly rate in effect when the employer's liability is otherwise terminated under this subsection and shall not be subject to termination under this subsection until such child becomes 18 years of age.

(i) If the employee does not leave any dependents who are citizens of or residing at the time of the accident in the United States, the amount of compensation shall not exceed in any case the sum of $750.

(j) A surviving spouse shall submit an annual statement to the employer and to the director, in such form and containing such information relating to eligibility for compensation under this section as may be required by rules and regulations of the director. If such spouse fails to submit such an annual statement, the employer may notify the director of such failure and the director shall notify such spouse of such failure by certified mail with return receipt. If such spouse fails to submit the annual statement or fails to reasonably provide the required information within 30 days after receipt of the notice from the director, all compensation benefits paid under this section to such spouse shall be suspended until such statement is submitted in proper form to the employer and the director.

Sec. 5. K.S.A. 44-510c is hereby amended to read as follows: 44-510c. Where death does not result from the injury, compensation shall be paid as provided in K.S.A. 44-510 and amendments thereto and as follows:

(a) (1) Where permanent total disability results from the injury, weekly payments shall be made during the period of permanent total disability in a sum equal to ~~sixty-six and two-thirds percent (66⅔%)~~ *66⅔%* of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511, and amendments thereto, but in no case less than ~~twenty-five dollars ($25)~~ $25 per week nor~~, prior to July 1, 1980, more than the dollar amount nearest seventy-two percent (72%) of the state's average weekly wage nor, on and after July 1, 1980,~~ more than the dollar amount nearest ~~seventy-five percent (75%)~~ *to 75%* of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week. The payment of compensation for permanent total disability shall continue for the duration of such disability, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

(2) Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, shall, in the absence of proof to the contrary, constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) (1) Where temporary total disability results from the injury, no compensation shall be paid during the first week of disability, except that provided in K.S.A. 44-510 and amendments thereto, unless the temporary total disability exists for three ~~(3)~~ consecutive weeks, in which case compensation shall be paid for the first week of such disability. Thereafter weekly payments shall be made during such temporary total disability, in a sum equal to ~~sixty-six and two-thirds percent (66⅔%)~~ *66⅔%* of the average gross weekly wage of the injured employee, computed as provided in K.S.A. 44-511 and amendments thereto, but in no case less than ~~twenty-five dollars ($25)~~ *$25* per week nor~~, prior to July 1, 1980,~~ ~~more than the dollar amount nearest seventy-two percent (72%) of the state's average weekly wage or, on and after July 1, 1980,~~ more than the dollar amount nearest ~~seventy-five percent (75%)~~ *to 75%* of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto, per week. The payment of compensation for temporary total disability shall continue for the duration of any such disability, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

(2) Temporary total disability exists when the employee, on account of the injury, has been rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment.

(3) Where no award has been entered by the director, a return by the employee to any type of substantial and gainful employment~~,~~ or a release by a treating physician or examining physician, who is not regularly employed or retained by the employer, to return to any such employment, shall suspend the employee's right to the payment of temporary total disability compensation, but shall not affect any right the employee may have to compensation for partial disability in accordance with K.S.A. 44-510d and 44-510e~~,~~ and amendments thereto.

(c) When any permanent total disability or temporary total disability is followed by partial disability, compensation shall be paid as provided in K.S.A. 44-510d and 44-510e~~,~~ and amendments thereto.

Sec. 6. K.S.A. 44-510d is hereby amended to read as follows: 44-510d. (a) Where disability, partial in character but permanent in quality, results from the injury, the injured employee shall be entitled to the compensation provided in K.S.A. 44-510 and amendments thereto, but shall not be entitled to any other or further compensation for or during the first week following the injury unless such disability exists for three ~~(3)~~ consecutive weeks, in which event compensation shall be paid for the first week. Thereafter compensation shall be paid for temporary total loss of use and as provided in the following schedule, ~~sixty-six and two-thirds percent (66⅔%)~~ *66⅔%* of the average gross weekly wages to be computed as provided in K.S.A. 44-511 and amendments thereto, ~~and~~ *except that in no case shall* the weekly compensation ~~in no case to~~ be more than the maximum as provided for in K.S.A. 44-510c and amendments thereto. If there is an award of permanent disability as a result of the injury there shall be a presumption that disability existed immediately after the injury and compensation is to be paid for not to exceed the number of weeks allowed in the following schedule:

(1) For loss of a thumb, ~~sixty (60)~~ *60* weeks.

(2) For the loss of a first finger, commonly called the index finger, ~~thirty-seven (37)~~ *37* weeks.

(3) For the loss of a second finger, ~~thirty (30)~~ *30* weeks.

(4) For the loss of a third finger, ~~twenty (20)~~ *20* weeks.

(5) For the loss of a fourth finger, commonly called the little finger, ~~fifteen (15)~~ *15* weeks.

(6) Loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of ~~one-half (½)~~ *1/2* of such thumb or finger, and the compensation shall be ~~one-half (½)~~ *1/2* of the amount specified above. The loss of the first phalange and any part of the second phalange of any finger, which includes the loss of any part of the bone of such second phalange, shall be considered to be equal to the loss of ~~two-thirds (⅔)~~ *2/3* of such finger and the compensation shall be ~~two-thirds (⅔)~~ *2/3* of the amount specified above. The loss of the first phalange and any part of the second phalange of a thumb which includes the loss of any part of the bone of such second phalange, shall be considered to be equal to the loss of the entire thumb. The loss of the first and second phalanges and any part of the third proximal phalange of any finger, shall be considered as

the loss of the entire finger. Amputation through the joint shall be considered a loss to the next higher schedule.

(7) For the loss of a great toe, ~~thirty (30)~~ *30* weeks.

(8) For the loss of any toe other than the great toe, ~~ten (10)~~ *10* weeks.

(9) The loss of the first phalange of any toe shall be considered to be equal to the loss of ~~one-half (1/2)~~ *1/2* of such toe and the compensation shall be ~~one-half (1/2)~~ *1/2* of the amount above specified.

(10) The loss of more than one phalange of a toe shall be considered to be equal to the loss of the entire toe.

(11) For the loss of a hand, ~~one hundred fifty (150)~~ *150* weeks.

(12) For the loss of a forearm, ~~two hundred (200)~~ *200* weeks.

(13) For the loss of an arm, ~~two hundred ten (210)~~ *210* weeks.

(14) For the loss of a foot, ~~one hundred twenty-five (125)~~ *125* weeks.

(15) For the loss of a lower leg, ~~one hundred ninety (190)~~ *190* weeks.

(16) For the loss of a leg, ~~two hundred (200)~~ *200* weeks.

(17) For the loss of an eye, or the complete loss of the sight thereof, ~~one hundred twenty (120)~~ *120* weeks.

(18) Amputation or severance below the wrist shall be considered as the loss of a hand. Amputation at the wrist and below the elbow shall be considered as the loss of the forearm. Amputation at or above the elbow shall be considered loss of the arm. Amputation below the ankle shall be considered loss of the foot. Amputation at the ankle and below the knee shall be considered as loss of the lower leg. Amputation at or above the knee shall be considered as loss of the leg.

(19) For the complete loss of hearing of both ears, ~~one hundred ten (110)~~ *110* weeks.

(20) For the complete loss of hearing of one ear, ~~thirty (30)~~ *30* weeks.

(21) Permanent loss of the use of a finger, thumb, hand, arm, forearm, toe, foot, leg or lower leg or the permanent loss of the sight of an eye or the hearing of an ear, shall be equivalent to the loss thereof. For the permanent partial loss of the use of a finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, compensation shall be paid as provided for in K.S.A. 44-510c and amendments thereto, per week during that proportion of the number of weeks in the foregoing schedule provided for the loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, which partial loss thereof bears to the total loss of a finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear; but in no event shall the compensation payable hereunder for such partial loss exceed the compensation payable under the schedule for the total loss of such finger, thumb, hand, arm, toe, foot or leg, or the sight of an eye or the hearing of an ear, exclusive of the healing period.

(22) For traumatic hernia, compensation shall be limited to the compensation under K.S.A. 44-510 and amendments thereto, compensation for temporary total disability during such period of time as such employee is actually unable to work on account of such hernia, and, in the event such hernia is inoperable, weekly compensation during ~~twelve (12)~~ *12* weeks, except that, in the event that such hernia is operable, the unreasonable refusal of the employee to submit to an operation for surgical repair of such hernia shall deprive such employee of any benefits under the ~~workmen's~~ *workers* compensation act.

(23) Whenever the employee is entitled to compensation for repetitive use conditions occurring in opposite upper extremities, whether occurring simultaneously or otherwise, the compensation shall be computed as separate scheduled injuries to each such extremity and the percentage of loss of use thereof shall be increased by 20% of the determined loss of use to each such extremity.

(b) Whenever the employee is entitled to compensation for a specific injury under the foregoing schedule, the same shall be exclusive of all other compensation except the benefits provided in K.S.A. 44-510 and amendments thereto, and no additional compensation shall be allowable or payable for either temporary or permanent disability, except that the director may, in proper cases, allow additional compensation during the actual healing period, such period not to be more than ~~ten percent (10%)~~ *10%* of the total period allowed for the scheduled injury in question nor in any event for longer than ~~fifteen (15)~~ *15* weeks. The return of the employee to ~~his or her~~ *the employee's* usual occupation shall terminate the healing period.

Sec. 7. K.S.A. 44-510e is hereby amended to read as follows: 44-510e. (a) ~~Should~~ *If* the employer and the employee ~~be~~ *are* unable to agree upon the amount of compensation to be paid in the case of injury not covered by the schedule in K.S.A. ~~510d, as amended~~ *44-510d and amendments thereto*, the amount of compensation shall be settled according to the provisions of the ~~workmen's~~ *workers* compensation act as in other cases of disagreement: ~~Provided~~, *except* that in case of temporary or permanent partial general disability not covered by such schedule, the

~~workman~~ *employee* shall receive weekly compensation as determined in this subsection ~~(a)~~ during such period of temporary or permanent partial general disability not exceeding a maximum of ~~four hundred fifteen (415)~~ *415* weeks. Weekly compensation for temporary partial general disability shall be ~~sixty-six and two-thirds percent (66⅔%)~~ *66⅔%* of the difference between the average gross weekly wage that the ~~workman~~ *employee* was earning prior to such injury as provided in the ~~workmen's~~ *workers* compensation act and the amount ~~he~~ *the employee* is actually earning after such injury in any type of employment, *except that in no case shall* such weekly compensation ~~in no case to~~ exceed the maximum as provided for in K.S.A. 44-510c~~, as amended~~ *and amendments thereto.* Permanent partial general disability exists when the ~~workman~~ *employee* is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d~~, as amended~~ *and amendments thereto.* 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~~ *employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence. There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.* The amount of weekly compensation for permanent partial general disability shall be determined: (1) By multiplying the average gross weekly wage of the ~~workman~~ *worker* prior to such injury by the percentage of permanent partial general disability as determined under this subsection ~~(a)~~; and (2) by then multiplying the result so obtained by ~~sixty-six and two-thirds percent (66⅔%)~~ *66⅔%*. The amount of weekly compensation for permanent partial general disability so determined shall in no case exceed the maximum as provided for in K.S.A. 44-510c~~, as amended~~ *and amendments thereto.* If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. In any case of permanent partial disability under this section, the ~~workman~~ *employee* shall be paid compensation for not to exceed ~~four hundred fifteen (415)~~ *415* weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528~~, as amended~~ *and amendments thereto.*

(b) If ~~a workman~~ *an employee* has received an injury for which compensation is being paid ~~him~~, and ~~his~~ *the employee's* death is caused by other and independent causes, any payment of compensation already due ~~him~~ *the employee* at the time of ~~his~~ death and then unpaid shall be paid to ~~his~~ *the employee's* dependents directly or to ~~his~~ *the employee's* legal representatives if ~~he~~ *the employee* left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such ~~workman~~ *employee* shall cease and be abrogated by ~~his~~ *the employee's* death.

(c) The total amount of compensation that may be allowed or awarded an injured ~~workman~~ *employee* for all injuries received in any one accident shall in no event exceed the compensation which would be payable under the ~~workmen's~~ *workers* compensation act for permanent total disability resulting from such accident.

(d) Where a minor *employee* or ~~his~~ *a minor employee's* dependents are entitled to compensation under the ~~workmen's~~ *workers* compensation act, such compensation shall be exclusive of all other remedies or causes of action for such injury or death, and no claim or cause of action against ~~said~~ *the* employer shall inure or accrue to or exist in favor of the parent or parents of such minor employee on account of any damage resulting to such parent or parents on account of the loss of earnings or loss of service of such minor employee.

(e) In any case of injury to or death of a female employee, where the ~~said~~ female employee or her dependents are entitled to compensation under the ~~workmen's~~ *workers* compensation act, such compensation shall be exclusive of all other remedies or causes of action for such injury or death, and no claim or action shall inure, accrue to or exist in favor of the surviving husband or any relative or next of kin of such female employee against such employer on account of any damage resulting to such surviving husband or any relative or next of kin on account of the loss of earnings, services, or society of such female employee or on any other account resulting from or growing out of the injury or death of such female employee.

Sec. 8. K.S.A. 44-510f is hereby amended to read as follows: 44-510f. (a) Notwithstanding any provision of the ~~workmen's~~ *workers* compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:

(1) For permanent total disability, including temporary total, temporary partial, permanent partial and temporary partial disability payments paid or due, ~~one hundred thousand dollars ($100,000)~~ *$125,000* for an injury or any aggravation thereof.

(2) For temporary total disability, including any prior permanent total, permanent partial or temporary partial disability payments paid or due, ~~seventy-five thousand dollars ($75,000)~~ *$100,000* for an injury or any aggravation thereof.

(3) For permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, ~~seventy-five thousand dollars ($75,000)~~ *$100,000* for an injury or any aggravation thereof.

(b) If an employer shall voluntarily pay unearned wages to an employee in addition to and in excess of any amount of disability benefits to which the employee is entitled under the ~~workmen's~~ *workers* compensation act, the excess amount paid shall be allowed as a credit to the employer in any final lump-sum settlement, or may be withheld from the employee's wages in weekly amounts the same as the weekly amount or amounts paid in excess of compensation due, but not until and unless the employee's average gross weekly wage for the calendar year exceeds ~~one hundred twenty-five percent (125%)~~ *125%* of the state's average weekly wage, determined as provided in K.S.A. 44-511 and amendments thereto. The provisions of this subsection shall not apply to any employer who pays any such unearned wages to an employee pursuant to an agreement between the employer and employee or labor organization to which the employee belongs.

Sec. 9. K.S.A. 44-511 is hereby amended to read as follows: 44-511. (a) As used in this section:

(1) The term "money" shall be construed to mean the gross remuneration, on an hourly, output, salary, commission or other basis, at which the service rendered is recompensed in money by the employer, but it shall not include any additional compensation, as defined in this section, any remuneration in any medium other than cash, or any other compensation or benefits received by the employee from the employer or any other source.

(2) The term "additional compensation" shall include and

mean only the following: (A) Gratuities in cash received by the employee from persons other than the employer for services rendered in the course of the employee's employment; (B) any cash bonuses paid by the employer within one year prior to the date of the accident, for which the average weekly value shall be determined by averaging all such bonuses over the period of time employed prior to the date of the accident, not to exceed 52 weeks; (C) board and lodging when furnished by the employer as part of the wages, which shall be valued at a maximum of $25 per week for board and lodging combined, unless the value has been fixed otherwise by the employer and employee prior to the date of the accident, or unless a higher weekly value is proved; (D) the average weekly cash value of remuneration for services in any medium other than cash where such remuneration is in lieu of money, which shall be valued in terms of the average weekly cost to the employer of such remuneration for the employee; and (E) employer-paid life insurance, health and accident insurance and employer contributions to pension and profit sharing plans. *In no case shall additional compensation include any amounts of employer taxes paid by the employer under the old-age and survivors insurance system embodied in the federal social security system.* Additional compensation shall not include the value of such remuneration until and unless such remuneration is discontinued. If such remuneration is discontinued subsequent to a computation of average gross weekly wages under this section, there shall be a recomputation to include such discontinued remuneration.

(3) The term "wage" shall be construed to mean the total of the money and any additional compensation which the employee receives for services rendered for the employer in whose employment the employee sustains an injury by accident arising out of and in the course of such employment.

(4) The term "part-time hourly employee" shall mean and include any employee paid on an hourly basis: (A) Who by custom and practice or under the verbal or written employment contract in force at the time of the accident is employed to work, agrees to work, or is expected to work on a regular basis less than 40 hours per week; and (B) who at the time of the accident is working in any type of trade or employment where there is no customary number of hours constituting an ordinary day in the character of the work involved or performed by the employee.

(5) The term "full-time hourly employee" shall mean and include only those employees paid on an hourly basis who are not part-time hourly employees, as defined in this section, and

who are employed in any trade or employment where the customary number of hours constituting an ordinary working week is 40 or more hours per week, or those employees who are employed in any trade or employment where such employees are considered to be full-time employees by the industrial customs of such trade or employment, regardless of the number of hours worked per day or per week.

(b) The employee's average gross weekly wage for the purpose of computing any compensation benefits provided by the ~~workmen's~~ *workers* compensation act shall be determined as follows:

(1) If at the time of the accident the money rate is fixed by the year, the average gross weekly wage shall be the yearly rate so fixed divided by 52, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime as computed in paragraph (4) of this subsection.

(2) If at the time of the accident the money rate is fixed by the month, the average gross weekly wage shall be the monthly rate so fixed multiplied by 12 and divided by 52, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection.

(3) If at the time of the accident, the money rate is fixed by the week, the amount so fixed, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime as computed in paragraph (4) of this subsection, shall be the average gross weekly wage.

(4) If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: (A) If the employee was a part-time hourly employee, as defined in this section, the average gross weekly wage shall be determined in the same manner as provided in paragraph (5) of this subsection; (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing

the wage of a full-time hourly employee; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation.

(5) If at the time of the accident the money rate is fixed by the output of the employee, on a commission or percentage basis, on a flat-rate basis for performance of a specified job, or on any other basis where the money rate is not fixed by the week, month, year or hour, and if the employee has been employed by the employer at least one calendar week immediately preceding the date of the accident, the average gross weekly wage shall be the gross amount of money earned during the number of calendar weeks so employed, up to a maximum of 26 calendar weeks immediately preceding the date of the accident, divided by the number of weeks employed, or by 26 as the case may be, plus the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. If the employee had been in the employment of the employer less than one calendar week immediately preceding the accident, the average gross weekly wage shall be determined by the director based upon all of the evidence and circumstances, including the usual wage for similar services paid by the same employer, or if the employer has no employees performing similar services, the usual wage paid for similar services by other employers. The average gross weekly wage so determined shall not exceed the actual average gross weekly wage the employee was reasonably expected to earn in the employee's specific employment, including the average weekly value of any additional compensation and the value of the employee's average weekly overtime computed as provided in paragraph (4) of this subsection. In making any computations under this paragraph (5), workweeks during which the employee was on vacation, leave of absence, sick leave or was absent the entire workweek because of illness or injury shall not be considered.

(6) (A) The average gross weekly wage of a person serving on a volunteer basis as a duly authorized law enforcement officer, an ambulance attendant, mobile intensive care technician, fire-

an or fire fighter, or any other volunteer under the ~~workmen's~~ *workers* compensation act, who receives no wages for such services, or who receives wages which are substantially less than the usual wages paid for such services by comparable employers to employees who are not volunteers, shall be computed on the basis of the usual wages paid by the employer for such services to employees who are not volunteers, or, if the employer has no employees performing such services for wages who are not volunteers, the average gross weekly wage shall be computed on the basis of the usual wages paid for such services by comparable employers to employees who are not volunteers.

(B) The average gross weekly wage of any person performing community service work shall be deemed to be $37.50.

(7) The average gross weekly wage of an employee who sustains an injury by accident arising out of and in the course of multiple employment, in which such employee performs the same or a very similar type of work on a part-time basis for each of two or more employers, shall be the total average gross weekly wage of such employee paid by all the employers in such multiple employment. The total average gross weekly wage of such employee shall be the total amount of the individual average gross weekly wage determinations under this section for each individual employment of such multiple employment.

(8) In determining an employee's average gross weekly wage with respect to the employer against whom claim for compensation is made, no money or additional compensation paid to or received by the employee from such employer, or from any source other than from such employer, shall be included as wages, except as provided in this section. No wages, other compensation or benefits of any type, except as provided in this section, shall be considered or included in determining the employee's average gross weekly wage.

(c) In any case, the average yearly wage shall be found by multiplying the average gross weekly wage, as determined in subsection (b), by 52.

