Approved: March 17, 1995
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on March 15, 1995 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Burke, Downey, Feleciano, Gooch, Harris, Hensley, Kerr, Petty, Ranson, Reynolds, Steffes and Vidricksen.

Committee staff present: Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Derenda Mitchell - Counsel for Alliance of American Insurers
Terry Leatherman, Executive Director Kansas Chamber of Commerce and Industry
Larry W. Magill, Executive Vice President, Kansas Association of Insurance Agents
Chip Wheelen, Kansas Medical Society
Patrick R. Nichols, Kansas Trial Lawyers Association
John M. Ostrowski, Kansas AFL-CIO

Others attending: See attached list

SB 242-Workers compensation procedural changes

Bob Nugent, Revisor, presented an overview of SB 242.

Derenda Mitchell, Kansas counsel for the Alliance of American Insurers, appeared in support of an amendment to SB 242 regarding the ombudsmen program in the workers compensation system in Kansas. The proposed amendment clarifies that an ombudsman is to assist unrepresented claimants. The ombudsmen are going beyond the parameters of the Alliance believes was originally contemplated by the legislature. Ms. Mitchell advised that if the ombudsmen program exercises a ministerial function only, many workers compensation claims can be expedited through the system.

The amendment provides that an ombudsman may assist claimants in benefit review conferences and otherwise assist unrepresented claims, employers and other parties to protect the rights of such parties under the Workers Compensation Act. The law presently contemplates that ombudsmen may "assist unrepresented claimants". Unfortunately, member companies have suffered recurrent episodes where represented claimants who have lawyers have received unsolicited advice when the advice, in some instances, has been contrary to the claimant's own attorney's advice and in come cases has been rendered even after a settlement has been reached. It is protracting litigation rather than assisting in a speedy resolution to litigation. The amendment would insure ombudsmen would assist claimants in benefit review conferences and emphasize that the term "assist" does not mean that an ombudsman provides legal representation or legal advice to a claimant. See attachment 1

The Chair noted the amendment would not be relevant should the ombudsman statutes be repealed by the enactment of SB 242.

Terry Leatherman, Executive Director, KCCI, testified "work disability" maybe the most difficult issue to resolve in the Workers Compensation act. The 1993 amendment which computes work disability by the loss of job skills used in the last 15 years averaged with the percentage loss of wages is an objective test, but one of the drawbacks is that the wage loss test can be maximized by not working. SB 242 involves only these cases, permitting an Administrative Law Judge to consider facts concerning a worker's unemployment and adjust the wage portion of the test accordingly.

Mr. Leatherman further testified that Benefit Review Conferences (BRC), proposed as an alternative to litigation, have resulted in more efficient and effective hearings before a judge, but this achievement is nowhere close to what the legislative intent of Benefit Review was when introduced in 1993. Rather than

eliminating it, KCCI suggests the parties identify where the BRC got off track and attempt to correct it. See attachment 2

Larry W. Magill, Executive Vice President, Kansas Association of Insurance Agents, testified in support of SB 242. Business has experienced some relief from rapidly escalating workers compensation insurance rates; however, the rates could decrease much more. The reforms enacted in 1993 have decreased rates approximately 6.9%. The Association disagrees that changes should be approved by the Advisory Council. It is a delegation of legislative authority. Mr. Magill advised the Association suggests changing SB 242 by limiting the loss of job skills in the disability or permanent partial general disability formula to the past five years rather than past 15 years. Further, the Association favors, as an alternative to eliminating independent medical examiners, requiring that the plaintiff have a different rating from a doctor and that any IME used by an administrative law judge be in an appropriate area of practice. Mr. Magill urged the Committee's consideration of three amendments: (1) eliminating administrative law judges and creating workers compensation judges; (2) eliminating any doubt as to the non-existence of the second injury fund, and placing a cap on future annual assessments by the fund on insurance companies, pools and self-insured at some reasonable level such as 5%; (3) allowing non-compensated officers and directors of nonprofits to elect into coverage under the workers compensation act. See attachment 3

Chip Wheelen, Kansas Medical Society, appeared before the Committee requesting a technical amendment to SB 242, inasmuch as the Workers Compensation Act refers to the third edition of the Guides to the Evaluation of Permanent Impairment and medical knowledge relies on the 4th edition. The proposed amendment is on Page 2, Line 5 following the word "the" by inserting the words "Guides to the Evaluation of Permanent Impairment, 4th edition, published by", Striking the words "third edition, revised, of; and on Line 6 striking the words "Guidelines for the Evaluation of Phys-"; and on Line 6 by striking the words, "ical Impairment". The Chair advised there is presently a bill on the Senate Calendar to which this amendment could be attached. The Chair asked the Committee if there was anyone that objected to the amendment. There was no dissent as to the concept. See attachment 4