(d) The state's average weekly wage for any year shall be the average weekly wage paid to employees in insured work subject to Kansas employment security law as determined annually by the secretary of human resources as provided in K.S.A. 44-704 and amendments thereto.

(e) Members of a labor union or other association who perform services in behalf of the labor union or other association and who are not paid as full-time employees of the labor union or other association and who are injured or suffer occupational

disease in the course of the performance of duties in behalf of the labor union or other association shall recover compensation benefits under the ~~workmen's~~ *workers* compensation act from the labor union or other association if the labor union or other association files an election with the director to bring its members who perform such services under the coverage of the ~~workmen's~~ *workers* compensation act.

The average weekly wage for the purpose of this subsection shall be based on what the employee would earn in the employee's general occupation if at the time of the injury the employee had been performing work in the employee's general occupation. The insurance coverage shall be furnished by the labor union or other association.

Sec. 10. K.S.A. 44-512a is hereby amended to read as follows: 44-512a. (a) In the event any compensation, including medical compensation, which has been awarded under the ~~workmen's~~ *workers* compensation act, is not paid when due to the person, firm or corporation entitled thereto, the ~~workman~~ *employee* shall be entitled to a civil penalty, to be set by the director and assessed against the employer or insurance carrier liable for such compensation~~,~~ *in an amount* of not more than ~~one hundred dollars ($100)~~ *$100* per week for each week any disability compensation is past due~~,~~ and in the sum of ~~twenty five dollars ($25)~~ $25 for each past due medical bill, if: (1) Service of written demand for payment, setting forth with particularity the items of disability and medical compensation claimed to be unpaid and past due, has been made personally or by registered mail on the employer or insurance carrier liable for such compensation~~,~~ and its attorney of record; and (2) payment of such demand is thereafter refused or is not made within ~~twenty (20)~~ *20* days from the date of service of such demand.

(b) After the service of such written demand, if the payment of disability compensation or medical compensation set forth in the written demand is not made within ~~twenty (20)~~ *20* days from the date of service of such written demand, plus any civil penalty, as provided in subsection (a) ~~of this section~~, if such compensation was in fact past due, then all past due compensation and any such penalties shall become immediately due and payable. *Service of written demand shall be required only once after the final award. Subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for the civil penalty without demand.* The ~~workman~~ *employee* may maintain an action in the district court ~~which~~

11-9

~~would have jurisdiction over an appeal of an award of compensation to the claimant,~~ *of the county where the cause of action arose* for the collection of such past due disability compensation and medical compensation, any civil penalties due under this section~~,~~ and ~~the~~ reasonable ~~attorneys'~~ *attorney* fees incurred in connection with the action.

(c) The remedies of execution, attachment, garnishment or any other remedy or procedure for the collection of a debt now provided by the laws of this state shall apply to such action and also to all judgments entered under the provisions of K.S.A. 44-529~~.~~ ~~*Provided*~~ *and amendments thereto, except that* no exemption granted by any law shall apply except the homestead exemption granted and guaranteed by the constitution of this state.

Sec. 11. K.S.A. 44-528 is hereby amended to read as follows: 44-528. (a) Any award or modification thereof agreed upon by the parties, except lump-sum settlements approved by the director or administrative law judge, whether the award provides for compensation into the future or whether it does not, may be reviewed by the director for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party. In connection with such review the director may appoint one ~~(1)~~ or two ~~(2)~~ physicians to examine the employee and report to the director. The director shall hear all competent evidence offered and if the director finds that the award has been obtained by fraud or undue influence, that the award was made without authority or as a result of serious misconduct, that the award is excessive or inadequate or that the ~~incapacity or~~ *functional impairment or work* disability of the employee has increased or diminished, the director may modify such award, or reinstate a prior award, upon such terms as may be just, by increasing or diminishing the compensation subject to the limitations provided in the ~~workmen's~~ *workers* compensation act.

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

employer, or has departed beyond the boundaries of the United States, the director *may modify the award and reduce compensation or* may cancel the award and end the compensation.

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

(d) Any modification of an award under this section on the basis that the functional impairment or work disability of the employee has increased or diminished shall be effective as of the date that the increase or diminishment actually occurred, except that in no event shall the effective date of any such modification be more than six months prior to the date the application was made for review and modification under this section.

Sec. 12. K.S.A. 44-534a is hereby amended to read as follows: 44-534a. (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. 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 workmen's compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the director or administrative law judge may make a preliminary award of medical and temporary total disability compensation to 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 tem-

rary total disability benefits has been paid by the employer or the employer's insurance carrier *either voluntarily or* pursuant to a preliminary award entered under this section and, *upon a full hearing on the claim,* the amount of compensation ~~so awarded is reduced or~~ *to which the employee is entitled is found to be less than the amount of compensation paid or is* 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.

Sec. 13. K.S.A. 44-536 is hereby amended to read as follows: 44-536. (a) With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or ~~his or her~~ *the employee's* dependents, whether secured by agreement, order, award or a judgment in any court shall exceed ~~twenty-five percent (25%)~~ *a reasonable amount for such services or* 25% of the amount of compensation recovered and paid, *whichever is less,* in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of ~~an attorney's~~ *attorney* fees shall not exceed ~~twenty-five percent (25%)~~ 25% of the sum which would be due under the ~~workmen's~~ *workers* compensation act for ~~four hundred fifteen (415)~~ *415* weeks of permanent total disability based upon the employee's average gross weekly wage prior to the date of the accident and subject to the maximum weekly benefits provided in K.S.A. 44-510c *and amendments thereto.*

(b) All ~~attorneys'~~ *attorney* fees in connection with the initial or original claim for compensation shall be fixed pursuant to a written contract between the attorney and the employee or ~~his or her~~ *the employee's* dependents, ~~and every~~ *which shall be subject to approval by the director in accordance with this section. Every* attorney, whether the disposition of the original claim is

by agreement, settlement, award, judgment or otherwise, shall file ~~his or her~~ *the attorney's* contract with the director ~~who~~ *for review in accordance with this section. The director shall review each such contract and the fees claimed thereunder as provided in this section and* shall approve ~~said~~ *such* contract *and fees* only if ~~it is~~ *both are* in accordance with all provisions of this section. Any ~~contracts~~ *claims* for ~~attorneys'~~ *attorney* fees not in excess of the limits provided in this section and approved by the director shall be enforceable as a lien on the compensation due or to become due. *The director shall specifically and individually review each claim of an attorney for services rendered under the workers compensation act in each case of a settlement agreement under K.S.A. 44-521 and amendments thereto or a lump-sum payment under K.S.A. 44-531 and amendments thereto as to the reasonableness thereof. In reviewing the reasonableness of such claims for attorney fees, the director shall consider the other provisions of this section and the following:*

(1) The offers of settlement made prior to litigation;

(2) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite to perform the legal services properly;

(3) the likelihood, if apparent to the employee or the employee's dependents, that the acceptance of the particular case will preclude other employment by the attorney;

(4) the fee customarily charged in the locality for similar legal services;

(5) the amount of compensation involved and the results obtained;

(6) the time limitations imposed by the employee, by the employee's dependents or by the circumstances;

(7) the nature and length of the professional relationship with the employee or the employee's dependents; and

(8) the experience, reputation and ability of the attorney or attorneys performing the services.

(c) No ~~attorneys'~~ *attorney* fees shall be charged with respect to compensation for medical expenses, except where an allowance is made for proposed or future treatment as a part of a compromise settlement.

(d) No ~~attorneys'~~ *attorney* fees shall be charged in connection with any temporary total disability compensation unless the payment of such compensation in the proper amount is refused, or unless such compensation is terminated by the employer and the payment of such compensation is obtained or reinstated by the efforts of the attorney, whether by agreement, settlement, award or judgment.

(e) With regard to any claim where there is no dispute as to any of the material issues prior to representation of the claimant or claimants by an attorney, or where the amount to be paid for compensation does not exceed the offer made to the claimant or claimants by the employer prior to representation by an attorney, the fees to any such attorney shall not exceed either the sum of ~~two hundred fifty dollars ($250),~~ $250 or a reasonable fee for the time actually spent by the attorney, as determined by the director, whichever is greater, exclusive of reasonable ~~attorney's~~ *attorney* fees for any representation by such attorney in reference to any necessary probate proceedings.

(f) All ~~attorneys'~~ *attorney* fees for representation of an employee or ~~his or her~~ *the employee's* dependents shall be only recoverable from compensation actually paid to such employee or dependents, except as specifically provided otherwise in subsection (g) and (h) ~~of this section~~.

(g) In the event any attorney renders services to an employee or ~~his or her~~ *the employee's* dependents, subsequent to the ultimate disposition of the initial and original claim, and in connection with an application for review and modification, a hearing for vocational rehabilitation, a hearing for additional medical benefits, or otherwise, such attorney shall be entitled to reasonable ~~attorney's~~ *attorney* fees for such services, in addition to ~~attorney's~~ *attorney* fees received or which ~~he or she~~ *the attorney* is entitled to receive by ~~his or her~~ contract in connection with the original claim, and such ~~attorney's~~ *attorney* fees shall be awarded by the director on the basis of the reasonable and customary charges in the locality for such services and not on a contingent fee basis. If the services rendered under this subsection by an attorney result in an additional award of compensation, the ~~attorney's~~ *attorney* fees shall be paid from such amounts of compensation. If such services involve no additional award of compensation, the director shall fix the proper amount of such attorney's fees in accordance with this subsection and such fees shall be paid by the employer.

(h) Any and all disputes regarding ~~attorneys'~~ *attorney* fees, whether such disputes relate to which of one or more attorneys represents the claimant or claimants or is entitled to the ~~attorneys'~~ *attorney* fees, or a division of ~~attorneys'~~ *attorney* fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning ~~attorney's~~ *attorney* fees or contracts for ~~attorneys'~~ *attorney* fees, shall be heard and determined by the director, after reasonable notice to all interested parties and attorneys.

(i) After reasonable notice and hearing before the director, any attorney found to be in violation of any provision of this section shall be required to make restitution of any excess fees charged.

Sec. 14. K.S.A. 44-556 is hereby amended to read as follows: 44-556. (a) Any action of the director pursuant to the workmen's compensation act shall be subject to review in accordance with the act for judicial review and civil enforcement of agency actions. Such review shall be upon questions of law and fact as presented and shown by a transcript of the evidence and proceedings as presented, had and introduced before the director ~~and~~. *The* venue of the action ~~is~~ *shall be* the county where the cause of action arose *or the county mutually agreed upon by all of the parties*. Any such action shall have precedence over all other hearings except those of like character, and shall be heard not later than the first term of the district court after the appeal has been perfected, and the court shall decide all such cases within 60 days after submission. The appealing party shall notify the director when judgment is issued by the court. If judgment is not issued within 60 days of submission, the appealing party shall notify the director to that effect. The director will advise the judge to whom the case was submitted that 60 days has elapsed since submission of the case and request that a decision be rendered. If no decision is forthcoming within 30 days of such request by the director, the director will advise the supreme court justice having jurisdiction over such judge of all of the facts in regard to the review and the failure of the judge to render a decision as required by this section.

(b) On any such review the district court shall have jurisdiction to grant or refuse compensation, or to increase or diminish any award of the director as justice may require. No compensation shall be due or payable until the expiration of the time for commencing an action for review and then the payment of past due compensation awarded by the director shall not be payable if, within such time notice of appeal to the district court, has been filed. The right of review shall include the right to make no payments of such compensation until the review has been decided by the district court if the employer is insured for workmen's compensation liability with an insurance company authorized to do business in this state, *if the employer is maintaining membership in a qualified group-funded workers' compensation pool under K.S.A. 44-581 through 44-591 and amendments thereto,* or if the employer is *currently approved by the director as* a self-insurer and has filed a bond with the district court in

accordance with K.S.A. 44-530 and amendments thereto. Commencement of an action for review shall not stay the payment of compensation due for the ten-week period next preceding the director's decision and for the period of time after the director's decision and prior to the decision of the district court on review.

(c) If review of the decision of the district court is sought pursuant to K.S.A. 77-623 and amendments thereto, the compensation payable under the decision of the district court shall not be stayed pending such review. Review of the decision of the district court shall take precedence over other cases except cases of the same character.

(d) If compensation has been paid to the worker by the employer or the employer's insurance carrier during the pendency of review by the district court or by appellate courts and the amount of compensation awarded by the director or the district court is reduced or totally disallowed by the decision on the appeal or review, the employer and the employer's insurance carrier, except as otherwise provided in this section, 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 worker is entitled to as determined by the final decision on review. 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.

Sec. 15. K.S.A. 44-567 is hereby amended to read as follows: 44-567. (a) An employer ~~(1)~~ who operates within the provisions of the ~~workmen's~~ *workers* compensation act ~~(2)~~ *and* who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto~~,~~ shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

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

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

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

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

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

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

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

Sec. 16. K.S.A. 44-574 is hereby amended to read as follows: 44-574. The provisions of ~~sections 1 to 55, inclusive, of this act and the acts contained in articles 5 and 5a of chapter 44 of the Kansas Statutes Annotated~~ *K.S.A. 44-501 through 44-592 and 44-5a01 through 44-5a22,* and any acts amendatory thereof or supplemental thereto, shall be construed together and shall be known and may be cited as the "~~workmen's~~ *workers* compensation act." Any reference in any of the statutes of this state to any of the ~~acts contained in article 5 or 5a of chapter 44 of the Kansas Statutes Annotated~~ *statutes referred to by this section* shall be deemed to be a reference to the ~~workmen's~~ *workers* compensation act. *Whenever the workmen's compensation act, or words of like effect, is referred to or designated by statute, contract or other document, such reference or designation shall be deemed to apply to the workers compensation act.*

Sec. 17 K.S.A. 44-501, 44-508, 44-510, 44-510b, 44-510c, 44-510d, 44-510e, 44-510f, 44-511, 44-512a, 44-528, 44-534a, 44-536, 44-556, 44-567 and 44-574 are hereby repealed.

Sec. 18. This act shall take effect and be in force from and after its publication in the statute book.

Approved April 9, 1987.

Workers' Compensation -- Vocational Rehabilitation

H.B. 2573 changes the Worker's Compensation Act as it relates to rehabilitation. Under the bill, the ability to perform work in the open labor market and to earn comparable wages designated as the average gross weekly wage the employee was earning at the time of the injury, replaces the prior standard of substantial and gainful employment.

Under the bill a vocational rehabilitation evaluation could be furnished to an injured employee by a private agency or facility, a public agency, or the employer's rehabilitation services program. An evaluation report is required to contain a rehabilitation plan which shall adhere to the following priorities:

1. to return the employee to the same work for the same employer;

2. to return the employee to the same work, with modification, for the same employer;

3. to return the employee to other work, with or without modification, for the same employer;

4. to return the employee to the same work for another employer;

5. to return the employee to other work for another employer; and

6. to provide vocational rehabilitation, reeducation, and training.

Within 50 days after an evaluation referral, the report shall be submitted to and reviewed by the rehabilitation administrator with copies furnished to each

party. Upon disagreement the administrator would be required to confer with the rehabilitation service provider, the employee, and the employer. Within 20 days after the initial review a report would be delivered to each party who would then have ten days to request a hearing before the director. Further elaboration of the duties and responsibilities of the rehabilitation administrator is provided.

Temporary total or temporary partial compensation ordered during the rehabilitation phase would not exceed 70 days from the date of evaluation, although a 30-day extension is possible if circumstances outside the control of the employee prevent completion of the evaluation or the rehabilitation plan.

Any vocational rehabilitation, reeducation, or training would not exceed 36 weeks unless an extension is granted by special order of the director. Maximum board, travel, and lodging expenses required for the employee would be raised from $2,000 to $3,500. Additional expenses of not more than $2,000 (raised from the current $1,000) could be allowed upon special order of the director.

Temporary total benefits, subject to a maximum of 26 weeks, would not be deducted from the maximum number of weeks available under the schedule of injuries for permanent partial disabilities.

Upon refusal by the employee to participate in rehabilitation, reeducation, or training the director may suspend or reduce compensation with certain restrictions. The director would be required to modify an award if there is a determination that the employee is rehabilitated.

An application for a preliminary hearing could be made for any matter related to vocational rehabilitation.

Senate Labor, Industry & Small Business
2-22-89
Attachment III

K.S.A. 44-567 relating to the liability of the Workers' Compensation Fund for subsequent injuries to handicapped employees is amended to provide that if an employer files a written notice of an employee's pre-existing impairment with the director, on a form approved by the director, the notice serves to establish a reservation in the mind of the employer as to whether to hire or retain the employee.

The Director of the Workers' Compensation Division is directed to appoint, subject to the approval of the Secretary of the Department of Human Resources, four assistant rehabilitation administrators.

Sec. 2. K.S.A. 44-510, as amended by section 3 of 1987 House Bill No. 2186, is hereby repealed.

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

Approved April 23, 1987.

CHAPTER 189

House Bill No. 2573

(Amends Chapter 187)

AN ACT concerning workers' compensation; relating to rehabilitation; preliminary hearings; amending K.S.A. 44-510g, 44-534a, as amended by section 12 of 1987 House Bill No. 2186, and 44-567, as amended by section 15 of 1987 House Bill No. 2186, and repealing the existing sections.

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 ~~workmen's~~ *workers* compensation act shall be to restore *to* the injured employee ~~to substantial and gainful employment~~ *the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto.* 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 director shall appoint, subject to the approval of the secretary, four assistant rehabilitation administrators.* The rehabilitation administrator *and the assistant rehabilitation administrators* shall be in the classified service *under the Kansas civil service act.* The rehabilitation administrator *and the assistant rehabilitation administrators, subject to the direction of 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 knowledgeable 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, *including rehabilitation service programs provided directly by employers,* the director shall approve as qualified such facilities, institutions, *agencies, employer programs* and physicians as are

Senate Labor, Industry & Small Business
2-22-89
8-1 Attachment VIII

capable of rendering competent rehabilitation services. No such facility ~~or~~, institution, *agency or employer program* 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 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 *to* such employee ~~to substantial and gainful employment~~ *the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto,* and as provided in this section.

(d) When as a result of an injury or occupational disease which is compensable under the ~~workmen's~~ *workers* compensation act, the employee is unable to perform work *for the same employer with or without accommodation or* 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 *to* such employee ~~to substantial and gainful employment~~ *the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto,* and as provided in this section.

(e) *(1) If the employee has remained off work for 90 days or if it is apparent to the director the employee requires vocational rehabilitation services and, in either case, if approved rehabilitation services are not voluntarily furnished to the employee by the employer,* the director, on such director's own motion or upon application of ~~the employee or employer, and after affording the parties an opportunity to be heard and to present evi-~~

~~dence~~ *any party,* may refer the employee to a ~~qualified physician or~~ *qualified public agency, if the employee is eligible, or private agency or* facility, *or the employer's rehabilitation service program, if qualified,* 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~~ *able to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto.* The costs of such evaluation and report shall be at the expense of the employer. *Each report shall contain a rehabilitation plan which shall adhere to the following priority listing of rehabilitation goals:*

(A) The first priority is to return the employee to the same work for the same employer;

(B) the second priority is to return the employee to the same work, with accommodation, for the same employer;

(C) the third priority is to return the employee to other work, with or without accommodation, for the same employer;

(D) the fourth priority is to return the employee to the same work for another employer;

(E) the fifth priority is to return the employee to other work for another employer; and

(F) the sixth priority is to provide vocational rehabilitation, reeducation and training.

(2) Within 50 days after such referral, the report shall be submitted to and reviewed by the rehabilitation administrator and copies shall be furnished to each party. If all parties do not agree with the report, the rehabilitation administrator shall confer with the rehabilitation service provider, the employee and the employer to review the evaluation and the proposed rehabilitation plan in the report. The rehabilitation administrator shall ensure the evaluation and the rehabilitation plan are objective and reasonable and the rehabilitation goal is reasonably obtainable. Within 20 days after the initial review of the report, the rehabilitation administrator shall deliver copies of the report, together with the rehabilitation administrator's recommendations and any revisions of or objections to the rehabilitation plan, to each party, to the director and to the assigned administrative law judge, if there is one. ~~Upon receipt of such report, and after~~ *Within 10 days after receipt of such report, any party may request a hearing before the director on any matter contained in the report or any such recommenda-*

tions or revisions. After affording the parties an opportunity to be heard and present evidence, the director:

~~(1)~~ *(A)* 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;

(B) may order the employer to pay temporary total disability compensation, computed as provided in K.S.A. 44-510c and amendments thereto, or temporary partial disability compensation, computed as provided in K.S.A. 44-510e and amendments thereto, during the period of rehabilitation evaluation and continuing through the date the rehabilitation plan is delivered to the director as provided in subsection (e)(2). Temporary total or temporary partial disability compensation paid solely because of involvement in the rehabilitation evaluation process shall not be payable for more than 70 days from the date of the evaluation, except such temporary total or temporary partial disability compensation may be continued by the director for an additional period of not more than 30 days if circumstances outside the control of the employee prevents completion of the evaluation or the formulation of the rehabilitation plan;

~~(2)~~ *(C)* 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 *to* the employee ~~to some type of substantial and gainful employment, the director~~ *the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto,* 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~~ *otherwise* provided in this section, *or, upon the request of the employer, to a qualified rehabilitation service program provided directly by the employer*; and

~~(3)~~ *(D)* 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~~ *by* any qualified *private agency or* facility in this state or any state contiguous to this state *or by a qualified rehabilitation service program provided directly by the employer.*

(3) Any ~~such services~~ *vocational rehabilitation, reeducation or training* to be provided at the expense of the employer under ~~this paragraph (3),~~ *subsection (e)(2)* shall not extend for a period of more than ~~26~~ 36 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 ~~26~~ 36 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-week~~ *thirty-six-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.