Patrick R. Nichols, testified on behalf of the Kansas Trial Lawyers Association in opposition to SB 242, stating the majority of the amendments contained in SB 242 either restricts the scope of coverage under the Workers Compensation Act, establishes new caps or lids on the amounts that can be recovered by a disabled worker, or redefines and reclassifies compensable disability in a manner that has the effect of reducing disability awards. The Kansas Trial lawyer's Association does not see the need for implementing another series of comprehensive amendments to the Act. There is no crisis in the availability and affordability of insurance coverage for Kansas industries, thus the Association do not believe a case can be made for a further reduction in coverage and limitation of disability benefit recovery. See attachment 5

John M. Ostrowski, Kansas AFL-CIO testified in opposition to SB 242. Mr. Ostrowski advised the Committee that on a national scale Kansas has extremely low rates, and also pays meager benefits for injuries to injured workers. He stated many provisions of SB 242 were contained in previous pieces of workers compensation legislation, and this bill is merely a resurfacing of those ideas previously negotiated, compromised, or rejected. See attachment 6.

Upon motion by Senator Steffes, seconded by Senator Reynolds, the Minutes of the March 14, 1995 meeting were unanimously adopted.

The Committee adjourned at 9:00 a.m.

The next meeting is scheduled for Thursday, March 16, 1995.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: 3/15/95

NAME	REPRESENTING
Derenda J Mitchell	Alliance of American Insurers
Don Hughes	Alliance of American Insurers
John Ostrowski	KS AFL-CIO
Bill Curtis	Ks Assoc of School Bds
Jim Newman	KS Governmental Consulting
Terry Leatherman	KCCI
Patricia Nichols	KTLA
Terry Humphries	KTLA
George Gomez	Ks [illegible] / AR [illegible]
Ricardo L Thomas	DHR / Workers Compensation
David A Shufelt	DHR / Workers Compensation
Murlene Pricst	DHR / Workers Comp
Wayne Maichel	KS AFL-CIO
~~[illegible] Ostrowski~~	~~[illegible]~~
Brent Smith	D of A.
Larry Magill	KAIA
BILL HENRY	KADC
Harry Herington	League of KS Municipalities

TESTIMONY BEFORE THE KANSAS SENATE COMMITTEE ON COMMERCE AND INDUSTRY SENATE BILL 242 - 1995 SESSION MARCH 15, 1995

Honorable members of the Committee, thank you for the opportunity to appear before you and to express support for Senate Bill 242 on behalf of the Alliance of American Insurers. My name is Derenda J. Mitchell, and I am Kansas counsel for the Alliance. The Alliance is a 220 member insurance organization. Member companies write approximately 16% of the private insurance company workers compensation market in Kansas, a large percentage of the market in Kansas.

We are supportive of Senate Bill 242 and respectfully request adoption of the provisions which help to clarify and implement the intent of previous legislation.

We also respectfully request the adoption of an amendment to Senate Bill 242, addressing another situation in need of clarification. Our amendment addresses the ombudsmen program under K.S.A. 44-5,110. We think it is important to point out that K.S.A. 44-5,110 provides that the ombudsmen program is designed "to assist" injured employees and persons claiming benefits under the Workers Compensation Act. The Act does not say that ombudsmen may "represent" claimants seeking benefits under the Act. The Act already contemplates that only "unrepresented" claimants are to be assisted by ombudsmen.

However, for some reason, some ombudsmen are going beyond the parameters of what we contend was originally contemplated by the legislature. Our amendment seeks to emphasize that an ombudsman may assist a claimant only when

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unrepresented and that the assistance they provide should not be in lieu of legal representation as if they were a lawyer. It should not be the goal of the Workers Compensation Act to provide free legal services for claimants at the expense of government and industry.

We believe that if the ombudsmen program exercises ministerial functions only, many workers compensation claims can be expedited smoothly through the system. It is our hope that the proposed amendments will clarify the framework within which the ombudsmen are to operate.

Thank you for consideration of our amendment.

Respectfully submitted,

Derenda J. Mitchell
Alliance of American Insurers
March 15, 1995

Amendment To S.B.242

Insert after Sec. 5 and renumber remaining sections accordingly:

New Section 6. K.S.A. 44-5, 110 is hereby amended to read as follows: 44-5,110. **Ombudsman program; qualifications and appointment of ombudsmen; special ombudsmen, contracts; dissemination of program information.** (a) The director of workers compensation shall establish an ombudsman program within the division of workers compensation to assist injured employees and persons claiming death benefits in obtaining benefits under the workers compensation act. The director shall employ qualified persons as ombudsman for the program.