(f) Where vocational rehabilitation, reeducation 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 ~~$2,000~~ $3,500 for any ~~twenty-six-week~~ *thirty-six-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 ~~$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. *Subject to a maximum of 26 weeks, 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 provided in K.S.A. 44-510d and amendments thereto.*

(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 ~~workmen's~~ *workers* compensation act, may be rehabilitated to the extent ~~that~~ such person can become ~~substantially and gainfully employed or increase such person's earning capacity,~~ *able to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto,* 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)~~,~~ *and the refusal is not due to the employee's physical or mental ability to do so, the employee shall be considered as having elected not to participate in such rehabilitation, reeducation or training and* the director ~~shall~~ *may* suspend the payment of any *disability* compensation until the employee consents to undertake such program or to be so evaluated~~, and~~. The director ~~shall cancel~~ *may reduce* the *disability* compensation otherwise payable if any such refusal persists for a period in excess of 90 days, *except disability compensation shall not be reduced to less than that payable for permanent partial disability in accordance with K.S.A. 44-510d and amendments thereto or for permanent partial general disability for functional impairment in accordance with K.S.A. 44-510e and amendments thereto.*

(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 employee for any disability. Upon at least 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~~ *perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto,* the director shall ~~cancel~~ *modify* 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, *or modification of an existing award,* made pursuant to this subsection *(j)* shall be subject to the provisions of K.S.A. 44-510d and 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.~~

Sec. 2. K.S.A. 44-534a, as amended by section 12 of 1987 House Bill No. 2186, is hereby amended to read as follows: 44-534a. (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 *and for any matter relative to the furnishing of vocational rehabilitation in accordance with and subject to the provisions of K.S.A. 44-510g and amendments thereto.* 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 ~~workmen's~~ *workers* compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the director or administrative law judge may make a preliminary award of medical *compensation* and temporary total disability compensation to 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 either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, 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.

Sec. 3. K.S.A. 44-567, as amended by section 15 of 1987 House Bill No. 2186, is hereby amended to read as follows: 44-567. (a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

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

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

(b) In order to be relieved of liability under this section, the employer must prove either ~~that~~ the employer had knowledge of the preexisting impairment at the time the employer employed the handicapped employee or ~~that~~ the employer retained the handicapped employee in employment after acquiring such knowledge. The employer's knowledge of the preexisting impairment may be established by any evidence sufficient to maintain the employer's burden of proof with regard thereto. If the employer, prior to the occurrence of a subsequent injury to a handicapped employee, files with the director a notice of the employment or retention of such employee, together with a description of the handicap claimed, such notice and description of handicap shall create a presumption that the employer had knowledge of the preexisting impairment. *If the employer files a written notice of an employee's preexisting impairment with the director in a form approved by the director therefor, such notice establishes the existence of a reservation in the mind of the employer when deciding whether to hire or retain the employee.*

(c) Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident,

injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation.

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

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

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

Sec. 4. K.S.A. 44-510g, 44-534a, as amended by section 12 of 1987 House Bill No. 2186, and 44-567, as amended by section 15 of 1987 House Bill No. 2186, are hereby repealed.

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

Approved April 21, 1987.

8-6

Topeka, Kansas, March 6, 1987

Compensation revisions get tentative OK

By ROGER MYERS
Capital-Journal Statehouse writer

Legislation that makes extensive changes for both employers and employees in the Kansas Workers Compensation Act was tentatively approved Thursday by the House. The bill was advanced to final action after only 40 minutes of debate, and a formal roll call vote on it is scheduled for today.

Rob Hodges, lobbyist for the Kansas Chamber of Commerce and Industry, said, "This is the most significant reform of the workers compensation law since about 1974. I think it will be beneficial to economic development in Kansas."

Wayne Maichel, executive vice president of the Kansas AFL-CIO, also endorsed the measure and said, "On balance, we think the bill is fair to workers."

Maichel said in a letter to members of the House Labor and Industries Committee, "Although there are certain provisions in the bill which we do not completely agree with, the overall balance of the bill is acceptable to the Kansas AFL-CIO."

The Kansas Trial Lawyers Association, many of whose members represent injured employees in workers compensation cases, said in a letter to committee members, "Though we are not completely in agreement with every change recommended in the bill, KTLA believes it is in fact a compromise. We intend to support the bill as it was amended when it reaches the House floor."

Although technical in nature and applicable only to those who are injured on the job, the measure is perceived as a major factor in helping the state rebuild its battered economy. Employers pay the cost of workers compensation through premiums on insurance they must carry, and liberal compensation awards drive up the cost of doing business.

The workers compensation law was an important, although mostly unpublicized, issue in the 1986 campaign for governor, and businessmen throughout the state pressed both gubernatorial candidates to clamp restrictions on compensation payments in Kansas.

There are a number of trade-offs in the bill intended to make it appealing to both labor and industry.

The measure substantially reduces the potential com-

Continued on page 15, column 1

Senate Labor, Industry & Small Business
2-22-89
Attachment IX

Continued from page 1

pensation for victims of carpal tunnel syndrome, an affliction of the wrists and forearms that affects those whose work involves highly repetitive hand movements.

But it raises from $75,000 to $100,000 the maximum compensation that those who suffer permanent partial disability as a result of the syndrome may receive.

The ailment especially affects those who work in the meat processing industry. Rep. Jim Lowther, R-Emporia, whose district includes a big beef processing plant, said the new provisions on carpal tunnel syndrome will keep jobs in his area.

Lowther said another employer in his town, Modine Manufacturing Co., a maker of vehicle radiators, has workers compensation costs several times higher than two comparable Modine plants in Missouri — largely because of the higher benefits that employees in Kansas receive for injuries they suffer on the job.

"If that company decides to expand, guess where they're going to go with the additional jobs?" Lowther said.

The bill's provisions on compensation for injuries caused by the repetitive use of upper extremities generated the only floor debate on the bill.

It would make carpal tunnel syndrome a so-called scheduled injury, one for which benefits are specified in a schedule of flat payments.

Rep. Elizabeth Baker, R-Derby, noted that if a worker suffering from carpal tunnel syndrome can no longer use his or her wrists on a meat processing assembly line, that worker would be potentially eligible for 100 percent disability and could collect the previous maximum payment of $75,000.

She said that if the ailment were compensated as a scheduled injury, the worker would be eligible only for the scheduled payments allowed for each arm. In an effort to defuse some of the opposition to the change, the bill provides that if both arms were injured because of carpal tunnel syndrome, the injured worker could receive the scheduled payment plus 20 percent additional for each arm.

Baker contended that carpal tunnel syndrome should continue to be treated as an injury to the whole body, and not just the arms. She offered an amendment that would have returned provisions on compensation for carpal tunnel syndrome to the current law, which treats it as an injury to the whole body, but her amendment was rejected, 46-67.

Baker noted during her arguments that women are especially liable to the ravages of carpal tunnel syndrome and that it was a women's issue in addition to an issue of fair compensation.

But Rep. Arthur Douville, R-Overland Park, chairman of the House Labor and Industries Committee, warned that Baker's amendment would upset the carefully arranged compromise.

Others said the Baker amendment would be a signal to potential industrial prospects that Kansas is not serious about improving its business climate to enhance economic development.

Other major provisions in the bill would subject the fees that attorneys receive in lump-sum settlement cases to review by the workers compensation director. The director would approve fees following a set of criteria that the bill would establish, and the 25 percent of an award that lawyers have been used to receiving would no longer be automatic.

The bill also would allow the workers compensation director to modify an award and reduce compensation as the result of a modification hearing and would bar health care providers from seeking a court judgement for medical services until there was a final disposition of a compensation claim.

The bill would continue to allow workers to receive $350 in "unauthorized medical services" paid for by the employer, but would limit such services to examination, diagnosis or treatment.

The bill also establishes a new concept for determining the percentage of disability that a worker suffers. Instead of measuring the disability as a percentage of the ability to perform the same job as before, the test would become an employee's ability to perform work in the open labor market taking into account the employee's education, training, experience and capacity for rehabilitation.

The bill would increase the maximum death benefit for survivors of a worker killed on the job from $100,000 to $200,000; increase the maximum for permanent total disability from $100,000 to $125,000; and increase the maximum for temporary permanent disability from $75,000 to $100,000.

1987
LEGISLATIVE CHANGES
WORKERS' COMPENSATION

I. INTRODUCTION

A. 1987 Legislative Changes Workers' Compensation has been characterized as "The Quiet Reform".

What does reform mean?

"Attempts to institute improved social and political conditions without revolutionary change." Have we done so?

We have laid the ground work, but the answer lies with all of us who are involved in the process;
employees and employers
attorneys - both claimant and respondent
administration
judiciary.

B. Developments in the law from 1974 to 1986.
The Kansas Legislature, starting in 1974, has taken a number of steps to liberalize the Workers' Compensation Law. We have summarized a number of these changes as they have developed over the intervening years.

In 1974 the compensation act was drastically overhauled.

1. The act was made applicable to practically all employments, including all units of government and not just to hazardous employments.

2. The medical limitation of $10,500 was removed, so today if an employee gets injured there is no limit on his right to medical benefits.

3. The death limitation of $18,500 was removed and increased to $50,000 and was made payable to the wife until her death or remarriage.

4. There was an increased amount of benefits payable to children.

5. The weekly benefit payable per week was increased from 60% to 66 2/3% of the employees weekly wage.

6. The maximum weekly benefit of $56.00 was stricken and the maximum weekly benefit was made to fluctuate with the states average weekly wage and was pegged at 2/3 of the states average weekly wage.

Senate Labor, Industry & Small Business
2-22-89
10-1 Attachment X

7. Subject to certain monetary maximums, a limitation of 415 weeks payable for temporary total and permanent total was removed.

8. All the scheduled entries were changed to provide that the weekly benefit would go up from 60% to 66% of the average weekly wage.

9. Also set in place was a hearing designated as a preliminary hearing, which is a summary proceeding, whereby an employee can file a claim and within a couple of weeks get a hearing on his application for medical and temporary total. Those are the only questions to be heard at the preliminary hearing and if the employee comes in and testifies that he needs medical care and can't work, with very few exceptions, he will be awarded some temporary total disability and medical benefits.

10. Also brought into the picture were both physical and vocational rehabilitation.

In 1977:

11. We increased the allowance for burial benefits to $2,000.

12. We changed the law so that an employee could continue to draw workers' compensation benefits even though he went on social security.

13. We also removed the provision in the law which cut down on death benefits when social security was paying social security benefits.

In 1979:

14. We increased the death benefit to a maximum of $100,000. Actually, by the wording in the statute, it is possible to draw more than a $100,000 death benefit if you have minor children.

15. We increased the maximum compensation rate to 75% of the states average weekly wage, from 66 2/3% of the states average weekly wage. (This was done in two steps.)

16. We also increased the total disability and total temporary disability to $100,000 and permanent partial to $75,000.

17. We also put the assistant director and administrative law judges under civil service statutes, so that they could not be removed simply because the

employer or employee did not like a particular decision.

In 1981:

18. We increased the unauthorized medical allowance to $350.00 from $150.00.

In 1982:

19. We cut down the employer subrogation rights when the employer was negligent.

In 1983:

20. We expanded the definition of children to include any natural or adopted child, as well as any dependent child related by marriage or blood.

In 1985:

21. We limited the right of employees to sue certain design professionals in situations where they had no contractual right to stop construction projects.

In 1986:

22. We took out qualified real estate agents performing service as an independent contractor. Frankly I did not agree with this change, but I was over run by the real estate bone crusher. We also set up a workers' compensation system for individuals assigned to community correction programs or suspension of sentence as a condition of probation or in lieu of a fine imposed by court order.

C. BACKGROUND FOR 1987 CHANGES

1. Senate Bill 365 passed out of the Senate in 1986, but was not acceptable to the House. Members of your association spoke against the bill. Required compulsory rehabilitation, except in special circumstances, would have resulted in endless hearings. Terms were ambiguous. Brought in the fund early in regard to the litigation process. Established another fund referred to as the Workers Rehabilitation Fund.

2. Concern of various groups.
   Impetus for change was generated by various groups.
   (a) Employers
       (1) No fair hearing.

(2) No incentive for putting the employee back to work.
(3) No reason to get involved in rehabilitation. Ploutz v. Ell, 234 Kan. 953.
9 Kan. App.2d 9
Antwi v. C.E. Industry Group, 5 Kan. App.2d 53.
(4) Bilateral tunnel syndrome awards were shaking certain industries, considered bodily disability not scheduled injuries see Murphy v. I.B.P., 240 Kan. 141 and Downs v. I.B.P., 10 Kan. App.2d 39.
(5) Court decision which appeared to wholly disregard statutory language, see Assay v. American Dry Wall, 11 Kan. App.2d 122. This case involved a situation where employee received an award and then returned to his job as a dry wall hanger in a commercial setting, as contrasted to being a dry wall hanger in a residential setting. He was earning more than at the time of his injury. The court indicated that regardless of the language in K.S.A.44-528 the test was still the employees ability to return to same or similar type of employment. K.S.A.44-528(b) provides that if the employee is capable of earning the same or higher wages that he did at the time of accident, then the director could cancel award and end the compensation. The directors office has gone a lot further even than that. I have seen awards entered in which the employee has returned to work for the same employer, doing the same job and yet gets 100% disability. The basis was that the man came in and testified that he was using eight aspirins a day to keep him on the job and the employee's attorney got a doctor to come in and say he really should not be doing that work.

(b) By employes and their representatives.
(1) Benefit levels not adequate, although indexed to wages each year.
For example where you had a high wage rate and a fairly substantial disability rating of permanent partial the $75,000 would be used up in a lot less than eight years.
(2) Employees getting sued on bills not paid for by the employer or the carrier.

(3) Requirement for continued demands, even though the carrier has failed to pay on time.
So what did we do and what didn't we do?

II. CHANGES

A. Bear in mind that there were a great number of proposals, some of which were turned down, some which were adopted, and some which were changed. The change process continued as it went through the House Labor and Industry Committee. Mike O'Neal and Ed Bideau sat with me for many a luncheon hour. We had several weeks of hearings, your representatives were present at all times in the Legislative hearings. Mr. Mason was always in touch. Gary Jordan kept in touch and convinced me on a number of things to change certain matters.

We utilized two bills to make the changes. House Bill 2186 and House Bill 2573. House Bill 2573 dealt with the problem of rehabilitation and changed a number of terms so as to agree with the word changes in House Bill 2186.

I have attached a hand out which summarized the various changes in the various bills and I might go over some of them with you.

B. BENEFITS

1. Maximum death benefits were increased from $100,000 to $200,000. How may deaths in Kansas occur each year arising out of in the course of employment? Approximately 100 each year. See Statistical Reports Division of Workers' Compensation. This could well build up to $10,000,000 a year.
2. Permanent total was increased from $100,000 to $125,000.
3. Temporary total was increased from $75,000 to $100,000.
4. Permanent partial was increased from $75,000 to $10?,000.

C. DEFINITION OF PERMANENT PARTIAL.

We left untouched the wording with respect to total permanent, but changed the present language relating to the definition of permanent partial. The test is no longer the reduction in the ability of the worker to perform work of the same type and character, but the extent to which the ability of the employee to perform work in the open labor market and to earn comparable

wages has been reduced, taking into consideration the employee's education, training, experience, and capacity for rehabilitation, except that the extent of permanent partial general disability shall not be less than functional disability as determined by competent medical testimony.

We created a presumption that employee has no work disability if he engages in any work for wages comparable to the average gross weekly wage employee was earning at the time of his injury. Someone had put in the word "conclusive" presumption, but that word was stricken from the proposed language.

What about the situation where employer puts the employee back to work at a comparable wage and then fires him six months later. We hope that the Review and Modification Statute should be in order.

The Review and Modification Statute, K.S.A. 44-528 as well as K.S.A. 44-510(e), refer to work disability as well as functional disability. So we have endorsed the concept of two types of disability, functional and work. We have also made it clear that work disability is to be limited if employee is back earning a comparable wage, but we give the director more authority by inserting "modify" the award and so under the modification statute the director is not required to end the award simply because the employee is earning the same wage or is capable of gaining an income equal to or greater than what he was earning at the time of the accident.

We have also taken care of the objection that modification should not be limited to the date the application has been filed, but that the director can go back six months prior to the filing of the application. Hopefully this change will not be abused. We hope that the director will issue regulations so that the process is not abused. The employer should be put on notice or should have some notice and yet has failed to act.

D. REPETITIVE USE CONDITIONS

K.S.A. 44-510(d) is amended to provide that when employee is entitled to compensation for repetitive use, compensation shall be computed as separate scheduled injuries to each extremity and then the percentage of loss of use thereof increased by 20% of the determined loss of each extremity. This item was quite controversial because of a political situation involving labor and a particular segment of the industry. One proposal would have made the date of

accident for repetitive use condition the date of onset of symptoms. According to Gary Jordan, this would have eliminated most repetitive use syndrome injuries and this provision was stricken from the bill.

E. DEFINITION OF DEPENDENT.

There were a number of instances in which a child would be over eighteen at the time of the death of employee, but would still be in school. Under the old definition of wholly dependent child that child would not be entitled to death benefits. We now provide that if that child is between eighteen and twenty three years old and is a full time student death benefits will be payable to that child.

F. STAY OF JUDGMENT

We received a number of complaints that employees were being sued and judgments rendered against them with respect to medical services and materials that should have been paid by the workers' compensation carrier. K.S.A. 44-510 has been amended to provide that judgment would be stayed until final litigation of the claim for compensation. Provision is also made for the amounts to be payable directly to the provider with interest.

G. DEMAND FOR COMPENSATION

How many of you, in the past, have had to make a series of demands in order to keep compensation going. We have now provided that service of written demand shall be required only once after the final award and that subsequent failures to pay compensation, including medical compensation, shall entitle the employee to apply for a civil penalty without demand.

H. ATTORNEY FEES

You all should have received a notice regarding attorney fees from the directors office and if you haven't you ought to get a copy of the notice, together with the required statement regarding attorney fees.

Originally there were some very strict proposals with respect to attorney fees, all of which would have limited attorney fees to a certain percentage less than the 25% which is now allowed. Under the new law there will be more accountability, especially with respect to settlement agreements and lump sum settlements.

I. TECHNICAL

1. Look at the whole record K.S.A. 44-501 and 44-608(g).

2. Impartial - K.S.A. 44-510(g).

3. Extended the Compensation Act to protect persons on public assistance and performing public or community services.

4. Costs and charges for medical records and testimony are subject to approval of the director.

5. Made it clear that employee get medical advise and treatment without application or approval, limit $350.00.

6. Definition of wage does not include social security taxes paid by employer.

7. Authorizes medical preventative treatment for emergency personnel exposed to hepatitis.

REHABILITATION

Comment:

House Bill 2573 was a vehicle used to amend the rehabilitation provisions of the law. K.S.A. 44-510(g) is a rehabilitation statute and we simply amended that statute to provide for the changes.

I. Rehabilitation may take one of two forms or a combination of both. These measures are:

A. Medical - Physical

Measures all designed to restore the individual physically and mentally. These measures could include such things as:

1. Medication
2. Physical Therapy
3. Speech Therapy
4. Occupational Therapy
5. Psychological Therapy
6. Prosthetic fitting and training.

B. Vocational Training

This term has reference to retraining in old work or training in some other type of work. Could involve employee returning to work for the same employer with accommodation or without accommodation.

II. ENTITLEMENT

A. Previously the director was given broad discretion as to who would be entitled to appropriate medical, physical or vocational rehabilitation. Employee was entitled to such combination of therapy upon a finding by the director that:

1. Employee was unable to perform work for which employee had previous training, education, qualifications or experience.

2. When employee was unable to perform other substantial or gainful employment.

3. Such therapy could increase his earning capacity when it was for the best interest of such person to undertake rehabilitative re-education or training. The amendment to the law now provides that employee may be entitled to vocational rehabilitation or training, as may be reasonably necessary to restore to employee the ability to perform work in the open labor market and to earn comparable wages. Rehabilitation not limited to restoring the employee to gainful employment, which appears to be the test that has generally been applied and which appears to be the rule announced by vocational rehabilitation personnel.

III. PROCEDURE

A. Informal

1. Minor injuries involve some type of therapy, usually physical therapy in the form of whirlpool, manipulative exercises or heat. The employer and employee may agree as to what must be done or should be done and work out a mutually agreeable plan. Conservative physical therapy may be the only requirement and that can be easily arranged. However, in such cases as;
    a. Amputation,
    b. Spinal cord or brain damage or other severe disabling injuries, contact must be made with the Rehabilitative Administrator in the Director's office and reports both initial and follow up, furnished to the Administrator who has the responsibility of working with the employer to insure that only fully accredited and authorized rehabilitative agencies are utilized.

B. Formal

1. If employee has been off work for ninety days, or if it appears to the director that employee requires vocational rehabilitation, the director on his own motion, upon application of any party, may refer employee to a qualified public agency, if employee is eligible or private agency or to the employer's own rehabilitation services for evaluation and report as to the practicality of the need for and the kind of service, treatment, or training which may be necessary to render employee able to perform work in the open labor market and earn comparable wage. The cost is to be born by the employer. There is no need to set up a hearing and present evidence. The director has authority to make this order.

C. Rehabilitation Plan

1. Within fifty days after the referral the report shall be submitted and reviewed by the Rehabilitation Administrator, copies to all parties. If no agreement, Rehabilitation Administrator mets with all the parties, including the proposed rehabilitation service provider, and tries to get the parties together. Within twenty days after the initial review the Rehabilitation Administrator shall deliver copies of the report, together with the Rehabilitation Administrator's recommendations and any revisions of or objections to the plan, to each party, to the director, and to the assigned administrative law judge, if there is one. Any party then can, within ten days, request a hearing, after which an opportunity is afforded to all to present any evidence.

   The director then can order the employer to pay temporary total disability compensation or temporary partial disability compensation during the period of rehabilitation evaluation continuing through the date the rehabilitation plan is delivered to the director, however, it is not payable for more than seventy days from the date of evaluation. In exceptional cases thirty additional days may be authorized.

   If vocational rehabilitation, re-education, or training is recommended, the director may direct the employee to the appropriate Federal, State, or other public facility for such services, or at the request of the employer, to a qualified rehabilitation service program provided directly by the employer. If the employee is not eligible

for vocational rehabilitation through such a facility, or there are none available, then the director may provide that the services are to be provided at the expense of the employer.

D. Cost and Allowances

1. Vocational rehabilitation, re-education, or training has been extended from twenty six weeks to thirty six weeks and in extremely unusual cases may extend for an additional thirty six weeks. Employer has a right to appeal to the District Court with respect to such orders. Clintsman v. St. Joseph Hospital 11 Kan. App.2d 199. There is no intent to change the rule as outlined in the Clintsman case.

   If the employee has to reside away from his customary residence, then he is entitled to a maximum of $3,500 for room and board for a thirty six week period and by special order entitled to an additional $2,000. Employee is also entitled to temporary total disability compensation during the period of vocational rehabilitation. The first twenty six weeks temporary total disability compensation is not to be deducted from the number of weeks due for scheduled injuries while in rehabilitation. All payments of temporary disability still deducted for general bodily disability.

2. EMPLOYEES RESPONSIBILITY

   Employee is responsible for co-operating in the evaluation and rehabilitation process if the director determines that it is in his best interest to do so. If he fails to co-operate and refusal is not due to employees physical or mental ability to do so, then the director can suspend the payment of any disability compensation and could, in some cases, reduce the disability compensation if the refusal persists for a period in excess of ninety days. Disability compensation may not be reduced to less than that which is payable for scheduled or for functional impairment.

3. MODIFICATION

   Once rehabilitation, re-education, or training has been completed the employer has a right to seek modification of any award. All parties must be put on notice and the director is given authority to modify the award of compensation if

any, if he determines that employee has been rehabilitated and is able to perform work in the open labor market and to earn comparable wages. Any modification is still subject to the provisions of K.S.A. 44-510(d) and K.S.A. 44-510(e) which relate to scheduled injuries and bodily injuries.

APPLYING THE CONCEPT OF HUMAN CAPITAL INVESTMENT TO DISABILITY: IMPROVING PRODUCTIVITY OF THE KANSAS ECONOMY

Rehabilitation Services Report

To

Senate Committee on Labor, Industry and Small Business

February 22, 1989

Presented By

Gabriel R. Faimon
Commissioner
(913) 296-3911

Senate Labor, Industry & Small Business
2-22-89
attachment XI 11-1

Applying the Concept of Human Capital Investment to Disability: Improving Productivity of the Kansas Economy

For the person who is not disabled, the satisfaction and dignity of contributing to and participating in the well-being of the family, community, and society is often taken for granted. Historically, the sense of independence and self-esteem derived from employment, not being dependent on public or private disability support or transfer payments, often is not realized by many Kansans with disabilities.

The Untapped Kansas Human Resource

The centuries-old philosophy that a person who is disabled cannot work, does not want to work, or will not work, is the philosophy which existed when most of today's public and private disability support programs were developed. These programs, i.e., Social Security, private long term disability insurance, workers' compensation, etc., were established in the 1920s and 30s. They are based on the assumption that a transfer payment is a suitable alternative to earning a livelihood. Generally, each program was developed in response to a single specific issue. A discrete set of eligibility criteria was developed for each program, usually with an end objective of maintaining the livelihood of the eligible applicant. Consequently, a maze of complex eligibilty requirements exists which tends to fragment or categorize the individual with a disability to meet a short run objective. In the absence of a long range objective which promotes independence, an integrated approach to address the whole individual is often missed. Perhaps this point is best illustrated by the fact that eight major State agencies (cabinet level or equivalent) have specific programmatic responsibilities related to disability, in addition to four of the seven service commissions of the Department of Social and Rehabilitation Services.

Approximately 140,000 working age Kansans (ages 16-64) have a substantial physical or mental impairment which constitutes a handicap to their employability. Nearly two-thirds of these Kansans are not working, although the vast majority want to work. In addition to illness and injury which lead to the onset of disability and limit the employability of adult Kansans, approximately 1,800 students age out or complete their special education each year. Kansans who are disabled and not working are not considered as part of the labor force. Neither Federal nor State labor statistics report them as unemployed or consider them as members, or even potential members, of the workforce.

The Challenge

To empower Kansans with disabilities to achieve and sustain independence, primarily through employment.

Kansas Rehabilitation Services, as a part of the Department of Social and Rehabilitation Services, has adopted the foregoing statement as its refined mission statement.

Vocational Rehabilitation

As reflected in Table I, a wide range of training sources are utilized to assist Kansans with disabilities to become self-reliant through gainful employment. The results of those efforts, weekly salary by occupation and hours worked, are summarized in Table 2. Based on a sixty-day follow-up after job placement during Fiscal Year 1988, 1,776 Kansans with disabilities achieved and sustained employment as a result of having successfully completed the vocational rehabilitation process. During their first full year of employment, the total new wages earned by these Kansans -- more than $11.5 million -- represents substantial economic activity in the State.

In addition to the 1,766 Kansans with disabilities who obtained and sustained employment, another 5,979 Kansans who had applied for services prior to Fiscal Year 1988 continued to work with their vocational rehabilitation counselor. An additional 4,480 Kansans with disabilities applied for services during the fiscal year.

Services are based on applicant eligiblity rather than entitlement, pursuant to provisions of the Rehabilitation Act of 1973, as amended, and rules and regulations promulgated by the U.S. Department of Education. For an adult to qualify for services, a vocational rehabilitation counselor must establish a file which: documents that the individual has a disabling condition; explains why the disabling condition constitutes a substantial handicap to employment; and describes how planned services are likely to improve the employability of the individual. Consequently, the services must be individualized to meet the specific needs of the adult who has one or more physical, mental or emotional disabilities.

Depending on the needs of the individual, services may be delivered directly by a vocational rehabilitation counselor located in 30 offices across the State or by staff at any one of three state-operated rehabilitation facilities. Services may also be delivered by staff of special programs or initiatives of Rehabilitation Services. The counselor may purchase other services from public or private providers and community-based organizations. Usually, an interdisciplinary array of services is identified, planned and managed by the counselor. Depending on the needs of the individual, services range from medical diagnostic studies, vocational evaluation, guidance and counseling, occupational training, to job placement. The average duration of a case is approximately two years.

A number of variables, such as understanding the vocational implications of different disabling conditions, the complexities of functional limitation and residual capacity associated with each condition, and coordinating interdisciplinary planning and services, are vital components of a successful employment outcome. The extent of interdisciplinary planning and interagency coordination undertaken by vocational rehabilitation counselors is reflected in Table 3. This table is based on data collected from 12% of the cases closed in Fiscal Year 1988 in which interdisciplinary planning and interagency coordination was used to secure at least one service funded by a source other than Rehabilitation Services during the life of the case.

Funding for staff and services through the Rehabilitation Act of 1973, as amended, is favorable for the State of Kansas, generally an 80-20 Federal-State

Table 1

Placement By Training Source

FFY 1988

Occupational Field	Training Source: University	Junior Colleges	Business Colleges	Rehab. Facilities	Vocational Technical	Misc.	Sheltered Workshop	On The Job Training	Total
Professional Technical Managerial	60	24	2	4	25	6	0	1	122
Clerical	30	31	6	4	44	31	4	4	154
Processing	4	2	1	4	1	2	0	1	15
Machine Trades	2	7	2	3	20	9	2	4	49
Bench Works	6	4	0	4	6	12	5	5	42
Service	32	24	9	18	34	45	15	10	187
Agricultural	3	2	0	1	3	2	1	0	12
Construction Work	7	7	0	4	20	4	0	5	47
Misc	7	12	1	2	10	10	1	3	46
TOTAL	151	113	21	44	163	121	28	33	674

2/22/89 (JEJ)

Table 2

Weekly Salary By Occupation And Hours Worked
Persons Placed Competitively

FFY 1988

Hours Worked	OCCUPATION																							
	Professional Technical Managerial (187)			Clerical (326)			Service (432)			Agricultural (34)			Processing (32)			Machine Trade (91)			Bench Work (92)			Structural Work (122)			Miscellaneous (106)		
	Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary			Weekly Salary		
	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean	Min	Max	Mean
20 or Less (42)	67	200	123	50	114	77	25	90	50	18	18	18	00	00	00	00	00	00	18	41	30	41	54	48	82	215	149
20 - 29 (162)	63	313	132	57	254	90	45	151	84	100	156	123	55	75	65	67	120	86	67	152	92	67	200	121	23	165	94
30 - 39 (201)	105	568	201	37	275	138	50	180	118	100	180	131	54	140	97	35	158	118	101	162	124	120	184	144	100	365	139
40 - 49 (979)	60	750	276	80	800	212	77	500	172	125	383	194	150	490	226	16	800	235	24	672	212	20	520	232	113	999	230
50 or More (38)	212	450	295	200	700	384	68	300	178	138	375	272	300	300	300	290	290	290	230	250	240	250	325	288	100	400	

2/22/89 (JEJ)

Table 3

Value of Interagency Coordination

Resources Drawn Through Coordination of Services
with Other Agencies and Organizations
SFY 1988

Sources of Funding For Planned Services	Number of Kansans Receiving Services Valued At: $1 to $2,499	$2,500 to $4,999	$5,000 to $7,499	$7,500 And Up
TOTAL	399	74	19	13
Pell Grants	117	16	4	0
Medicare/Medicaid	57	11	2	2
J.T.P.A.	40	2	0	0
Private Ins	28	10	4	8
Scholarships	18	2	2	2
Mental Health Center	13	2	1	0
Area Vo Tech	4	2	0	0
State Hospital	2	0	0	0
Other	120	29	6	1

Note: Data gathered on 12% of closed cases where interagency coordination was used to provide at least one service. Sources used to supplement Rehabilitation Services funds. SFY 1988

2/22/89 (JEJ)

matching arrangement. Federal standards for agency performance are supported by funding for staff inservice training to meet those standards.

Recent Federal legislation has enhanced the array of services. Supported employment provides an opportunity for persons with severe disabilities to receive the initial intensive, on-site job coaching and support they need to enter into and sustain competitivie employment. A mobile rehabilitation engineering shop has been established to design and fabricate or modify equipment or devices at relativley low cost to enhance a person's independence at home or on the job. These services promote competitive employment, community integration, individual choice, and independence.

In 1986, State legislation was enacted which authorized Rehabilitation Services to serve as the lead agency for planning the transition of special education students from the school setting to the adult setting of living and working in the community. Transition counselors, classified as vocational rehabilitation counselors, are responsible for building a team composed of the student, the student's parent(s) or guardian, educators, community service providers, medical professionals, and others to participate in the planning effort and become owners of the transition process. Approximately 1,800 students age out or complete their special education each year. Students with the most severe handicaps, or approximately 35% of the population leaving the special education system, are targeted within the staff positions authorized and funds appropriated for these activities in Fiscal Year 1989.

To enhance the independence of Kansans with disabilities to live at home, nine independent living resource centers have been established to serve communities in 31 counties. These community-based non-residential information and referral centers promote self-help, self-determination, and accessibility to community economic, social, educational, and recreational activities. In Fiscal Year 1988, these centers responded to more than 12,000 inquiries and requests for information or referral.

Work and Disability

A substantial strength of the existing service delivery system is its emphasis on individualized services. However, it does have limitations for responding to the full range of work and disability issues. These issues have lead to consideration of a pilot project which would define an innovative case management concept and structure.

The U.S. Department of Education rules and regulations which govern the process are built on an assumption that eligible persons with disabilities have little or no labor market experience. Therefore, the service delivery system design focuses on accessing or entering the labor market. At the end of 60 days of continued employment, the service delivery process is terminated. The present service delivery system design does not accomodate changes that either the employer or employee may face which will affect the disabled individual's continued participation in the labor market.

The existing service delivery system, through its emphasis on individualized services, also carries the expectation that the vocational rehabilitation

counselor is an expert in many disciplines. The counselor is expected to be versed in the medical aspects of any and all types of physical, mental and emotional disability. The counselor must be knowledgable of the vocational implications associated with the limitations and residual capacities of each disability. In addition, the counselor must be cognizant of labor market opportunities and the mental and physical demands of a wide range of occupations in order to effectively counsel and guide the client in the joint development of a service plan and monitor the client's progress with the plan.

The 1986 amendments to the Rehabilitation Act authorized three innovative services, but the Federal rules and regulations did not alter the service delivery system design. Those services include: supported employment, providing the initial phase of an indefinite period of job coaching; rehabilitation engineering, services for modifying or adapting tools and equipment at the worksite; and services to enable the individual to live more independently in the community, such as modification of the residence.

Technology and competition produce a dynamic environment for the employer. The mental and physical aspects of disability change with each individual. There is a need for the service delivery system to be able to respond to changes related to either, if employment of the individual with a disability is to be sustained through the work lifespan (ages 16-64).

Individuals who were not disabled at the time they were hired become disabled through injury (on or off work) and through illness. The service delivery system should be able to recognize that their needs for returning to work are quite different from the needs of individuals who are accessing the labor market for the first time.

A number of research studies indicate that most employers, including those with diversified and specialized management staff, do not realize that work and disability are compatible management issues. Approximately 78% of Kansas employers have a work force of 10 or less employees. There is no formal academic curriculum to train future managers to handle work and disability as compatible management issues. Little or no organized capability exists to assist employers with these management issues.

The vocational rehabilitation process has become increasingly interdisciplinary in nature. It focuses on one client, the individual with a disability, not recognizing that in reality there is a second equally important client -- the prospective or existing employer. The present case management format appears to have substantial potential for enhancement through introduction of an interdisciplinary team into the format.

Therefore, identification and definition of an innovative case management concept and structure which would accomodate labor market entry, return to work and disabled worker retention issues for both, the individual and the employer, appears to provide a lucrative alternative for improving the productivity of the Kansas economy. Operation of an innovative case management concept could provide experience-based documentation leading to a request for modification or waiver of selected Federal rules and regulations. However, development of that case management concept and structure is also a resource allocation issue.

Alternatives

The service needs have been compiled for 280 of the 639 special education students with the most severe disabilities for whom planning the transition from school to the adult community has been completed. An estimated $9.8 million in vocational, day program and residential services will not be available to support them in the community during their first year out of school. The costs of related support, i.e., assessment, recreation, transportation, etc., have not been incorporated into the estimate. Without these services, in one year's time these young adults are almost certain to experience a functional loss when compared to their functional capability at the time they left school. Functional loss relates to a loss in being more independent, being able to contribute to sustaining one's livelihood, in whole or in part. Functional loss relates to a declining return on the special education investment and a decline in the net productivity of the Kansas economy.

Similar losses, although not tabulated, are realized each time a Kansan becomes disabled and does not return to work.

In part, K.S.A. 39-1101 states: "It is hereby declared to be the policy of this state to encourage and enable the blind, the visually handicapped and persons who are otherwise physically disabled to participate fully in the social and economic life of the state and to engage in remunerative employment."

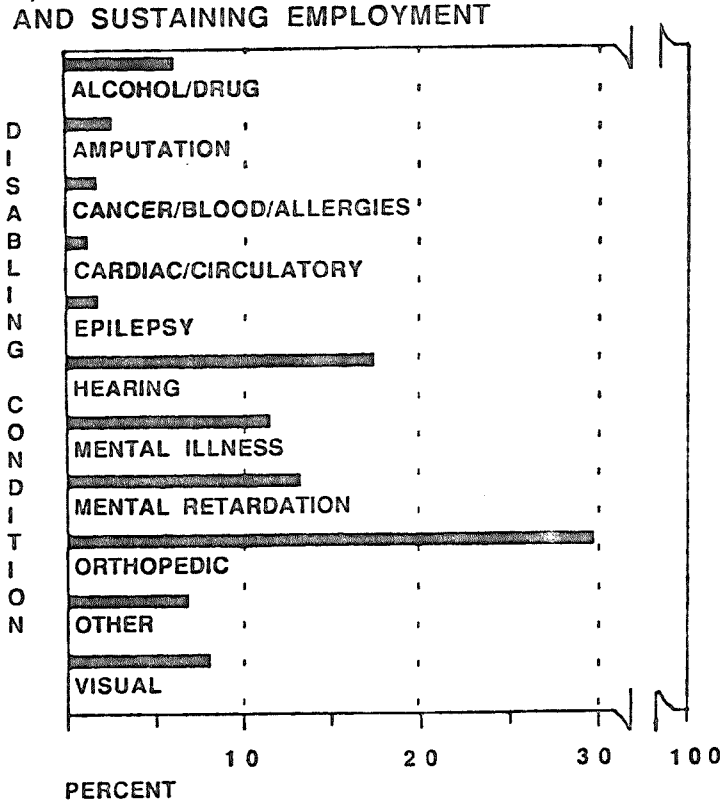
Kansas Rehabilitation Services

RESOURCES

	FY 1988 Actual	FY 1989 Rev. Estimate	FY 1990 Level C
Rehabilitation Services (7600)			
FTE Staff Positions	195.5	215	246
Salary Budget	$ 5,070,484	$ 5,871,848	$ 7,251,513
Total Budget	$14,048,599	$16,230,957	$16,774,450
Funding sources: 19.5% state, 80.1% federal, .4% other			
Division of Services for the Blind (7700)			
FTE Staff Positions	61.5	64.3	68.3
Salary Budget	$1,969,461	$1,989,795	$2,243,184
Total Budget	$4,327,963	$4,028,407	$4,215,923
Funding sources: 19.3% state, 61.5% federal, 19.2% other			
Disability Determination and Referral Services (7800)			
FTE Staff Positions	88	88	88
Salary Budget	$2,154,024	$2,490,612	$2,543,709
Total Budget	$4,481,546	$5,091,150	$5,374,670
Funding sources: 1% state, 99% federal			

PERFORMANCE

In FY 1988, 1,776 Kansans with disabilities were empowered through Rehabilitation Services to achieve and sustain employment, including 1,422 in competitive employment. In addition, services were continued for 5,979 Kansans while new rehabilitation programs were initiated for 4,480.