(b) Each ombudsman shall meet with or otherwise provide information to injured employees, shall investigate complaints and shall communicate with employers, insurance carriers and health care providers. An ombudsman may assist **UNREPRESENTED** claimants in benefit review conferences and otherwise assist unrepresented claimants, employers and other parties to protect the rights of such parties under the workers compensation act. **HOWEVER, IN NO EVENT SHALL AN OMBUDSMAN ACT AS A LEGAL REPRESENTATIVE OF OR PROVIDE LEGAL ADVICE TO ANY PARTY.**

(c) In cases of emergency, on a case-by-case basis, the director may enter into contracts with trained mediators or other qualified persons to perform services under the ombudsman program as special ombudsmen. Each special ombudsman shall receive a fee commensurate with the services rendered in accordance with the contracts for services. The fee for a special ombudsman shall be taxed as costs in the claim to which the special ombudsman is assigned against the respondent.

(d) The director of workers compensation shall widely disseminate information about the ombudsman program.

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LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, Kansas 66612-1671 (913) 357-6321 FAX (913) 357-4732

SB 242

March 15, 1995

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

I am Terry Leatherman with the Kansas Chamber of Commerce and Industry. The legislation before you may only be eight pages long, but it contains many substantial changes in the workers compensation act. KCCI has the following observations about some of the proposals in SB 242.

The Kansas Chamber of Commerce and Industry (KCCI) is a statewide organization dedicated to the promotion of economic growth and job creation within Kansas, and to the protection and support of the private competitive enterprise system.

KCCI is comprised of more than 3,000 businesses which includes 200 local and regional chambers of commerce and trade organizations which represent over 161,000 business men and women. The organization represents both large and small employers in Kansas, with 55% of KCCI's members having less than 25 employees, and 86% having less than 100 employees. KCCI receives no government funding.

The KCCI Board of Directors establishes policies through the work of hundreds of the organization's members who make up its various committees. These policies are the guiding principles of the organization and translate into views such as those expressed here.

1. WORK DISABILITY

How to handle "work disability" cases may be the most difficult issue to resolve in the Kansas Workers Compensation law. In 1993 "work disability" was changed to a two-prong test, the loss of job skills used in the last 15 years averaged with the percentage loss of wages. The main virtue of

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today's test is its objectivity. One of several drawbacks is the wage loss test can be maximized by not working.

The SB 242 proposal would only involve these cases, by permitting an Administrative Law Judge to consider facts concerning a worker's unemployment and adjust the wage portion of the test accordingly. KCCI supports this change.

2. BENEFIT REVIEW CONFERENCES

SB 242 proposes to repeal Benefit Review Conferences (BRC). The BRC was created in the 1993 reform bill as an alternative to litigation. In theory, these conferences would have an employer and employee resolving their difference, with assistance from a mediator.

The vast majority of today's BRCs involve lawyers for both parties. The biggest supporters of today's BRC would be Administrative Judges, who will tell you the BRC process forces lawyers to become knowledgeable about their cases earlier in the process. The result is hearings before a Judge are much more efficient and effective. While that achievement may be laudable, it is nowhere close to what the legislative intent of Benefit Review was when introduced in 1993.

Rather than eliminating Benefit Review, as proposed in SB 242, KCCI instead suggests we look for where the BRC concept left the track of legislative intent, and attempt to redirect the process. A proposed change in the process is attached to my testimony.

Both of the issues I have commented on today have been presented for consideration by the Workers Compensation Advisory Council, and KCCI will continue to pursue workers compensation change through the Advisory Council process. In addition, Madam Chair, KCCI would be pleased to work with the Subcommittee you unveiled last week in reviewing potential changes in the workers compensation law.

Thank you for the opportunity to comment on some of the key provisions in SB 242. I would be happy to answer any questions.

OMBUDSMAN/ BENEFIT REVIEW

44-5, 110. Ombudsman program; qualifications and appointment of ombudsmen; special ombudsmen, contracts; dissemination of program information. (a) The director of workers compensation shall establish an ombudsman program within the division of workers compensation to assist injured employees and persons claiming death benefits in obtaining benefits under the workers compensation act. The director shall employ qualified persons as ombudsmen for the program.