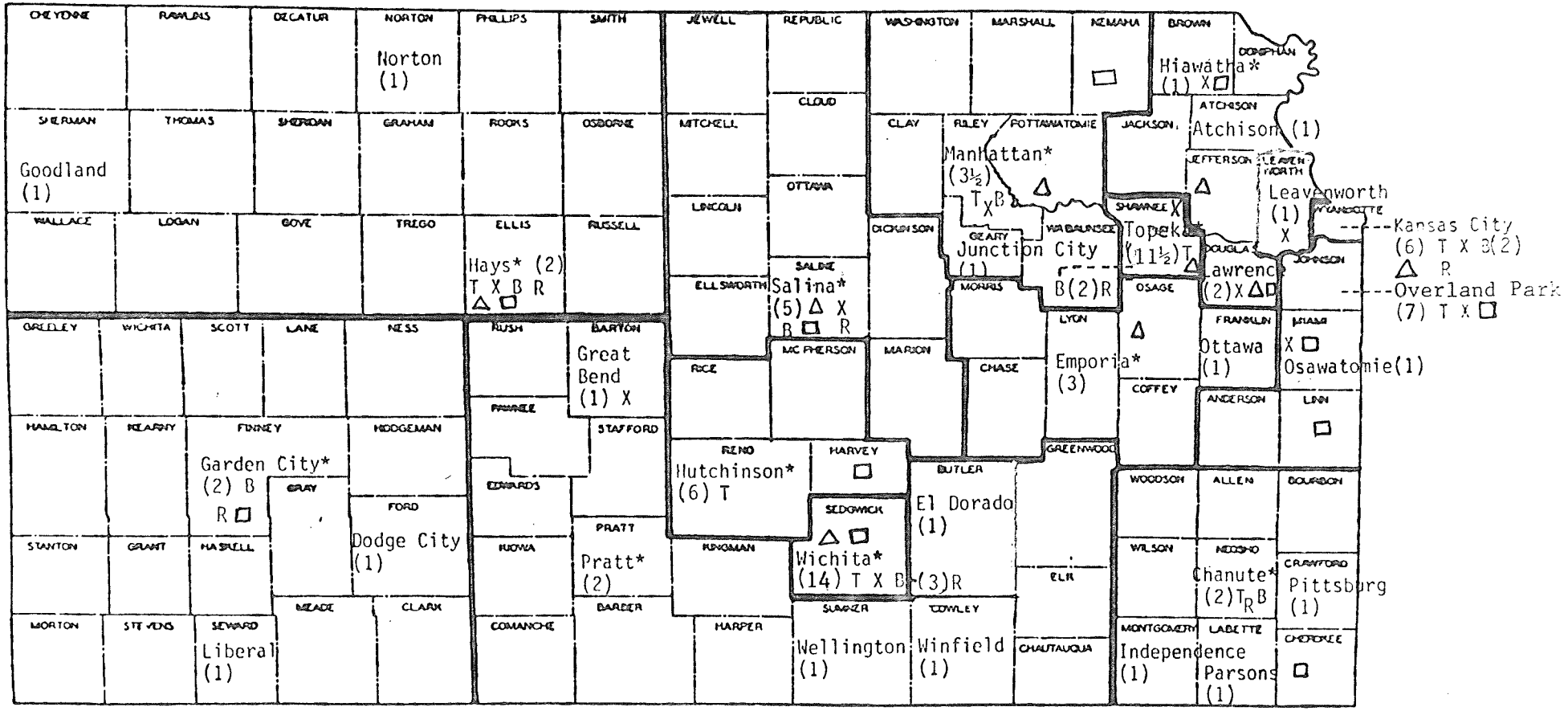
RESULTS

Rehabilitation is a sound investment. For every $1 spent on rehabilitation programs for Kansans with disabilities, more than $2 is returned to the economy in increased taxable earnings and reduced reliance on public assistance of the person rehabilitated.

In FY 1988, the average earnings of Kansans with disabilities who were rehabilitated increased by $125 a week. During their first full year of work, the total new wages produced by these Kansans will represent substantial economic activity for the state: more than $11.5 million.

(F0189 MAS)

KANSAS REHABILITATION SERVICES



* KRS District Office
— KRS service districts
( ) Number of KRS staff

B Division of Services for the Blind staff (#)
T Transition Counselor
R Rehabilitation Teacher

△ Independent Living Center
X Grant Program
□ Supported Employment Initiative of Kansas grant

(MAY 3-10-88)

KANSAS DEPARTMENT OF HUMAN RESOURCES

DIVISION OF WORKERS COMPENSATION
Landon State Office Building, 900 S.W. Jackson, Room 651-S
Topeka, Kansas 66612-1276
913-296-3441

Mike Hayden, Governor

Dennis R. Taylor, Secretary

February 22, 1989

Senator Alicia Salisbury
Madam Chairperson
Senate Labor, Industry & Small Business Committee
State Capitol Building
Topeka, KS 66612

Dear Senator Salisbury:

As you may recall, on January 18, 1989, I had the pleasure of appearing before your Senate Labor, Industry & Small Business Committee to discuss the administration of the Division of Workers Compensation.

During my testimony, Senator Daniels asked general questions about the vocational rehabilitation vendors, as defined in K.A.R. 51-24-3(a), i.e., the number of vendors and what, if any, Kansas Administrative Regulations existed that gave the Director of the Division of Workers Compensation the power or authority to monitor vendor activities, to conduct inquiries into complaints concerning vendor activities, and to take appropriate action against vendors who fail to comply with established administrative rules and regulations.

At the January 18, 1989, committee meeting, I advised Senator Daniels that I would study her request and report back to you and the other members of the committee.

I was also present on January 26, 1989, when labor lobbyists testified before your committee at the request of Senator Feleciano. Labor lobbyists alleged that the use of the "ability" to perform work as a sole consideration in interpreting K.S.A. 44-510e and 44-510g(d) is the narrowest possible construction and defeats legislative intent in all aspects of vocational rehabilitation.

The lobbyists also complained that the Division's interpretation of the new statute operates unjustly towards the injured worker. Finally, the lobbyists also discussed the Howard v. Airwick/Airkem Professional Products, Docket No. 126,562, which was the Wichita case involving the alleged impropriety by a

Senate Labor, Industry & Small Business 2-22-89
Attachment XII

specific vendor, her employee, and attorneys for the employer. I advised the committee at that time that the above captioned case was not closed, and that I would be investigating it and report back to you. Please be advised that the matter is still being investigated, however, please find enclosed a copy of the order in the above captioned case which is a public record (Exhibit I). After my investigation is complete, I will report further to your committee on the matter.

On January 18, 1989, I made a verbal recommendation that your committee should consider minor amendments to the new act to clarify the legislative intent in order to avoid the possibility of adverse judicial interpretation. At that meeting after some discussion, I advised you that I would be submitting a more formal request to your committee in the near future. I realize that the time to introduce the new bills or amendments to old statutes has expired for some committees and is nearing expiration for other committees. Enclosed with this letter is my formal recommendations concerning the minor amendments to the "New Act" (Exhibits J, K, L, M, N, O, P & Q).

Chairman Art Douville, House Labor & Industry Committee has asked me to appear before his committee on Wednesday, February 22, 1989, to address the criticism, comments, and suggestions made by the labor lobbyists to their committee on February 8, 1989, and to address certain vocational rehabilitation issues. I hope that I will have a similar opportunity to address the Senate Labor, Industry & Small Business Committee.

The purpose of this letter is to answer Senator Daniels' concerns and to respond to the request of Senator Feleciano.

Please be advised that the Division of Workers Compensation is continuing to study the issues raised by Senator Daniels concerning vendor control. We will be making recommendations for amendments to the existing Kansas Administrative Regulations concerning vocational rehabilitation vendors. We have written and called several states whose vocational rehabilitation laws are older and similar to Kansas. We will be reviewing the material we receive before we recommend any changes.

I am pleased to advise you and your committee that the Division of Workers Compensation is establishing an advisory committee to study vocational rehabilitation issues. This advisory committee will serve to establish input from the various agencies and organizations interested in returning injured workers to the competitive labor market, and will also establish quality and

ethical guidelines for vendors. Please find enclosed a copy of the rehabilitation notes section from our soon to be mailed newsletter (Exhibit D). In that attachment, you will note that we are seeking interested parties to be appointed to the advisory committee. Additionally, other articles will educate those individuals either affected by or working within the workers compensation system.

Our initial study finds the major problems with the current workers compensation vendors and the vocational rehabilitation system are:

1. Failure of voluntary exchange of medical reports and vocational rehabilitation reports between all interested parties.

2. Timeliness of services and reporting activities, i.e. failure to meet statutorily mandated time tables.

3. Accuracy in completeness in reports furnished.

4. Reasonableness of proposed vocational rehabilitation plans.

5. Perceived conflict of interest, caused by insurance companies owning or being closely tied with corporate structures of vendors.

6. Failure on the part of all parties to allow vendors to be objective, i.e., Howard v. Airwick, Docket No. 126,562.

7. Limited ex parte communications with vendors by one party only.

8. No clear definitions of terms and concepts concerning vocaitonal rehabilitation.

9. No appellate court decisions interpreting the legislative intent to date.

The Division has rescheduled the vendors meeting from February 2, 1989, to March 18, 1989. We expect to disseminate information to all licensed vendors at that meeting and to establish the frame work for the quality and ethics advisory committee and control measures.

In addition to the Division's efforts described above, Ray Siehndel, Acting Secretary for Department of Human Resources will be selecting a Workers Compensation Joint Advisory Committee. A copy of the article from our soon to be mailed newsletter is attached for your review (Exhibit E). That article describes the advisory committee and requests interested parties to contact our office.

Please find enclosed a list of the qualified vocational rehabilitation vendors as of December 1988, (Exhibit F) and the proposed draft of changes to K.A.R. 51-24-4 [qualifications and duties of vendors (Exhibit H)], and 51-24-5 [qualifications for counselors, evaluators, and job placement specialists (Exhibit G)]. Attached to each draft proposal is the actual language of the existing administrative regulation. This material is provided in response to Senator Feleciano's specific request.

I have also taken the liberty to enclose a list of the proposed minor amendments to the existing "New Act" discussed above. Attached with that proposed list is the xerox copies of the actual language of the statutes as well as a sheet listing the proposed language change on each statute discussed (Exhibits J, K, L, M, N, O, P & Q). Finally, I have enclosed for you and each committee member a copy of (1) the text of my initial discussion to the House Labor & Industry Committee (A-1); (2) a copy of the executive summary rebutting the labor lobbyists' comments as presented to the House Labor & Industry Committee (A); and, (3) a copy of the rehabilitation issues which were disseminated on October 1988 to all participants of the Annual Division of Workers Compensation Seminar and that the labor lobbyists make reference to in their printed material provided to the Senate committee members (Exhibit B). You should specifically note that question #1 is the question quoted in their printed material.

I will be more than willing to present oral testimony on any or all of this material to your committee if you so desire. I and Richard Thomas, Vocational Rehabilitation Administrator, and his four Assistant Vocational Rehabilitation Administrators will be present at your committee meeting on Wednesday, February 22, 1989, when Jerry Donaldson gives your committee an overview of the vocational rehabilitation laws of the new act. We will be ready, willing and able to answer any questions you or any committee member may have concerning the administration of the Division of Workers Compensation, the materials provided with this letter or any questions concerning the vocational rehabilitation statutes.

Thank you for allowing me to respond to your inquiries, the inquiries of Senator Daniels and the inquiries of Senator Feleciano by means of this letter.

Yours truly,

Robert A. Anderson

Robert A. Anderson
Workers Compensation Director

mr

Enclosures

pc: w/enc: Acting Secretary Ray Siehndel
Senate Labor, Industry & Small Business Committee Member
Jerry Donaldson
Jim Wilson, Revisor of Statutes
Mary Allen, Administrative Assistant

A 1

Mr. Chairman, members of the House Labor & Industry Committee:

Good morning. It is a pleasure to appear before you again. Chairman Douville asked me to speak to you today and answer any questions you may have about the administration of the Division of Workers Compensation and to respond to the comments made by John Ostrowski and Bud Langston on January 26, 1989, and by Tom Hammond and John Ostrowski on February 8, 1989.

I would like to give you a brief idea of what I am going to talk about. You have all been provided with another packet, and I will be addressing each handout, if only for a second.

I will first respond to the earlier "public comments," and second, advise you of the recent Department of Human Resources and Division of Workers Compensation's efforts to control the perceived vendor problems and other problems within the administration of the Division of Workers Compensation; third, I will report to you on the investigation of the Howard v. Airwick/Airkem case discussed earlier by "public comment"; and finally, I will be making a formal presentation to you on recommended amendments to the New Act. Those are the recommendations I previously made orally in early January. I am aware that the time has passed for this committee to introduce new legislation; however, I would respectfully request that Chairman Douville consider asking the Appropriations Committee, or another like committee, to introduce the changes if you agree with our recommendations.

I hope my total presentation will take less than 30 minutes. I have asked Dick Thomas, Vocational Rehabilitation Administrator, and his four Assistant Vocational Rehabilitation Administrators to be present today. I have also asked Chris Cowger of the Kansas Insurance Department, who administers the Workers' Compensation Fund, to be present. If any of you have any questions during my presentation, or after my presentation, for me or others, we will be more than happy to answer your questions.

Late last month and early this month, lobbyists representing the Kansas State Federation of Labor and one representing private vendor concerns, gave public comments about their perceptions of the vocational rehabilitation laws, how the Division, and more specifically how I, was interpreting the language of the new vocational rehabilitation statutes.

I would like to offer some brief rebuttal.

The July 1, 1987, Kansas Workers Compensation Act ("New Act") was the result of months of hard work and compromise by the Senate Labor, Industry & Small Business Committee; the House Labor & Industry Committee and lobbyists from labor and industry organizations.

To date, no case involving either work disability or certain vocational rehabilitation issues under the "New Act" has been appealed to the Director's office or decided by a Kansas appellate court.

Notwithstanding the lack of appellate review, there has been criticism of the Division's interpretation of the language of the new vocational rehabilitation statutes. Labor lobbyists testified before both the Senate Labor, Industry & Small Business Committee and the House Labor & Industry Committee on January 26, 1989, and before the House Labor & Industry Committee on February 8, 1989. They alleged the use of "ability" to perform work as a sole consideration in interpreting K.S.A. 44-510e and 44-510g(d) is the narrowest possible construction and defeats legislative intent and all aspects of vocational rehabilitation.

The lobbyists complained that the Division's interpretation of the new statutes operates unjustly towards the injured worker. Although there may be merit to the lobbyists' concerns, the fact that the application of the Workers Compensation Act may seem to operate unjustly affords no grounds for the courts to substitute rules different from those enacted by the legislature. If a practical operation of the law is found to bring disproportionate or unjust results, it may be assumed that the legislature will amend it, but that function belongs to that body alone.

Since July 1, 1988, when I was appointed as Director, we have followed the fundamental rule of statutory construction when interpreting legislative intent of the "New Act." We recognize that the purpose and intent of the legislature governs when the intent can be ascertained from the statutes, and that it is to be determined by a general consideration of the entire Act. It is our duty at the Director's level to reconcile the different provisions to make them consistent, harmonious and sensible and, where a statute is plain and unambiguous, we must give effect to the intentions of the legislature as expressed, rather than to determine what the law should or should not be.

I, with the assistance of Dick Thomas, have taken the liberty to prepare an executive summary/rebuttal of the "public comments." A copy is attached marked Exhibit A.

That summary points out K.S.A. 44-510g(a) and the use of the word "ability." I submit to you that the word "ability" is not ambiguous; however, I have listed four interpretations which are associated with various interest groups. You will note that interpretation No. 1 is the position expressed in the earlier "public comments." Interpretation No. 4 is a national rehabilitation concept and the definition that the Division of Workers Compensation has adopted.

Also enclosed is a copy of Rehabilitation Issues marked as Exhibit B. Question No. 1 of that handout was quoted by both John Ostrowski and Tom Hammond, and each alleged that I have interpreted the use of the word "ability" improperly.

The lobbyists also suggested that, given the Division's interpretation, there will never be any work disability. Enclosed please find, as Exhibit C, Page 15 of a 20 page outline I prepared for the Kansas Trial Lawyers Association "Country Lawyer" seminars. That one page clearly demonstrates work disability is still available in

Kansas if the evidence is presented. I have not attempted to limit your access to that entire outline, and any member who wishes to have the entire outline will be provided with a copy.

Let me turn now to address Bud Langston's comments. I'll have to say quite frankly that what Mr. Langston had to say was accurate, meaningful and on all fours with what the Division, and specifically Vocational Rehabilitation Administrator Thomas, had been contemplating.

We have studied, and will continue to study, the need for peer assessment and an ethics committee to resolve vocational rehabilitation vendor problems. We are forming a Joint Advisory Committee to study vocational rehabilitation issues and vendor control. Enclosed as Exhibit D is an article about the Advisory Committee and other articles concerning rehabilitation notes that will appear in our soon to be mailed newsletter. You will note from those various articles that the Division does not have a narrow interpretation to the vocational rehabilitation act as alleged, but rather has a fair and impartial application of the act as this legislative body has mandated we have.

Also enclosed is an article about the formation of a Joint Advisory Committee being selected by Secretary Ray Siehndel to study the vocational rehabilitation act and to make any viable recommendations to this committee and the Senate Labor, Industry & Small Business Committee. You will note from that article it has been eight years since that committee has met. We expect the committee to be active, well representative of all interest groups and to assist, not hinder, this learned legislative committee, if not this session, certainly next session.

Also enclosed as Exhibit F is a current list of the approved vocational rehabilitation vendors in the state of Kansas; as Exhibit G the draft of proposed changes to K.A.R. 51-24-5 which is the qualifications for counselors, evaluators and job placement specialists; and as Exhibit H the draft recommendations for changes to K.A.R. 51-24-4 which is the qualifications and duties of vendors. You will note that Exhibit G was prepared in December, months before any "public comments" or testimony to this committee was made; however, in all frankness, due to the recommendations and the comments made by Bud Langston, the recommendations for amendments to K.A.R. 51-24-4 which is Exhibit H are going to be made. We also expect the Joint Advisory Committee that will be studying vocational rehabilitation to make other recommendations, as well as the Joint Advisory Committee studying the entire Workers Compensation Act to make similar recommendations.

During the "public comments," the case of Howard v. Airwick/Airkem Professional Products, Docket No. 126,562, was discussed. I will tell you that, although the parties settled their disputes amongst each other, I have not resolved the issue of alleged improprieties and am continuing to investigate that case. Once I have completed my investigation, I will take appropriate action and make recommendations to the appropriate parties for further administrative, ethical or legal action if it appears to be proper. However, in fairness to all parties involved, I will not

discuss with this committee any of the specific allegations at this time until a complete investigation has been conducted. However, since it was apparent at the last meeting that at least one, if not other members, of this committee had access to the actual order written by Judge Jackson, I have taken the liberty to make a copy of that order for each and every member of this committee since that is a matter of public record and I am sure each of you, and your constituents, have questions about it. The order is attached as Exhibit I.

Finally, I have enclosed copies of proposed minor amendments to existing Kansas statutes under the "New Act." You will recall on January 18, 1989, I enclosed in my executive summary a brief list suggesting the committee should consider minor amendments to the "New Act" to clarify what is already implied, but may be subject to adverse judicial interpretation without clarification. I have taken the liberty to re-enclose that specific language and have copied it in an enlarged edition. In addition to that list (which is Exhibit J), please find enclosed as Exhibit K the statute K.S.A. 44-523(c) as Exhibit L, the recommendations for changes to that statute.

Please find enclosed as Exhibit M the actual statute, K.S.A. 44-534a(b), and as Exhibit N the recommended changes for that statute.

Please find enclosed as Exhibit O, actual statute K.S.A. 44-510g(d) and, as Exhibit P, the recommended changes, and as Exhibit Q a chart listing vocational rehabilitation statutes and the actual language which suggests the need for amendment to K.S.A. 44-510g(d).

I realize, as I explained earlier, that this committee can no longer introduce new legislation; however, if the committee, in reviewing the proposed changes, feels there is merit, I would respectfully request Chairman Douville to seek introduction of these amendments to the Appropriations Committee. One of the reasons I specifically asked Chris Cowger to be present today is in the event you would have questions concerning the Fund's position on amendments to K.S.A. 44-534a(b) which would affect the Fund liability and increase ultimate liability on a yearly basis. I suspect that Chris would like the opportunity to issue a position paper if you decide to take any action this year.

Although we do not give advisory opinions, it is my belief that the intent behind the Workers Compensation Act and the Workers' Compensation Fund in general would require reimbursement of vocational rehabilitation expenses in those cases where less compensation is awarded than is received, and in those cases in which compensation is ultimately denied although vocational rehabilitation benefits have previously been received.

I will be more than willing to appear before this committee on any other date to discuss any of these matters in more detail as a committee or to discuss with any individual committee member any of your concerns. At this time, I would like to answer any questions the Chairman or committee members may have of me or allow members of my staff to answer questions you may have.

I would like to thank you for allowing me to appear before you today, and to answer those comments previously made concerning the administration of the Division of Workers Compensation and our interpretation of the language found in the new vocational rehabilitation statutes.

Thank you.

INDEX OF EXHIBITS

A. Executive Summary/Rebuttal

B. Rehabilitation Issues

C. Page 15 to Kansas Trial Lawyers Association Seminar

D. Rehabilitation Notes

E. Joint Advisory Committee

F. Vendor List

G. Proposed Amendments to K.A.R. 51-24-5

H. Proposed Amendments to K.A.R. 51-24-4

I. Docket No. 126,562 (Howard case)

J. Recommended Amendments

K. K.S.A. 44-523(c)

L. Proposed Amendments to K.S.A. 44-523(c)

M. K.S.A. 44-534a(b)

N. Proposed Amendments to K.S.A. 44-534a(b)

O. K.S.A. 44-510g(d)

P. Proposed Amendments to K.S.A. 44-510g(d)

Q. Chart listing Vocational Rehabilitation language - recommended 44-510g(d)

EXECUTIVE SUMMARY/REBUTTAL OF "PUBLIC COMMENTS" MADE TO HOUSE, LABOR AND INDUSTRY COMMITTEE ON JANUARY 26, 1989 AND FEBRUARY 8, 1989 CONCERNING AN ANALYSIS OF VOCATIONAL REHABILITATION ISSUES UNDER THE KANSAS WORKERS COMPENSATION ACT.

BY: ROBERT A. ANDERSON, DIRECTOR, DIVISION OF WORKERS COMPENSATION AND RICHARD L. THOMAS, VOCATIONAL REHABILITATION ADMINISTRATOR, DIVISION OF WORKERS COMPENSATION

K.S.A. 44-510g(a)

> (a) A primary purpose of the workers compensation act shall be to restore to the injured employee the **ability** to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto.

How should the phrase " **ability** to perform work in the open labor market" be interpreted?

Black's Law Dictionary, p. 18, defines:

Ability: When the word is used in statutes, it is usually construed as referring to pecuniary ability (i.e., contemplates earning capacity).

Ability is defined in Webster's II, New Revised University Dictionary as follows:

1. Physical, mental, financial, or legal powers to perform.
2. A natural or acquired skill or talent.

Open labor market has not been defined by the legislature or the courts, to date.

This phrase "**ability** to perform work in the open labor market" could be interpreted using a very narrow definition or one that is very broad. Following are some of the possible interpretations that have been presented by various interest groups.

(1) **Ability** means the physical capacity to perform some type of work that exists in the national labor market as identified in the Dictionary of Occupational Titles (DOT). (Insurance Extreme Position)

If this interpretation is adopted, only the most severly injured and the lowest skilled workers would be eligible for rehabilitation under the Kansas Workers Compensation Act. This is basically the concept used by the Social Security Disability Insurance program. The successful return to work rate of the Social Security referrals made to the state rehabilitation agency is one of the three least successful referral groups.

(2) **Ability** to perform work is defined as actually obtaining a comparable wage position. (Labor Position)

Under this interpretation, anyone that has not returned to work at comparable wage would be eligible for a vocational rehabilitation plan. This definition does not take into consideration the need for rehabilitation services. It is an "employment guarantee" for anyone losing a job as a result of a work related injury.

(3) **Ability** would take into consideration the physical and mental capacity to perform work at comparable wages. (Industry Position)

Theoretically, the counselor would again be identifying jobs found in the Dictionary of Occupational Titles and would likely be utilizing a computerized transferable skills match that considers the claimant's stated physical and mental capabilities. Eligibility for rehabilitation would be based on the national labor market data. Actual existence of jobs in the claimant's labor market area that are within the claimant's functional restrictions are not addressed.This definition does not take into consideration the need for professional intervention.

(4) **Ability** must take into consideration the physical and mental capabilities as well as the "need for rehabilitation services" plus the availability of comparable wage employment in the open labor market. (National Rehabilitation Concept)

Under 44-510g(e)(1) the Legislature set up a system that requires an assessment for these individuals meeting the threshold for evaluation. This assessment " must result in a report of the practicability of need for and kind of services, treatment, training or rehabilitation which may be necessary and appropriate to render such employee able to perform work in the open labor market and to earn comparable wage".

RECOMMENDATION

It is apparent that the Legislature wanted an evaluation for the worker who is injured and cannot return to comparable wage work for the same employer, or who does not already have the skills and **ability** to return to a comparable wage employment.

The interpretation found in #4 addresses the physical and mental capabilities of the individual. It also requires the counselor to document whether or not there is a need for rehabilitation services and requires that a plan be developed for those who need services to return to work in the open labor market and to earn comparable wages.

Attached is a copy of the evaluation form that a qualified rehabilitation counselor must complete. The form addresses the person's specific limitations and their impact on the individual's **ability** to return to work for the same employer or to other work for which he/she is already qualified. The counselor must address whether the injured worker could return to work without assistance. If this is not possible, the counselor is required to identify the specific problems or obstacles the claimant will have in returning to work in the open labor market and in earning comparable wages.

The counselor, in consultation with the injured worker must develop a rehabilitation plan with services that either alleviate or circumvent the "specific problems or obstacles" identified in the vocational assessment.

The law prescribes in 44-510g(e)(1) that the individual's need for rehabilitation services must be determined.In order for rehabilitation to be effective in returning injured Kansans to work, "**ability**" must be interpreted to include physical and mental capability to return to a position available in the open labor market that would allow the injured worker to earn comparable wages.

KANSAS DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION

VOCATIONAL ASSESSMENT/EVALUATION

VENDOR NAME_____ INS.CARRIER_____
VR COUNSELOR_____ ADJUSTOR_____
QRP#_____ PHONE_____
PHONE_____

CLAIMANT_____ SS#_____ D/A_____
ADDRESS_____ CITY_____ STATE_____ ZIP CODE_____
PHONE_____ BIRTHDATE_____ MALE_____ FEMALE_____
EMPLOYER AT D/A_____ WEEKLY EARNINGS AT D/A_____

APPRAISAL OF THE CLAIMANT'S PREVIOUS EDUCATION, TRAINING, QUALIFICATIONS AND WORK EXPERIENCE INCLUDING MENTAL AND PHYSICAL DEMANDS OF OCCUPATION AT TIME OF INJURY.

CURRENT MEDICAL STATUS INCLUDING PHYSICAL AND/OR MENTAL LIMITATIONS IMPOSED BY THE OCCUPATIONAL INJURY OR DISEASE.

CLAIMANT'S NAME_____

DOES CLAIMANT RETAIN THE CAPACITY TO RETURN TO THE SAME JOB, SAME EMPLOYER? YES____NO____

RESULTS OF TRANSFERABLE JOB SKILLS ASSESSMENT AND/OR FORMAL TESTING RESULTS(if applicable)

OTHER PERTINENT CONSIDERATIONS

CLAIMANT'S NAME_____

SUMMARY

IDENTIFY THE SPECIFIC PROBLEMS OR OBSTACLES THE CLAIMANT WILL HAVE IN RETURNING TO WORK IN THE OPEN LABOR MARKET AND EARNING COMPARABLE WAGES. THIS SECTION SHOULD DOCUMENT WHETHER A VOCATIONAL PLAN SHOULD BE DEVELOPED. PROVIDE THE RATIONALE FOR YOUR CONCLUSIONS.

IS A VOCATIONAL REHABILITATION PLAN NEEDED? YES____NO____
IF YES, DATE PLAN WILL BE SUBMITTED TO DIVISION_____

COUNSELOR SIGNATURE_____DATE_____

(ATTACH MEDICAL AND VOCATIONAL REPORTS TO SUPPORT VOCATIONAL ASSESSMENT.)

cc:

REHABILITATION ISSUES

DEFINITIONS

ACCOMMODATION: As used in this outline, accommodation means the changing of job duties either by changing or modifying the means, method, weight, speed, hours, location or other feature of the work to be performed for the purpose of enabling an injured worker to perform the work within restrictions imposed because of an injury.

VENDOR: As used in this outline, vendor means a company, qualified by the director to provide vocational rehabilitation services by employing qualified vocational rehabilitation counselors, evaluators and job placement specialists

ENTITLEMENT

44-510g(d) If "...the employee is unable to perform work for the same employer with or without accommodation..."

1. QUESTION: If employee is "able" to perform the same work for the same employer but the employer will not take the employee back, is the employee entitled to a referral for an evaluation to determine the need for vocational rehabilitation services?

RESPONSE: No. Section 44-510g in subsection (a) provides: "A primary purpose of the workers compensation act shall be to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages...". The theme and goal of vocational rehabilitation in Workers Compensation is to restore to the employee the ability to return to comparable wage work. If the physicians' reports indicate that the employee still has the ability to return to the same job and earn comparable wages, there is nothing to "restore" to the employee. The fact that the employer does not want to re-employ the claimant does not alter the fact that the employee has the ability to perform the work without accommodation.

2. QUESTION: If the employee's ability to return to work for the same employer was only possible because of accommodation by the employer, and the employer does not accommodate the employee is the employee entitled to a referral for vocational evaluation?

RESPONSE: Yes. The employer's decision to not re-employ the claimant removes any opportunity for accommodation. Without the accommodation the employee's status remains that he cannot return to the work he was doing when injured and the employee thus meets the threshold requirements of being entitled to a referral.

12-18

3. QUESTION: If the employee has the ability to return to work for the same employer and the employer offers work with or without accommodation, must the offered work pay comparable wages?

RESPONSE: Yes. 44-510 in subsection (a) makes one of the goals of the act to restore to the employee the ability to perform work in the open labor market and earn comparable wages. If a job offer at lower wages defeated claimant's rights to rehabilitation, the stated purpose of restoring the ability to earn comparable wages would not be accomplished. Additionally, the entire scheme of the new provisions of the act is to guage vocational rehabilitation and permanent partial disability to comparable wages. It must be presumed that the legislature intended that a "comparable wages" requirement was implied.

4. QUESTION: Must a job offered by the claimant's employer be "reasonable" or "suitable" for the claimant? If the offered job is less desirable than the job claimant was doing when injured, i.e., night shift, menial tasks, dirty work, or work at which claimant has proved unsuccessful, do those factors affect the "reasonableness" or "suitableness" of the offer?

RESPONSE: The particular facts in each case must be reviewed to determine the reasonableness. In general, the offered work must be appropriate for the individual. It might not be appropriate to offer night work to a single parent with small children unless that person was working a night shift when injured. It might not be appropriate to offer a sales job to a person who is not suited to sales work or has been unsuccessful at it before.

5. QUESTION: If a person is offered work or a plan contemplates work in a town other than where claimant lives or works would that affect the appropriateness of the work? Is there a region or area concept that must be implied?

RESPONSE: Again, it would be necessary to look at the facts peculiar to the case. While it might not be appropriate to require a person with a family to move from their lifetime home, it might be appropriate to require a person to drive an hour commuting distance. As a general rule, it would probably be very rare that a person would be required to move to a different town to accept a job, but not so rare to look at the idea of commuting and take into account the community involved and its proximity to cities with available jobs.

FORM R87-1: INSURANCE CARRIER STATUS REPORT

44-510(e)(1) "If the employee has remained off work for 90 days or if it is apparent to the director the employee requires vocational rehabilitation services and, in either case, if approved rehabilitation services are not voluntarily furnished to the employee by the employer, the director, on such director's own

12-19

motion or on application of any party,... may refer the employee ... for evaluation and for a report..."

6. QUESTION: If a claimant, who has been off work for over 90 days but has not been referred to a vendor by the employer, asks the rehabilitation administrator to make a referral, what factors determine whether a referral should be made?

RESPONSE: If a current Form R87-1 is on file with the administrator, a referral will <u>not</u> be made if the form indicates:
1. that the claim is being denied as non-compensable;
2. that the claimant's medical condition is not stable enough to begin assessment;
3. that claimant is expected to return to work for the same employer at comparable wages;
4. that claimant has already returned to comparable wage work;
5. that claimant is not interested in vocational rehabilitation;

If a current R87-1 is on file a referral <u>will</u> be made if the rehabilitation administrator is satisfied that the claim is compensable, the claimant apparently needs rehabilitation and:
1. the employer declines making a referral after being given the opportunity to do so;
2. an order from an administrative law judge directs that a referral be made;

If a current R87-1 is <u>not</u> on file with the administrator, a referral will be made if:
1. the claimant apparently needs rehabilitation and contact with the employer or insurance carrier has been attempted to determine whether valid reasons exist to not make a referral;
2. referral has been ordered by an administrative law judge

7. QUESTION: Does claimant (with or without an attorney) have any input into the choice of vendor, either to approve or object? Is this different if the referral is by order of an administrative law judge?

RESPONSE: No. Whether the question of the appointment of a vendor is before the rehabilitation administrator or an administrative law judge the answer is the same. Just as in the furnishing of medical treatment, it is the employer's responsibility to furnish vocational rehabilitation and therefore the vendor, like the treating physician is chosen by the employer subject to the situations discussed earlier and subjects brought before an administrative law judge. Claimant might have right to object to a particular vendor if there is some reason that vendor could be shown to be inappropriate. Claimant could legitimately have input in applying for the appointment of a vendor initially or a change of vendor but not to name a particular vendor since vendors, when appointed by the director, are appointed on a rotating basis.

HEARINGS

8. QUESTION: Is a party entitled to a hearing on whether there should be a referral to a vendor in a claim that is admittedly compensable?

RESPONSE: No. It is clear the legislature did not intend for there to be a hearing under the act for a determination as to whether the claimant should be referred for an evaluation. The provision in K.S.A. 44-510g(e)(2) speaking about affording the parties an opportunity to be heard and present evidence, deals with those situations in which it is necessary to have a hearing on a substantive issue such as compensability of the claim, and the evaluation is being ordered after-the-fact following an affirmative ruling on compensability. This hearing provision first occurs after the referral provisions are completed. The placement of this section after the plan has been developed indicates that the provision was intended to relate to hearings needed beyond completion of the normal referral process.

9. QUESTION: Is any party entitled to have a regular hearing before completion of vocational rehabilitation?

RESPONSE: No. Until an injured worker has completed the rehabilitation process, whether it is completed by evaluation or by fully executing an approved plan, there cannot be a regular hearing. The hearing cannot be held because the evidence necessary to present on the issue of work disability or the proper computation of a scheduled disability is not available and cannot be made available until the completion of the rehabilitation process.

TEMPORARY TOTAL BENEFITS

10. QUESTION: What is the "date of the evaluation" mentioned in 44-510g(e)(2)(B) from which temporary total disability compensation is to be paid?

RESPONSE: It is the date the injured worker is referred to a vendor for vocational assessment.

11. QUESTION: Is an injured worker entitled to payment of temporary total disability compensation during vocational assessment and rehabilitation plan development. If so, does claimant automatically have to apply for preliminary hearing to get compensation started?

RESPONSE: Payment of temporary total disability compensation during vocational assessment and plan development is payable for not more than 70 days from the date of the evaluation and not more than an additional 30 days if circumstances outside of the control of the employee prevents completion of the evaluation or the

formulation of the rehabilitation plan. The topic of the payment of temporary total compensation during an evaluation is touched in 44-510g(e)(2)(B) where it provides that the director may order it paid. This implies that it is payable but nowhere does it tell the employer to pay except in connection with an order. The director interprets the statute to require automatic payment from the day the claimant is referred to a vendor, unless the claim is being denied totally, otherwise the evaluation process would be stymied. The delay in getting a setting for a hearing and getting an order thereafter does not mesh with the limited time frames of the evaluation process. In too many cases the delay would defeat the rehabilitation process because claimants, without income, could not afford to wait.

12. QUESTION: K.S.A. 44-510g(g) provides, in part, "...The employer shall pay temporary total disability compensation during any period of vocational rehabilitation, reeducation or training..." Does this section require the employer to pay during attempted job placement if the approved plan includes job placement?

RESPONSE: Yes. The legislature constructed a list of priorities to be followed in determining a proper rehabilitation plan. If the priority found appropriate is returning the employee to work, that plan must be fully executed just as it would be required to be fully executed if the plan were reeducation. It is obvious that a plan calling for reeducation would not be completed until the schooling was completed. Likewise a plan that includes job placement as a part of the service necessary to return an employee to work is not completed until job placement is accomplished.

13. QUESTION: When a plan is approved, is it required that the claimant apply for hearing to obtain an order for payment of temporary total disability compensation during the execution of the plan?

RESPONSE: No. The act is intended to be self-enacting and not require the invoking of the hearing process. The director is considering the possibility of devising a new method of confirming an agreed plan to an award format. The attached draft of a "STIPULATION AND ORDER APPROVING REHABILITATION PLAN" would be used in those situations in which the parties and the rehabilitation administrator agree to an appropriate plan for rehabilitation and one or more parties wish to have the agreement made into an enforceable order.

SERVICES

44-510g(e)(2)(D) "... may order such services be provided at the expense of the employer by any qualified private agency or facility in this state or any state contiguous to this state..."

12-22

14. QUESTION: If the claimant lives in a state outside the State of Kansas which is not contiguous with Kansas or moves out of state, is the employer required to provide a vocational evaluation and/or vocational rehabilitation services?

RESPONSE: No. The limitation that the director cannot order rehabilitation paid by the employer except in this state or a contiguous state must be followed. If an employee does not live in Kansas or a contiguous state when the accident occurs or if the employee moves to a non-contiguous state and needs rehabilitation, special problems are presented and each case will be judged on the facts of that case. The employer must keep in mind, however, that the purpose of rehabilitation is to decrease the employee's work disability. If rehabilitation is not furnished, the work disability may well be higher.

15. QUESTION: Can the rehabilitation administrator approve a plan which provides for rehabilitation services beyond 36 weeks?

RESPONSE: No. The limitation that the director cannot order rehabilitation paid by the employer for more than 36 weeks (with the possibility of a 36 week extension) is another type of case in which special problems are presented and which must be judged on the facts of that case. However, like the non-contiguous state problem, the employer must keep in mind that the purpose of rehabilitation is to decrease the employee's work disability. If rehabilitation which is otherwise appropriate is not furnished because it exceeds the weeks limitation, the work disability may well be higher than if the excess rehabilitation service had been provided.

16. QUESTION: If, during the evaluation process, the counselor receives medical reports which conflict as to the employee's restrictions, is the counselor bound to consider all the medical reports?

RESPONSE: Yes. Not only must all the medical reports be considered, but they must be considered fairly giving due deference to reports of specialists in the type of injury from which claimant suffers. Undue weight or credence must not be given to specific reports solely because the report was furnished by one party or favors one party or the other.

REFUSAL TO COOPERATE

K.S.A. 44-510g(i) provides in part "... if the injured worker without good cause refuses to undertake the rehabilitation, education, or training program determined by the director to be suitable for such employee or refuses to be evaluated under the provisions of subsection (e)..."

17. QUESTION: If the injured worker refuses to allow a medical

manager or a vocational rehabilitation counselor to attend a medical appointment with the injured worker, does that constitute a refusal to cooperate with the evaluation or the approved plan?

RESPONSE: NO. The medical manager is not considered as a participant in the vocational evaluation as this service must be completed by a qualified vocational rehabilitation counselor. Medical management is an optional service that the injured worker may choose to cooperate with to assist in medical recovery.

The answer is also no for the vocational rehabilitation counselor. The vocational rehabilitation counselor may obtain medical records from the physician and can meet with the physician to clarify restrictions and to discuss the limitations as they relate to claimants ability to return to or to participate in an employment plan. If the injured worker and the physician do not object they can attend the medical appointment. However, refusal to allow them to attend is not refusing to cooperate. The injured worker has the right of meeting privately with the physician.

18. QUESTION: Does the refusal to allow a medical manager or the vocational rehabilitation counselor to attend medical appointments constitute a refusal to submit to medical examination as set out in K.S.A. 44-518?

RESPONSE: No. Neither the medical manager nor the vocational rehabilitation counselor have a role in medical treatment decisions, therefore are not a recognized participant in the medical examination. If the injured worker and the physician give them permission they can attend the appointments.

u) increased absenteeism;
v) inability to do portion of present job;
w) increase in irritability and stress caused by injury;
x) inability to pass pre-employment physicals;
y) effects of "traumatic neurosus";

2) These factors may be relevant in Kansas in determining whether or not post-injury earnings are a reliable measure of loss of earning capacity. However, it is important to note that many of the state statutes applicable to the cases cited by Larson's treatise may vary from the Kansas statute which may limit the relevancy of the above considerations.

3) The claimant has the burden to get these factors into evidence to rebutt the statutory presumption.