(b) Each ombudsman shall meet with or otherwise provide information to injured employees, shall investigate complaints and shall communicate with employers, insurance carriers and health care providers. An ombudsman ***shall inform claimants, employers and other parties about*** ~~may assist claimants in~~ benefit review conferences and otherwise assist unrepresented claimants, employers and other parties to protect the rights of such parties under the workers compensation act. ***Upon informing any party about benefit review conferences, an ombudsman shall assist in the scheduling of a benefit review conference.***

44-5, 111. Benefit Review conferences; purpose and guidelines, rules and regulations; procedures. (a) ~~Upon receipt of an application for a preliminary hearing pursuant to K.S.A. 44-534a and amendments thereto, or~~ on the written request of any party to a disputed workers compensation claim, the director of workers compensation ~~may require~~ ***shall schedule*** the parties to meet in a benefit review conference to attempt to reach agreement on disputed issues involved in a claim.

(b) A benefit review conference shall be a nonadversarial, informal dispute resolution process. ***A conference is intended to be an alternative to a legal proceeding, and should be conducted in a manner where any party involved in a conference does not need legal representation. The benefit review conference is*** designed to:

Testimony on SB 242
Before the Senate Commerce Committee
By: Larry W. Magill, Jr., Executive Vice President
Kansas Association of Insurance Agents
March 15, 1995

Thank you, Madam Chair, and members of the committee for the opportunity to appear today in support on SB 242, along with some proposed amendments we feel deserve legislative attention.

In our view, the workers compensation act is much like an organization, it is either moving forward or it will slide back. There is very little likelihood it will stay static. We support continued refinement of the 1993 reforms and clarification of some of those changes, along with additional administrative changes to the act.

Clearly, while the reforms enacted in 1993 were good, they were not perfect. Aggressive plaintiff's attorneys and the courts will likely interpret some of the provisions of SB 307 differently than the drafters envisioned.

And while business has seen some relief from rapidly escalating workers compensation insurance rates, those rates could decrease much more. Rates increased by nearly 50% over the two years leading up to the 1993 reforms and have only decreased by approximately 6.9% since then.

In Oregon, for example, the cumulative total rate reductions over the last five years from 1991 through 1995 is 42.1%. Their rates are currently 68% of the rates used in 1989. The Safety Association Insurance Fund in Oregon estimates that the total premium savings over that period have been $618.6 million or the equivalent of 12,914 jobs at

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Oregon's average annual salary. This provides Kansas with an enviable yardstick to measure our progress by.

We disagree with those who feel that any changes enacted by the Kansas legislature should be approved by the Workers Compensation Advisory Council created by the 1993 reform. Time and judicial interpretations will be on the side of those who fought workers compensation reform in 1993. To determine to do nothing without the advisory council's consent seems to be an extraordinary delegation of legislative authority and an invitation for Kansas to slip backward. To obtain their input, if they ever have a quorum to vote, is fine - to give them veto power is not.

We support the continued refinement and improvement of our workers compensation act as embodied in SB 242.

We would suggest that the committee consider an additional change to the work disability or permanent partial general disability formula to limit the loss of job skills to the past five years. The current formula that looks at the past 15 years is unworkable for the employer of a person who has had numerous jobs over the last 15 years. Calling past employers for job descriptions and lists of skills used is virtually an impossible task. This leaves the employer at the mercy of whatever the employee submits as evidence of skills used over the last 15 years.

Secondly, we would suggest that the committee consider, as an alternative to eliminating independent medical examiners, at least requiring that the plaintiff have a different rating from a doctor and that any IME used by an administrative law judge be in an appropriate

area of practice. We do not feel it is appropriate, for example, for a podiatrist to rate a person with a back injury.

In addition to the clarifications in SB 242, we urge the committee to consider the following three amendments:

1. Take the concept embodied in SB 243 eliminating administrative law judges and creating workers compensation judges, but expand it to include the provisions in SB 59. Attached to our testimony is a bill draft that we think would accomplish a major improvement in the selection and retention of administrative law judges. Both labor and business appear to agree that the workers compensation appeal board nominating process has worked extremely well. We are suggesting the same process be applied to workers compensation judges with an added requirement for a performance appraisal by the director of the Division of Workers Compensation before a workers compensation judge could be considered for reappointment by the nominating committee.

We suggest the performance appraisal process as a good management tool for the director and an essential step that will have to be performed separately by the two members of the nominating committee if not done by the director.

As with the workers compensation appeals board, this should remove much of the politics in the selection process and guarantee "middle of the road" judges who would have an incentive to follow the decisions handed down by the workers compensation appeal board. We realize that there is a constitutional question over elimination of the present administrative law judge positions, but feel that it can be overcome.

2. The second injury fund has been "dead" since July 1, 1994. We

suggest you "bury it" by eliminating any doubt as to whether a portion of the second injury fund continues in effect. While we understand that the department of insurance has been interpreting the fund as being dead for new accidents occurring after July 1, 1994, there is the possibility that three or four years down the road a Supreme Court decision will say that a part of the fund has been alive all along. That would create a tremendous unfunded liability for employers in Kansas and prolong efforts to save the $4 million in administrative costs and attorneys fees currently being spent by the second injury fund. We feel that is too large a risk to take.

We also urge the committee to consider placing a cap on future annual assessments by the fund on insurance companies, pools and self-insureds at some reasonable level such as 5%. This assessment for the second injury fund is ultimately paid by employers. This would allow a predictable cost to be budgeted, although it would stretch out the reimbursement of second injury claims. The legislature would have to provide some mechanism where when the fund ran out of money in a given year, the legislature could either allow borrowing against the state general fund or provide "IOU's" to parties owed reimbursement by the fund until it had the money to pay the claims. Keep in mind that there will be a number of new "players", pools, insurance companies and businesses that will be paying for the second injury fund with no chance of ever recovering anything.

3. Allow non-compensated officers and directors of nonprofits to elect into coverage under the workers compensation act. Currently they cannot elect out, since they do not own 10% or more of the corporation's

stock. A nonprofit by definition does not issue stock. Without a specific statutory change, every nonprofit is subject to a substantial additional premium from their insurance company on audit if the auditor catches the fact that officers and directors are not being included. We do not believe the legislature ever intended to require coverage for volunteer nonprofit officers and directors. Nor do we believe most nonprofit officers, directors and trustees expect coverage. By making it an "election in" you greatly simplify the paperwork. Attached to my testimony is a proposed amendment.

We also would urge the committee to consider the other changes contained in SB 327 introduced at the request of the Department of Administration. It contains a number of further clarifications in the 1993 reforms that we believe are worth serious consideration.

Our workers compensation act is constantly changing. If the legislature takes no action, the act will still change through judicial interpretation and we fear the results. We urge the committee to continue the momentum begun in 1993 and pass SB 242 favorably with our proposed amendments.

AN ACT concerning workers compensation; reorganizing the division thereof; amending K.S.A. 1994 Supp. 75-5708 and repealing the existing section.

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

Section 1. K.S.A. 1994 Supp. 75-5708 is hereby amended to read as follows: 75-5708. (a) There is hereby established within and as a part of the department of human resources a division of workers compensation. The division shall be administered, under the supervision of the secretary of human resources, by the director of workers compensation, who shall be the chief administrative officer of the division. The director of workers compensation shall be appointed by the secretary of human resources and shall serve at the pleasure of the secretary. The director shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary fixed by the secretary of human resources, with the approval of the governor. The director of workers compensation shall be an attorney admitted to practice law in the state of Kansas. The director shall devote full time to the duties of such office and shall not engage in the private practice of law during the director's term of office.

(b) The director of workers compensation may appoint two assistant directors of workers compensation ~~and also may appoint not to exceed 10 administrative law judges~~. Such assistant directors ~~and administrative law judges~~ shall be in the classified service. The assistant directors shall act for and exercise the powers of the director of workers compensation to the extent authority to do so is delegated by the director. The assistant directors ~~and administrative law judges~~ shall be attorneys admitted to practice law in the state of Kansas, and shall have such powers, duties and functions as are assigned to them by the director or are prescribed by law. The assistant directors ~~and administrative law judges~~ shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office.

(c) There is hereby established the position of workers compensation judge. Such judges shall serve a four-year term, but shall be eligible for reappointment. Workers compensation judges shall hear and resolve disputes arising out of workers compensation claims and exercise such other duties as the director of workers compensation shall assign. Workers compensation judges shall be attorneys admitted to practice law in the state of Kansas. Workers compensation judges shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office. Workers compensation judges shall receive an annual salary equal to 90% of the annual salary of a district court judge.

(d) Applications for appointment as a workers compensation judge shall be submitted to the director of workers compensation. The director shall determine if an applicant meets the qualifications to be a workers compensation judge prescribed in subsection (c). Qualified applicants for the board will be submitted by the director to the workers compensation judge nominating committee for consideration.

(e) There is hereby established the workers compensation judge nominating committee which shall be composed of two members as follows: the Kansas AFL/CIO and the Kansas Chamber of Commerce and Industry shall each select one member to serve on the workers compensation judge nominating committee and shall give written notice of the nomination to the secretary who shall appoint such representatives to the committee. In the event of a vacancy occurring for any reason on the nominating committee, the respective member shall be replaced by the appointing organization with written notice of the appointment to the secretary of human resources within 30 days of such vacancy.