G. Burden will shift to employer to prove other work available to claimant

1. It is the Director's opinion that under the new act, once a workers' compensation claimant seeking benefits for permanent partial disability proved that, as a result of a compensable accident or injury, he could no longer work at his former job where he sustained injury or accident and resultant disability, the burden shifts to the employer, to prove that other work, in the open market, was available to claimant in which he could earn comparable wages to those he would have received from his former job.

2. Employer will have to rely on wage surveys; vocational rehabilitation other expert testimony.

   a. If wage surveys are used, they need to address overtime policies and pay.

   b. There should be evidence in the case of the claimant's post-disability occupation that the claimant could in fact obtain either overtime or fringe benefits.

3. Open labor market must be reasonably assessable.

   a. Legislature did not intend for workers to move unreasonable distances.

   b. Vocational Rehabilitation transferrable to contiguous states (i.e., states must have common border with Kansas).

H. Success or failure of the vocational rehabilitation "plan" will have effect on final percentage of work disability awarded.

I

REHABILITATION NOTES

Advisory Committee

An advisory committee will be established by the Division of Workers Compensation to study vocational rehabilitation issues. This committee will serve to establish input from the various agencies and organizations interested in returning injured workers to the competitive labor market; and to establish quality and ethical guidelines for vendors.

If anyone has an interest in serving on the committee, please contact Richard Thomas, Rehabilitation Administrator at (913) 296-3441 or send your request in writing to Mr. Thomas at the Division of Workers Compensation, 900 SW Jackson, Room 651-S, Topeka, KS 66612-1276.

Insurance Carrier Status Report (R87-1)

It is the responsibility of the insurance carrier or self-insured employer to complete the R87-1 form.

Some companies are under the wrong impression that if they refer a case to a rehabilitation vendor that there is no need to complete the R87-1 since the vendor will submit a vendor referral report (R87-2).

The R87-1 is documentation that the referral has been made and notifies the Rehabilitation Section whether it is a medical management or vocational referral. (See Form Helper page _____ for other reporting requirements).

Reminder to Insurance Companies and Self-Insured Employers

Telling a vendor to place a vocational referral on hold because they are attempting to negotiate a settlement is **not** acceptable. Vendors are instructed to complete the assessment and/or plan development process unless there has been a settlement agreement or the claimant has put in writing that he/she no longer wishes to pursue vocational rehabilitation benefits.

Vendor Selection Policy Change

If a referral for vocational evaluation is the result of a hearing before an Administrative Law Judge, the Director's office will appoint a vendor.

If the injured worker has to have a hearing to require the insurance company/employer to make a referral, then the referral is not "voluntarily furnished to the employee by the employer" as stated in K.S.A. 44-510g(e)(1). This is a change from allowing the insurance company/employer 10 calendar days to select a vendor and notify the Rehabilitation Administrator.

Division Referral on "Apparent" Cases

The Rehabilitation Section receives numerous requests from injured workers and claimant attorneys to refer an injured worker for vocational rehabilitation evaluation.

The Rehabilitation Administrator under the authority delegated by the director under K.S.A. 44-510g(e)(i) can refer an "apparent" case.

In order for the Rehabilitation Administrator to invoke the apparency rule there must be medical documentation of permanent restrictions and that the claimant is medically stable enough to benefit from the vocational evaluation. This documentation should accompany the request for referral. Otherwise, the referral must either be volunta-

rily made by the insurance company/employer or through a formal motion before an administrative law judge, pursuant to K.S.A. 44-534a.

Reports Generated by Vendors

All vocational reports generated by a vocational rehabilitation vendor **shall** be distributed by the vendor to all parties involved with the claim. It is the direct responsibility of the vendor to see that the parties receive copies of these reports.

The information contained in these vocational reports is not privileged and failure to provide copies will result in the vendor jeopardizing their status as an approved vendor.

The Division does not require medical management reports to be distributed to both sides. Parties should voluntarily exchange non-privileged medical management reports so all sides are equally informed about the status of the injured worker.

The vendor will follow the reporting guidelines established by the Division when reporting to the Rehabilitation Section.

New Assistant Rehabilitation Administrator

Alan R. Stanton was hired as an Assistant Rehabilitation Administrator for the Division of Workers Compensation effective December, 1989.

Mr. Stanton received a master of vocational rehabilitation from the University of Wisconsin-Stout. Prior to joining the Division of Workers Compensation, he worked in the private insurance rehabilitation sector as a case manager for International Rehabilitation Associates in Colorado and Kansas. He moved to Kansas in 1986 to work as a training director with a federally grant-funded research and training center studying worker disability at The Menninger Foundation in Topeka, Kansas.

Mr. Stanton has nearly 14 years experience in the field of vocational rehabilitation in both private non-profit and proprietary sectors, including positions as vocational evaluator, job development/placement specialist, rehabilitation counselor, and facility administrator. He is a certified rehabilitation counselor and a certified vocational evaluator. He has conducted in-service staff training for employers, and co-authored several publications targeted to the rehabilitation field, insurance industry and government.

Mr. Stanton is a member in the American Society of Training and Development (Kansas City Chapter), and is currently serving on the Program Committee for the Society's annual regional conference being held in Kansas City this fall.

National Rehabilitation Association

Robin O'Dell, Assistant Rehabilitation Administrator for the Division of Workers Compensation, Department of Human Resources, was elected to an office in the National Rehabilitation Association.

O'Dell, president of the Kansas Rehabilitation Association, was named representative of the Great Plains Regional Council of Chapter Presidents at the organization's meeting on November 19, 1988, in Reno, Nevada. She also is active in national and regional committees and boards.

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SECRETARY SIEHNDEL TO SELECT WORKERS COMPENSATION JOINT ADVISORY COMMITTEE

Ray D. Siehndel, Acting Secretary, Department of Human Resources announced that he will select a Workers Compensation Joint Advisory Committee to study the "New Act" and to make recommendations for any amendments to the Kansas Legislature. The Advisory Committee, who will serve without compensation, will be composed of two members representing labor groups; two members representing business and industry groups; two at-large members from the general public; a claimant's attorney; a respondent's attorney; an attorney representing the Workers' Compensation Fund; a vendor as defined in K.A.R. 51-24-3(a); the Rehabilitation Administrator; and the Workers Compensation Director. The labor members will be selected from a list submitted by the Kansas State Federation of Labor. The industrial and business members will be selected from a list submitted by the Kansas State Chamber of Commerce. The at-large members, attorneys, and the vendor will be selected from recommendations and requests received for consideration.

Although there have been no meetings held during the last eight years, an advisory committee is not a new concept in Kansas. A joint advisory committee was first formed in 1964. A similar committee was formed on December 6, 1976, by then Secretary of Human Resources, Dr. James A. McCain, who appointed seven members from labor, management and the legal profession to serve on an advisory committee to the Division of Workers Compensation.

Secretary Siehndel stressed that he expects the new advisory committee to make viable recommendations to the Senate Labor, Industry & Small Business Committee; the House Labor & Industry Committee; and other legislators. He believes this advisory committee is very important to the state of Kansas, and that committee member involvement will be important in determining the future shape of our workers compensation laws.

If you are interested in serving on this advisory committee as an at-large member, attorney, or vendor or if you would like Secretary Siehndel to consider someone for one of these at-large positions, please write to Director Robert A. Anderson, Division of Workers Compensation, Landon State Office Building, 900 SW Jackson, Room 651-S, Topeka, KS 66612-1276.

December, 1988

KANSAS DIVISION OF WORKERS COMPENSATION

QUALIFIED VOCATIONAL REHABILITATION VENDORS

AMERICAN INTERNATIONAL HEALTH AND
REHABILITATION SERVICES
10890 Benson Drive, Suite 250
Bldg. 24, Corporate Woods
P.O. Box 25096
Overland Park, Kansas 66210
913-661-8900

ASSOCIATED REHABILITATION CONSULTANTS
302 S. Clairborne, Suite A
Olathe, Kansas 66062
913-829-1649

BEECH AIRCRAFT CORPORATION
PO Box 85, Dept. 69
9709 East Central
Wichita, Kansas 67201-0085
316-681-7111

BETHANY HEALTH and REHABILITATION SERVICES
155 S. 18th Street, Suite 185
Kansas City, Kansas 66102
913-281-7719

JOHN T. BOPP, P.C.
616 East 63rd Street, Suite 201
Kansas City, Missouri 64110
816-333-0606

BONNIE RUTH AND ASSOCIATES
35 Corporate Woods
9101 W. 110th St., #210
Overland Park, Kansas 66210
913-451-1143

12-29

CENTENNIAL REHABILITATION ASSOCIATES, INC.
10628 West 87th
Overland Park, Kansas 66214
913-492-0808

CEREBRAL PALSY RESEARCH
2021 N. Old Manor
P.O. Box 8217
Wichita, Kansas 67208
316-688-1888

CLASS LIMITED
P.O. Box 266
1200 E. Merle Evans Drive
Columbus, Kansas 66725
316-429-1212

CONSERVCO
9800 Metcalf, Suite 21962
Overland Park, Kansas 66212
913-967-4409

CRS CARE CORPORATION
8400 W. 110th St.
Suite 220
Overland Park, Kansas 66210
913-469-0712

CRAWFORD
HEALTH AND REHABILITATION SERVICES
3406 Broadway
Kansas City, Missouri 64111
816-753-2863

GOODWILL INDUSTRIES
1817 Campbell Street
Kansas City, Missouri 64108
816-842-7425

HCA WESLEY MEDICAL CENTER
Health Strategies
550 North Hillside
Wichita, Kansas 67214-2468
316-688-3040

IAM CARES
3830 South Meridian Street
Wichita, Kansas 67217
316-522-1591

INTRACORP/IRA
6701 West 64th Street, Suite 220
Shawnee Mission, Kansas 66202
913-722-2085

JEWISH VOCATIONAL SERVICE
Attn: Injured Workers Program
1608 Baltimore
Kansas City, Missouri 64108
816-471-2808

KANSAS REHABILITATION AND CLINICAL CONSULTANTS
2909 Plass Court
Topeka, Kansas 66611
913-266-0210

KANSAS REHABILITATION SERVICES
300 SW Oakley
2nd Floor, Biddle Building
Topeka, Kansas 66606
913-296-3911

LANGE & ASSOCIATES
PROFESSIONAL REHABILITATION
7407 East 79th Street
P.O. Box 37120
Kansas City, Missouri 64138
816-353-0351

MCCLELLAN & ASSOCIATES
8600 West 95th, Suite 104
Valley View Medical Bldg.
Overland Park, Kansas 66212
913-341-6208

MENNINGER RETURN TO WORK CENTER
700 Jackson, 9th Floor
Topeka, Kansas 66603
913-233-2051

PERC, INC.
6901 West 63rd Street
Building 2, Suite 406
Shawnee Mission, Kansas 66202
913-236-5300

PRINCIPAL FINANCIAL GROUP
Rehabilitation Services
Attn: Debra Husted
10985 Cody, Suite 200
Overland Park, Kansas 66210
913-341-8550

PROFESSIONAL REHABILITATION CONSULTANTS, INC.
400 N. Woodlawn, Suite 18
Wichita, Kansas 67208
(316) 687-6229

PROFESSIONAL REHABILITATION MANAGEMENT, INC.
PO Box 847
201 East Santa Fe
Olathe, Kansas 66061
913-782-6697

REHABILITATION INSTITUTE
3011 Baltimore
Kansas City, Missouri 64108
816-756-2250

REHABILITATION MANAGEMENT CONSULTANTS
949 S. Glendale, Room 117
Wichita, KS 67218
316-684-0950

UPJOHN HEALTHCARE SERVICES
101 E. Elm Street
Columbus, Kansas 66725
316-429-1177

WORK ASSESSMENT & REHABILITATION CENTER
3216 East Douglas
Wichita, Kansas 67208
316-685-9675

Wx WORK CAPACITIES, INC.
8000 Reeder
Lenexa, Kansas 66214
913-894-9675

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51-24-5. Qualifications for counselor, evaluator, and job placement specialist. (a) Each person seeking to qualify as a vocational rehabilitation counselor for cases under the Kansas workers compensation act shall:

(1) furnish proof to the director that the person has:

(A) a masters degree from a nationally accredited program in rehabilitation counselor education; or

~~(B)(i) a masters degree based on a curriculum and course work designed to fully prepare a person to practice vocational rehabilitation counseling; and~~

(B)(i) a masters degree in counseling, guidance and counseling, clinical psychology, counseling psychology, clinical social work or any related field which includes 9 hours of graduate course work in counseling, and

(ii) one year of experience as a vocational rehabilitation counselor or completion of a nationally accredited rehabilitation counselor internship program from a college or university; or

~~(C) a masters degree with at least 32 postgraduate hours including all of the following courses:~~

(C) 32 graduate hours from an accredited rehabilitation counseling program including coursework from at least 9 of the following courses:

(i) medical aspects of disability
(ii) counseling theories
(iii) individual and group appraisal
(iv) career information service
(v) evaluation techniques in rehabilitation
(vi) placement process in rehabilitation
(vii) psychological aspects of disability
(viii) case management in rehabilitation
(ix) utilization of community resources
(x) survey of rehabilitation
(xi) supervised practicum in rehabilitation; or

(D) a bachelors degree in rehabilitation services and three years of experience as a vocational rehabilitation counselor; and

(2) furnish the director with the addresses and telephone numbers of that persons offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(4) acknowledge that the persons qualifications may be suspended or revoked if there is a repeated failure to make timely filing of reports with the director or fails to comply with the regulations adopted by the director.

(b) each person seeking to qualify as a vocational rehabilitation evaluator shall:

(1) furnish proof to the director that the person has:

(A) a masters or doctoral degree in vocational evaluation, rehabilitation counseling, work adjustment, ~~counseling and guidance, psychology or counselor education~~ and one year of experience as a vocational evaluator; or

~~(B) a bachelors degree in vocational rehabilitation evaluation, psychology, special education or rehabilitation services and three years of experience as a vocational evaluator under the supervision of a masters degree vocational evaluator; and~~

(B) a masters degree in counseling, psychology, adult education or related field which includes at least nine graduate hours in testing, evaluation and assessment and one years experience as a vocational evaluator, or

(C) 32 graduate hours from an accredited rehabilitation counseling program including coursework from at least 9 of the following areas:

(i) medical aspects of disability
(ii) counseling theories
(iii) individual and group appraisal
(iv) career information service
(v) evaluation techniques in rehabilitation
(vi) placement process in rehabilitation
(vii) psychological aspects in disability
(viii) case management in rehabilitation
(ix) utilization of community resources
(x) survey of rehabilitation
(xi) supervised practicum in rehabilitation and

1 years experience as a vocational evaluator.

(D) a bachelors degree in vocational rehabilitation evaluation, psychology, special education or rehabilitation services and three years of experience as a vocational evaluator under the supervision of a masters degree vocational evaluator; and

(2) furnish the director with the addresses and telephone numbers of that person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(4) acknowledge that the persons qualifications may be suspended or revoked if there is a repeated failure to make timely filing of reports with the director or fails to comply with the regulations adopted by the director.

(c) Each person seeking to qualify as a vocational rehabilitation job placement specialist shall:

(1) furnish proof to the director that the person has:

(A) a masters or bachelors degree in vocational rehabilitation counseling, vocational counseling, ~~sociology, psychology,~~ rehabilitation services, or job placement ~~or social work; and one year of experience as a job placement specialist of disabled individuals; or~~

(B) ~~at least two years of college level education and three years of experience as a job placement specialist of disabled individuals; and or~~

(B) a bachelors degree in counseling, sociology, psychology or related field and one years experience as a job placement specialist of disabled individuals

(C) at least two years of college level education and three years of experience as a job placement specialist of disabled individuals; and or

(D) qualified as a vocational rehabilitation counselor under 51-24-5

(2) furnished the director with the addresses and telephone numbers of the person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(4) acknowledge that the persons qualifications may be suspended or revoked if there is a repeated failure to make timely filing of reports with the director or fails to comply with the regulations adopted by the director.

(d) Each person employed by or working under contract as a counselor, evaluator or job placement specialist for the Kansas department or rehabilitation services shall be considered qualified in that person's discipline while working for that agency. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective T-88-20, July 1, 1987.)

KANSAS
WORKERS COMPENSATION
LAW & RULES

JULY 1, 1987

DEPARTMENT OF HUMAN RESOURCES
DIVISION OF WORKERS COMPENSATION
Landon State Office Building,
900 S.W. Jackson, Room 651-S
Topeka, Kansas 66612-1276
(913) 296-3441

immediately in order to gain the rehabilitation administrator's aid in the coordination of essential services. Priority shall be given to the determination of the specialized facility for the injured employee and, in this consideration, a determination shall be made as to which specialized facility would best provide the medical treatment and physical rehabilitation for the injured worker. Medical and other follow-up reports on the condition of severely injured workers shall be furnished to the rehabilitation administrator immediately. Such follow-up reports shall include reports of progress in any physical therapy, speech therapy, occupational therapy, psychotherapy, and prosthesis fitting and training, as well as the medical reports from the attending physicians. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510, 44-510g; effective May 1, 1976; amended Feb. 15, 1977; amended May 1, 1983.)

51-24-3. Definitions. As used in K.A.R. 51-24-1, *et seq.*:

(a) "Vendor" means a vocational rehabilitation facility, institution, agency or employer program provided for by K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1.

(b) "Vocational rehabilitation counselor" or "counselor" means a person who has provided the director with the necessary proof of eligibility for qualification under K.A.R. 51-24-5(a) and who has received a certification of qualification from the director.

(c) "Vocational rehabilitation evaluator" or "evaluator" means a person who has provided the director with the necessary proof of eligibility for qualification under K.A.R. 51-24-5(b) and who has received a certification of qualification from the director.

(d) "Job placement specialist" means a person who has provided the director with the necessary proof of eligibility for qualification under K.A.R. 51-24-5(c) and who has received a certification of qualification from the director.

(e) "Training facility" means a private agency, facility or employer rehabilitation service program which has filed with the director the necessary evidence for the director to deem that agency, facility or employer rehabilitation service program qualified to perform rehabilitation education or training.

(f) "Director" means the director of the Kansas division of workers' compensation. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

51-24-4. Qualifications and duties of vendor. Any person, firm, or corporation proposing to qualify as a vendor in vocational rehabilitation cases under the Kansas workers compensation act, shall file an application with the director. The application shall be updated as changes occur which may affect the standing of the applicant to become or remain qualified and shall include:

(a) a statement that the person, firm or corporation will maintain an office in the state of Kansas or in the metropolitan Kansas

City area, staffed with personnel capable of responding to written or telephone inquiries relating to cases referred to that vendor;

(b) the addresses and telephone numbers of the offices within and without the state of Kansas from which vocational rehabilitation services will be performed for cases under the Kansas workers compensation act;

(c) a listing of each person employed to perform services as a medical manager, counselor, evaluator or job placement specialist for cases referred to that vendor and an indication of each person's discipline;

(d) a statement that the person, firm or corporation will employ or contract with persons qualified to perform work as medical manager, counselor, evaluator or job placement specialist as necessary to carry out the purpose of the referral;

(e) a statement that the person, firm or corporation will be responsible for the appropriateness and timeliness of the delivery of service by each medical manager, counselor, evaluator and job placement specialist employed or under contract to carry out the purpose of the referral;

(f) a statement indicating whether the person, firm or corporation wants to be included in the list of vendors qualified and requesting to receive referrals from employers or the director;

(g) a statement that the person, firm or corporation will report to the vocational rehabilitation administrator each referral received from an employer or insurance carrier and the date of the referral;

(h) a statement that the person, firm or corporation will report the status of each evaluation 30 days after the referral and will report the status of each evaluation and plan on each occasion changes occur which affect the status of the evaluation or plan. The report shall be in a form prescribed by the director. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

51-24-5. Qualifications for counselor, evaluator, and job placement specialist. (a) Each person seeking to qualify as a vocational rehabilitation counselor for cases under the Kansas workers compensation act shall:

(1) furnish proof to the director that the person has:

(A) a masters degree from a nationally accredited program in rehabilitation counselor education; or

(B) (i) a masters degree based on a curriculum and coursework designed to fully prepare a person to practice vocational rehabilitation counseling; and

(ii) one year of experience as a vocational rehabilitation counselor or completion of a nationally accredited rehabilitation counselor internship program from a college or university; or

(C) a masters degree with at least 32 postgraduate hours including all of the following courses:

(i) medical aspects of disability

(ii) counseling theories

(iii) individual and group appraisal

(iv) career information service

(v) evaluation techniques in rehabilitation

(vi) placement process in rehabilitation

(vii) psychological aspects of disability

(viii) case management in rehabilitation

(ix) utilization of community resources

(x) survey of rehabilitation

(xi) supervised practicum in rehabilitation; or

(D) a bachelors degree in rehabilitation services and three years of experience as a vocational rehabilitation counselor; and

(2) furnish the director with the addresses and telephone numbers of that persons offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(b) Each person seeking to qualify as a vocational rehabilitation evaluator shall:

(1) furnish proof to the director that the person has:

(A) a masters or doctoral degree in vocational evaluation, rehabilitation counseling, work adjustment, counseling and guidance, psychology or counselor education and one year of experience as a vocational evaluator; or

(B) a bachelors degree in vocational rehabilitation evaluation, psychology, special education or rehabilitation services and three years of experience as a vocational evaluator under the supervision of a masters degree vocational evaluator; and

(2) furnish the director with the addresses and telephone numbers of that person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(c) Each person seeking to qualify as a vocational rehabilitation job placement specialist shall:

(1) furnish proof to the director that the person has:

(A) a bachelors degree in vocational rehabilitation, vocational counseling, sociology, psychology, rehabilitation services or social work, and one year of experience as a job placement specialist of disabled individuals; or

(B) at least two years of college level education and three years of experience as a job placement specialist of disabled individuals; and

(2) furnish the director with the addresses and telephone numbers of the person's offices and the names of the vendors with whom that person is affiliated; and

(3) acknowledge that the person's qualification may be suspended or revoked if the person performs work in a rehabilitation discipline other than a discipline in which that person has been found to be qualified by the director.

(d) Each person employed by or working under contract as a counselor, evaluator or job placement specialist for the Kansas department of rehabilitation services shall be considered qualified in that person's discipline while working for that agency. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

51-24-6. Qualification of private training facility. Before a private training facility begins providing vocational rehabilitation training or education to persons under the Kansas workers compensation act, the vendor formulating the training plan shall file with the vocational rehabilitation administrator a sufficient description of the course work and qualifications of the individuals performing the training or education to satisfy the vocational rehabilitation administrator that the training is adequate and appropriate to fulfill the goal of the plan. (Authorized by K.S.A 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

51-24-7. Qualification of medical or physical rehabilitation services. Each facility, institution, agency or employer program seeking to qualify to provide medical or physical rehabilitation to persons under the Kansas workers compensation act shall be supervised by a physician with a speciality or sub-specialty in the area of medicine which deals with the type of injury or disability it intends to treat. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

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51-24-1. Qualifications and duties of vendor. Any person, firm, or corporation proposing to qualify as a vendor in vocational rehabilitation cases under the Kansas workers compensation act, shall file an application with the director. The application shall be updated as changes occur which may affect the standing of the applicant to become or remain qualified and shall include:

(a) a statement that the person, firm or corporation will maintain an office in the state of Kansas or in the metropolitan Kansas City area, staffed with personnel capable of responding to written or telephone inquiries relating to cases referred to that vendor;

(b) the addresses and telephone numbers of the offices within and without the state of Kansas from which vocational rehabilitation services will be performed for cases under the Kansas workers compensation act;

(c) a listing of each person employed to perform services as a medical manager, counselor, evaluator or job placement specialist for cases referred to that vendor and an indication of each person's discipline;

(d) a statement that the person, firm or corporation will employ or contract with persons qualified to perform work as medical manager, counselor, evaluator or job placement specialist as necessary to carry out the purpose of the referral;

(e) a statement that the person, firm or corporation will be responsible for the appropriateness and timeliness of the delivery of service by each medical manager, counselor, evaluator and job placement specialist employed or under contract to carry out the purpose of the referral;

(f) a statement indicating whether the person, firm or corporation wants to be included in the list of vendors qualified and requesting to receive referrals from employers or the director;

(g) a statement that the person, firm or corporation will report to the vocational rehabilitation administrator each referral received from an employer or insurance carrier and the date of the referral;

(h) a statement that the person, firm or corporation will report the status of each evaluation 30 days after the referral and will report the status of each evaluation and plan on each occasion changes occur which affect the status of the evaluation or plan. The report shall be in a form prescribed by the director. (Authorized by K.S.A. 44-573; implementing K.S.A. 44-510g, as amended by 1987 HB 2573, Sec. 1; effective, T-88-20, July 1, 1987.)

(i) a statement that the person, firm or corporation will provide copies of all vocational reports (assessments, plans and progress) to all parties involved including attorneys for claimant and respondent if it is a litigated case.

(j) a statement that the person, firm or corporation will provide objective and impartial assessment of the injured workers need for rehabilitation services.

12-40

I.

BEFORE THE DIVISION OF WORKERS COMPENSATION
FOR THE STATE OF KANSAS

Bryan G. Howard,	Claimant,	
vs.		
Airwick/Airkem Professional	Products, Respondent,	Docket No. 126,562
and		
Self-Insured,	Insurance Carrier.	

ORDER

Decision rendered this 23rd day of November, 1988.

Appearances

J. Greg Kite, Wichita, Kansas, appeared on behalf of the Claimant. Aubrey G. Linville, Salina, Kansas, and Charles W. Hess, Wichita, Kansas, appeared on behalf of the Respondent and Insurance Carrier.

Record

The record in this matter consists of the transcript of motion hearing, dated May 18, 1988; the deposition of Robert L. Eyster, M.D., dated May 18, 1988; the transcript of motion hearing, dated July 29, 1988; the deposition of Sharilyn K. Young, dated August 31, 1988; the deposition of Sharilyn Young, dated October 17, 1988; the transcript of motion hearing, dated November 2, 1988; the transcript of motion hearing, dated November 3, 1988; and the correspondence and pleadings of the Court file.

Issue

1. The Claimant is requesting temporary total disability benefits under K.S.A. 44-510g(e) between June 23, 1988, and July 29, 1988. The Claimant is alleging that Respondent, having agreed to an additional vocational rehabilitation evaluation and the payment of temporary total disability benefits, then improperly terminated temporary total disability benefits.

Findings of Fact

K.S.A. 44-510g(e)(1) provides that a vocational rehabilitation evaluation produces a vocational rehabilitation report.

K.S.A. 44-510g(e)(2) provides that, once a vocational rehabilitation report is sent to the Division of Workers Compensation, copies are furnished to each party. If either party disagrees with the report, the Vocational Rehabilitation Administrator shall confer with the vocational rehabilitation counselor, the Claimant, and the Respondent.

12-41

Director Rule 51-24-1 does indicate that the Rehabilitation Administrator shall be the coordinator between the parties seeking vocational rehabilitation and the private rehabilitation vendor. The same rule sets forth that the Rehabilitation Administrator shall keep all interested parties advised as to the progress of an evaluation report in a timely manner.

At issue is the particular actions of this particular Respondent attorney firm in directly meeting with Jeanette Scher, operating as the vocational rehabilitation vendor PERC, and PERC's rehabilitation counselor, Sharilyn Young, and the Respondent attorneys intentionally using financial and psychological pressure to change counselor Young's vocational rehabilitation findings.

In accordance with the Division of Workers Compensation's guidelines, Sharilyn Young had promulgated a vocational rehabilitation evaluation and a vocational rehabilitation plan, (Young deposition Exhibits 5 and 6). Sharilyn Young had done prior vocational rehabilitation consultations, in March, 1988, with the Claimant, and her vocational rehabilitation findings in the vocational rehabilitation evaluation and plan are corroborated by her prior consultations, and the independent consultant reports prepared by PERC's job placement specialist.

In particular, these documents identify that the Claimant has certain medical restrictions regarding his ability to work: the Claimant is restricted from lifting between 20 and 25 pounds on a single basis, repetitive lifting over 15 pounds, and is restricted from prolonged sitting. Regarding the availability of jobs, these reports indicate that the Claimant was in the need of a job development process. The vocational rehabilitation plan, Exhibit 6, indicates that, because of the Claimant's medical restrictions, the Claimant is prevented from returning to his same job, and that prolonged traveling was not compatible with the Claimant's medical restrictions. The vocational rehabilitation plan called for 26 weeks of job placement services. Further, the documents indicate that the Claimant was interested in participating in the vocational rehabilitation process. In a letter by Counselor Young on May 6, 1988 (Young deposition Exhibit 11), the Claimant is described as being energetic, and actively looking for work.

On May 19, 1988, a meeting was held between the vocational rehabilitation provider, Jeanette Scher, PERC, Sharilyn Young, the vocational rehabilitation counselor, and the Respondent attorneys, at the Respondent attorney's law offices. The meeting was called by Respondent attorney, Gary Winfrey, who had supervisory authority over the two other Respondent attorneys, attorney Martens, and attorney Hess. Attending that meeting were Gary Winfrey, attorney Martens, attorney Hess, the vocational rehabilitation vendor, Jeanette Scher, operating as PERC, and PERC's rehabilitation counselor, Sharilyn Young.

Sharilyn Young testified that, prior to going into the meeting, her supervisor and the owner of PERC, Jeanette Scher, reminded Sharilyn Young that this Respondent attorney firm was one of PERC's main clients. The Administrative Law Judge finds that Sharilyn Young's testimony in this regard is credible.

The meeting began with certain statements from attorney Gary Winfrey, telling Sharilyn Young, in Jeanette Scher's presence, that the Respondent firm was dissatisfied with the vocational rehabilitation findings and reports, and that, in essence, unless the reports were better prepared, PERC may lose this firm's future vocational rehabilitation business. This constitutes an intentional financial pressure upon the vocational rehabilitation counselor by all three of these Respondent attorneys, and this was done with the silent acquiesce and approval of Jeanette Scher, owner, and operating as PERC.

The facts show that there were areas of legitimate concern by Respondent attorneys: late receipts of reports, certain clerical mistakes regarding the average weekly wage, and other such matters.

However, as attorney Hess himself testified, one of the Respondent's main contentions and objectives was to have so-called Respondent input into the vocational rehabilitation process. The facts show that all three Respondent attorneys, in turn, directly questioned the vocational rehabilitation counselor, Sharilyn Young, on her rehabilitation findings regarding at least three Workers Compensation Claimants.

At that meeting, attorney Hess, in the presence of Gary Winfrey and Jeanette Scher, made direct and specific suggestions regarding the vocational rehabilitation findings on the vocational rehabilitation plan and rationale, (Young deposition Exhibit 5, and Young deposition Exhibit 13). A finding favorable to the Claimant, saying that the Claimant's medical restriction for light work was complimentary to radio sales, was deleted. Regarding job availability, chemical sales were eliminated from the portion dealing with availability of work. The vocational rehabilitation plan itself was shortened. While Sharilyn Young testified that some of the deletions and corrections were mere clarifications, the Administrative Law Judge disagrees. Such matters as eliminating statements regarding the Claimant's medical restrictions, eliminating categories of jobs, such as chemical sales, and shortening the plan, work in a manner severely disadvantageous to the Claimant; and directly involve complex factual and legal issues of which the vocational rehabilitation counselor may be unaware. These changes were not for the injured worker's benefit, nor were they based upon the receipt of any additional information: the changes were for litigation purposes, and were adverse to the injured worker's interest. The changes were made under the influence of attorney Winfrey and attorney Hess.

Following this meeting, Sharilyn Young prepared proposed vocational rehabilitation findings regarding this Claimant which, in their final form, are contrary and contradictory to her previous findings and opinions that were embodied in her promulgated vocational rehabilitation evaluation and report, (Young deposition, Exhibit 5 and 6). The final form, (Young deposition, Exhibit 15), was the product of Sharilyn Young's proposed findings that were changed by attorney Hess, (Hess Exhibit No. 1).

For example, in the final vocational rehabilitation progress report, (Young deposition Exhibit 15), the Claimant is listed as showing no interest in vocational rehabilitation. The subsequent findings are negative in content, and negative in overall tone. The progress report is critical of the Claimant. The progress report reaches the conclusion that the Claimant's injury has not negatively impacted upon the availability of work for the Claimant.

The facts show that these findings are not the result of any action or inaction by the Claimant.

Sharilyn Young testified that as a result of the meeting with Respondent's attorneys, and comments by Jeanette Scher, she believed that she was obligated by Jeanette Scher and Gary Winfrey to allow attorney Hess to make direct suggestions regarding her proposed rehabilitation findings. Attorneys Hess and Winfrey believed they had the authority to directly tell her how and what her findings should be. Sharilyn Young's testimony is credible, and is corroborated by the testimony of attorney Hess, and by Hess deposition Exhibit 1, to wit:

Hess deposition Exhibit 1 is Sharilyn Young's proposed rehabilitation findings, and attorney Hess' own handwriting showing additions, deletions, and amendations. Some of the changes were grammatical, but accordingly changed the emphasis of the findings, and the overall tone of the progress report.

One particular change, a deletion of a medical restriction, was more than grammatical, and shows that attorney Hess was, in fact, revising and amending proposed rehabilitation findings of the vocational rehabilitation counselor.

Further, the testimony of attorney Hess corroborates the testimony of Sharilyn Young that upon Gary Winfrey calling the meeting and making statements regarding financial incentive to PERC, that all three Respondent attorneys directly questioned Sharilyn Young in that meeting about her specific rehabilitation findings on several cases. This questioning occurred with the silent acquiesce and approval of Jeanette Scher.

Therefore, it appears that there was an intentional effort to change the rehabilitation counselor's findings, using direct psychological and financial pressure: The financial pressure was exerted through Gary Winfrey's opening statements, as corroborated by Jeanette Scher telling Sharilyn Young that this Respondent attorney firm was one of PERC's clients; the psychological pressure existed as all three attorneys, in turn, directly questioned Sharilyn Young on specific, factual issues, in a setting where she did not have the protection of the Rehabilitation Administrator's independent authority.

There can be no question that Sharilyn Young actually did deliver proposed vocational rehabilitation findings to this Respondent attorney firm, and that attorney Hess actually made substantive changes in the proposed rehabilitation findings.

Regarding Jeanette Scher's activities in this case, they were biased against the Claimant, in favor of the Respondent, and engineered for litigation purposes. They show intentional intereference with the objective findings of the rehabilitation counselor.

As a medical manager, Jeanette Scher decided to send the Claimant for an independent medical evaluation by Dr. John Hered. The authorized and treating physician, Dr. Robert Eyster, had already reviewed the MRI study, diagnostically finding that the Claimant's bulging discs were symptomatic. Dr. Eyster was discussing disc surgery with the Claimant. It does not appear Dr. Eyster was requiring an independent reading of the MRI study.

Jeanette Scher eliminated remarks critical of Dr. Hered in Sharilyn Young vocational rehabilitation counsultation report. This was interference, adverse to the Claimant's interests, and favorable to the Respondent's interest. (Young deposition Exhibit 3 and Exhibit 4).

In her subsequent actions, she required her vocational rehabilitation counselor to attend a meeting with the Respondent's attorneys; and allowed the Respondent attorneys to directly question her rehabilitation counselor regarding specific rehabilitation findings; and allowed the Respondent attorney, Hess, to make changes in proposed rehabilitation findings.

The testimony of both Sharilyn Young and attorney Hess to the effect that specific rehabilitation findings of two other Workers Compensation Claimants were also discussed at the meeting, and in Jeanette Scher's presence, raises the strong suspicion that PERC's attitude toward the vocational rehabilitation process is not confined to this particular case.

Regarding the Division policy of allowing Respondents to select the vocational rehabilitation vendor, Respondent attorneys were thereby able to exert financial pressure upon a vocational rehabilitation counselor, and thereby gain direct interference with the independence and integrity of the vocational rehabilitation counselor or the rehabilitation provider.

Claimant's Motion is therefore sustained.

IT IS SO ORDERED.

DATED this 23rd day of November, 1988.

David V. Jackson
Administrative Law Judge

copies: Robert A. Anderson, Director
J. Greg Kite
Aubrey G. Linville

12-45

THE COMMITTEE SHOULD CONSIDER MINOR AMENDMENTS TO THE NEW ACT, TO CLARIFY WHAT IS ALREADY IMPLIED, BUT MAY BE SUBJECT TO ADVERSE JUDICIAL INTERPRETATION WITHOUT CLARIFICATION.

A. K.S.A. 44-523(c) "...to an Assistant Director [or a Special Administrative Law Judge]... This would allow Director to appoint Specials to hear backlogged cases, and not overburden Assistant Directors who are hearing Director's Reviews.

B. K.S.A. 44-534(b)(1) "...if compensation in the form of medical benefits or temporary total disability benefits [or vocational rehabilitation benefits] has been paid...

K.S.A. 44-556(d) "compensation" [to include medical benefits, temporary total disability benefits or vocational rehabilitation benefits]. This would encourage employers to voluntarily pay vocational rehabilitation benefits without time consuming hearings.

C. K.S.A. 44-510g(d) "...employee is unable to perform work for the same employer [at a comparable wage] with or without accommodations or for which such employee has previously training, education, qualifications or experience to enter open labor market and earn comparable wage]. This merely clears up apparent oversight, (see

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44-523. Hearing procedure; time limitations on evidence and entry of award. (a) The director, administrative law judge or court shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure an employee an expeditious hearing and act reasonably without partiality.

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than thirty (30) days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than thirty (30) days thereafter. An extension of the foregoing time limits may be granted:

(1) If all parties agree;

(2) If the employee is being paid temporary or permanent total disability compensation;

(3) For medical examination of the claimant if the party requesting the extension explains in writing to the administrative law judge facts showing that the party made a diligent effort but was unable to have a medical examination conducted prior to the submission of the case by the claimant but then only if the examination appointment was set and notice of the appointment sent prior to submission by the claimant; or

(4) On application to the director for good cause shown.

(c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within thirty (30) days. When the award is not entered in thirty (30) days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within thirty (30) days following submission by the party and assign it to an assistant director for immediate decision based on the evidence in the record.

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K.S.A. 44-523(c) [or a Special Administrative Law Judge]

12-48

(c) When all parties have submitted the case to an administrative law judge for an award, the administrative law judge shall issue an award within thirty (30) days. When the award is not entered in thirty (30) days, any party to the action may notify the director that an award is not entered and the director shall assign the matter to an assistant director who shall enter an award forthwith based on the evidence in the record, or the director, on the director's own motion, may remove the case from the administrative law judge who has not entered an award within thirty (30) days following submission by the party and assign it to an assistant director for immediate decision based on the evidence in the record.

[or a Special Administrative Law Judge]

44-534a. Preliminary hearing; application and notice; medical and temporary total compensation; vocational rehabilitation; reimbursement from workers' compensation fund. (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 and for any matter relative to the furnishing of vocational rehabilitation in accordance with and subject to the provisions of K.S.A. 44-510g and amendments thereto. 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 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 compensation and temporary total disability compensation to 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 either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, 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 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.

K.S.A. 44-534a(b) [or vocational rehabilitation benefits]

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(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 either voluntarily or pursuant to a preliminary award entered under this section and, upon a full hearing on the claim, the amount of compensation to which the employee is entitled is found to be less than the amount of compensation paid or is totally disallowed, 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 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.

12-50

44-510g. Medical, physical and vocational rehabilitation; administrator and assistants, appointment, duties; entitlement; procedures; purpose and priorities of rehabilitation; evaluation and plan for employee; expenses and disability compensation; cancellation of compensation; review and modification. (a) A primary purpose of the workers compensation act shall be to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto. 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 director shall appoint, subject to the approval of the secretary, four assistant rehabilitation administrators. The rehabilitation administrator and the assistant rehabilitation administrators shall be in the classified service under the Kansas civil service act. The rehabilitation administrator and the assistant rehabilitation administrators, subject to the direction of 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 knowledgeable 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, including rehabilitation service programs provided directly by employers, the director shall approve as qualified such facilities, institutions, agencies, employer programs and physicians as are capable of rendering competent rehabilitation services. No such facility, institution, agency or employer program 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 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 to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, 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 the same employer with or without accommodation or for which such employee has previous training, education, qualifications or experience, such employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, and as provided in this section.

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K.S.A. 44-510g(d)

[at a comparable wage]

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(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 the same employer with or without accommodation or for which such employee has previous training, education, qualifications or experience, such employee shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages, as determined pursuant to subsection (a) of K.S.A. 44-510e and amendments thereto, and as provided in this section.

[to enter open labor market and earn comparable wage]

VOCATIONAL REHABILITATION

PRIMARY PURPOSE 44-510g(a)	WORK DISABILITY (GENERAL BODY INJURIES) 44-510e(a)	THRESHOLD FOR REHAB 44-510g(d)	VOCATIONAL REHABILITATION SERVICES 44-510g(d)
A primary purpose of the Workers Compensation Act shall be to restore to the injured employee the ability to perform work in the open labor market and to earn comparable wages.	The extent of permanent general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wageshas been reduced.	Employee is unable to perform work for the same employer with or without accommodation or for which such employee has previous training, education, qualification or experience. RECOMMENDATION 1. Same employer at a comparable wage. 2. Previous training, education, qualification or experience to enter open labor market and to earn comparable wage.	Including re-training and job placement as may be reasonably necessary to restore to such employee the ability to perform work in the open labor market and to earn comparable wages.