(f) (1) Upon being notified of any vacancy in a workers compensation judge position or of the need to appoint a judge pro tem under subsection (h), the nominating committee shall consider all qualified applicants submitted by the director for the vacant position or the judge pro tem position and nominate a person qualified therefor. The nominating committee shall be required to reach unanimous agreement on any nomination for workers compensation judge or judge pro tem. With respect to each person nominated, the secretary either shall accept and appoint the person nominated by the nominating committee to the position for which the nomination was made or shall reject the nomination and request the nominating committee to nominate another person for that position. Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for that position in the same manner.

(2) The initial terms of office of workers compensation judges shall be staggered. Two judges shall be appointed for a one year term. Two judges shall be appointed for a two year term. Three judges shall be appointed for a three year term. And three judges shall be appointed for a four year term.

(3) Each judge shall hold office for the term of the appointment and until the successor shall have been appointed. Successors to such judges shall be appointed for terms of four years.

(4) If a vacancy should occur in a workers compensation judge position during the term of a judge, the nominating committee shall nominate an individual from the qualified applicants submitted by the director to complete the remainder of the unexpired portion of the term. With respect to each person so nominated, the secretary shall either accept and appoint the person nominated or shall reject the nomination and request the nominating committee to nominate another person for the position.

Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for the position in the same manner.

(g) (1) Following the completion of a term, judges who wish to be considered for reappointment to the position of workers compensation judge shall be deemed to have met the qualification requirements for selection and shall be considered for renomination by the workers compensation judge nominating committee.

(2) The director shall conduct a performance appraisal of each workers compensation judge 90 days prior to the end of each workers compensation judge's term and submit a report to the workers compensation judge nominating committee. The performance appraisal shall include, but not be limited to, a measurement of how current the judge remained on the judge's docket compared to the norm, how many of the judge's decisions were appealed compared to the norm, how many of the judge's decisions were overturned by the appeal board and such other information as the director shall deem relevant.

(h) If illness or other temporary disability of a judge will not permit the judge to serve during a case or in any case in which a judge must be excused from serving because of a conflict or is otherwise disqualified with regard to such case, the director shall notify the workers compensation judge nominating committee of the need to appoint a judge pro tem. Upon receipt of such notice, the committee shall act as soon as possible and nominate a qualified person to serve as judge pro tem in such case in accordance with subsection (f). Each judge pro tem shall receive compensation at the same rate as a judge receives, prorated for the days of actual service as a judge pro tem and shall receive expenses under the same circumstances and to the same extent as a judge receives. Each judge pro tem shall have all the powers, duties and functions of a workers compensation judge with regard to the case.

(i) ~~(e)~~ Assistant directors ~~and administrative law judges~~ shall be selected by the director of workers compensation , with the approval of the secretary of human resources. Each appointee shall be subject to either dismissal or suspension of up to 30 days for any of the following:

(1) Failure to conduct oneself in a manner appropriate to the appointee's professional capacity;

(2) failure to perform duties as required by the workers compensation act; or

(3) any reason set out for dismissal or suspension in the Kansas civil service act or rules and regulations adopted thereto.

No appointee shall be appointed, dismissed or suspended for political, religious or racial reasons or by reason of the appointee's sex.

(j) *The position of administrative law judge is hereby abolished.*

Sec. 2. K.S.A. 1994 Supp. 75-5708 is hereby repealed.

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

44-551 allows appointment of emergency ALJ's

3-9

Section 1. (a) as used in this section:

(1) "Nonprofit organization" means those nonprofit organizations exempt from federal income tax pursuant to section 501(c) of the internal revenue code of 1986, as in effect on the effective date of this act.

(2) "Compensation" does not include actual and necessary expenses that are incurred by a volunteer officer, director or trustee in connection with the services that the volunteer performs for a nonprofit organization and that are reimbursed to the volunteer or otherwise paid.

(3) "Volunteer Officer, director or trustee" means an officer, director or trustee who performs services for a nonprofit organization but does not receive compensation, either directly or indirectly, for those services.

44-543. Election by certain employees.
(a) Any employee of a corporate employer who owns ten percent (10%) or more of the outstanding stock of such employer, may file with the director, prior to injury, a written declaration that he elects not to accept the provisions of the workmen's compensation act, and at the same time, he shall file a duplicate of such election with the employer. Such election shall be valid only during his term of employment with such employer. Any employee so electing and thereafter desiring to change his election may do so by filing a written declaration to that effect with the director and a duplicate of such election with the employer. Any contract in which an employer requires of an employee as a condition of employment that he elect not to come within the provisions of the workmen's compensation act, shall be void. Any written declarations filed pursuant to this section shall be in such form as may be required by regulation of the director.

History: L. 1927, ch. 232, § 51; L. 1959, ch. 221, § 1; L. 1961, ch. 243, § 11; L. 1974, ch. 203, § 38; July 1.

(b) Any noncompensated volunteer officier, director or trustee of a non-profit corporation as defined in section (1) may elect to bring himself or herself within the provisions of the workers compensation act by filing with the director, prior to injury, a written declaration that the officer, director or trustee elects to accept the provisions of the workers compensation act, and at the same time, the person shall file a duplicate of such election with the employer and the employer's insurance company or qualified group-funded workers compensation pool.

Amendment requested by KS Medical Society

any event, the extent of permanent partial general disability shall not be less than the 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 and based on the ~~third edition, revised, of~~ the American Medical Association ~~Guidelines for the Evaluation of Physical Impairment~~, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. ~~If the employer and the employee are unable to agree upon the employee's functional impairment, such matter shall be referred by the administrative law judge to an independent health care provider who shall be selected by the administrative law judge from a list of health care providers maintained by the director. The health care provider selected by the director pursuant to this section shall issue an opinion regarding the employee's functional impairment which shall be considered by the administrative law judge in making the final determination.~~ The amount of weekly compensation for permanent partial general disability shall be determined as follows:

Guides to the Evaluation of Permanent Impairment, 4th edition, published by

(1) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average gross weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(2) find the number of disability weeks payable by subtracting from 415 weeks the total number of weeks of temporary total disability compensation was paid, excluding the first 15 weeks of temporary total disability compensation that was paid, and multiplying the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(3) multiply the number of disability weeks determined in paragraph (2) of this subsection (a) by the payment rate determined in paragraph (1) of this subsection (a).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. 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 employee shall be paid compensation for not to exceed 415 weeks following the date of such injury, subject to review and modification as provided in K.S.A. 44-528 and amendments thereto.

(b) If an employee has received an injury for which compensation is

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KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Senator Alicia Salisbury and
Members of the Commerce Committee

FROM: Patrick R. Nichols on behalf of
Kansas Trial Lawyers Association

RE: S.B. 242

DATE: March 15, 1995

On behalf of the consumers and injured workers of Kansas, KTLA offers the following comments regarding S.B. 242. Much of what was presented in testimony regarding S.B. 327 is applicable here. Therefore, the testimony will duplicate to some extent that previous presentation.

At this time it would be unwise to institute significant changes in the Kansas Workers Compensation system. In 1993, wholesale changes in the Kansas Workers Compensation Act were adopted by the Legislature following substantial debate. The vast majority of these amendments either restricted the scope of coverage under the Workers Compensation Act, established new caps or lids on the amounts that could be recovered by a disabled worker, or redefined and reclassified compensable disability in a manner which had the effect of reducing disability awards. In other words, the economic burden of these amendments was placed upon injured workers.

Although these amendments followed on the heels of a 3.9% hike in the premium allowed to be charged for workers compensation insurance coverage, it is questionable whether the 1993 amendments were really necessary, since the loss ratio (loss ratio is defined as claim amounts at current benefit levels divided by premiums at current rate levels) for Kansas workers compensation insurers actually decreased in 1992. (See "Kansas Historical Loss Ratios" attached hereto as Exhibit A). Moreover, according to statistics found in the Division of Workers Compensation 20th Annual Statistical Report published on 1 July 1994, in 1992 and 1993 Kansas workers compensation insurance carriers were being paid higher and higher amounts of premium dollars while paying lower and lower claims losses. (See "Worker's Compensation Insurance Experience" attached hereto as Exhibit B). Since claims dollars had substantially decreased two years in a row, and premium dollars had substantially increased at the same time, a persuasive case is thus established that the 1993 amendments were unnecessary. Be that as it may, the 1993 amendments have certainly accelerated and expanded the profitability of workers compensation insurance in Kansas. According

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Terry Humphrey, Executive Director

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to statistics presented to the House Business, Commerce and Labor Committee on 22 February 1995, employers saved almost $59,000,000 in 1994 due to the "reforms" implemented by the 1993 Legislature. (See "Cumulative Employer $avings Due to Kansas Reform" chart attached hereto as Exhibit C). As expected, the Kansas Insurance Department in 1994 ordered 2% reduction in the premium costs to Kansas employers for workers compensation insurance coverage. Finally, the NCCI on 22 February 1995 announced that they were recommending a 6.9% reduction in premiums to Kansas employers for workers compensation insurance.

Given these facts, the Kansas Trial Lawyer's Association fails to see the need for implementing another series of comprehensive amendments to the Workers Compensation Act. Today, there is no "crisis" in availability and affordability of workers compensation insurance coverage for Kansas industries. Therefore, a case cannot be made today for further reductions in coverage and limitations upon disability benefit recoveries. The amendments sought in Senate Bill 242 will exact hardship upon injured workers when there is no recognized good reason for exacting such harm. We hope that the rule of reason will prevail in your deliberations on Senate Bill 242.

S.B. 242 makes significant changes in the workers compensation system in the following respects:

1. Giving a court the power to impute a hypothetical wage to an unemployed worker. (P.1, L41-43)
2. Stripping the ALJ of power to order and independent examination for functional impairment. (P.2, L12-19)
3. Requiring Pre-Hearing Settlement Conferences to be conducted by someone other than the ALJ who will preside over the award in the claim. (P.4, L29-31)
4. Removing the prohibition against lump sum settlements. (P.5, L17-22)
5. Elimination of benefit review. (P.7, L13-14; Section 7, P.8, L8-10)
6. Provides that overpayment of benefits create entitlement to a credit against future benefits.

DISCUSSION

ISSUE I; Allowing imputation of a post-injury wage to an unemployed worker would undo the linch-pin of the 1993 compromise which overhauled the calculation of "work disability" benefits. That compromise created a new formula which uses actual wages earned by the worker following injury. Prior to the 1993 amendments, ALJ's were faced with a constant difficulty of imputing "ability to earn" under K.S.A. 44-510e. This led to great uncertainty in the evaluation of claims and was a frequent source of litigation. In 1993 benefits were reduced and high wage earners were restricted in their partial disability benefits by an artificial cap on their pre-injury earnings at $450

per week. In exchange, a high degree of predictability and certainty was written into the law by removing speculation about post-injury earnings. No longer was "ability" the key; rather actual earnings were used. It would be fundamentally unfair to withdraw one of the benefits workers received in this compromise without returning the concessions made as well.

ISSUE II; Current law allows the ALJ to appoint a physician where the parties are unable to agree on functional impairment. Under present law, the employer appoints a physician of the employer's choosing. The 1993 amendments created very significant procedural obstacles for a Claimant to change physicians and prohibited the use of unauthorized medical to obtain a functional impairment rating. Thus, the employer is given virtually total control over the rating process. K.S.A. 44-510e(a) currently allows the ALJ to appoint an independent health care provider to present an impairment rating of the Claimant to the court. This gives the Administrative Judge greater control over the case and a rating independent of that given by potentially partisan physicians. That the doctor appointed under this section would be independent is beneficial to the equitable adjudication of claims in workers compensation. Repeal of this provision strips the court of important power to obtain an independent evaluation and reduce partisan bickering.

ISSUE III; Prohibiting the ALJ who hears the case from conducting the settlement conference represents a change of existing law. Our clients and members have worked within the framework of the current system and we are content to continue to do so. However, we are not insensitive to the statements by some members of the bar that the settlement hearing Judge should not decide the case on the merits. If the Committee feels strongly that the current law should be changed this would represent a reasonable alternative. However, we do not feel this is a high priority problem with the system.

It is important that the Division of Workers Compensation be consulted regarding this change. In both western and central Kansas there is only one ALJ for the district. It would be necessary to implement appropriate procedures to avoid the difficulty of requiring all litigants to travel to a different city. The Division should require the ALJ's in Salina and Garden City to go to the corresponding alternate city periodically to hear settlement conferences.

ISSUE IV; The bill proposes to allow recoupment of any overpayment as a credit against the final weeks of an award payable to the Claimant. If this change is adopted, corresponding amendments must occur in K.S.A. 44-534a(b) to clarify fund liability. That statute should be amended to show that the Fund is liable only in cases where the remaining benefits are insufficient to satisfy the necessary credit for the overpayment. Our members and the injured workers we represent are satisfied with the current system. If the Committee feels there is a strong need for change in this area, it is important that a technical amendment occur as outlined above.

ISSUE V; The statutory prohibition on lump sum settlements is removed by these amendments. The prohibition is circumvented by litigants from time to time, sometimes by Respondents in dealing with unrepresented Claimants. Moreover, this provision represents what many see as an unwarranted intrusion by government into the affairs of Claimants who, all in all, can probably judge more accurately what course of action better meets their needs and overall welfare. KTLA and its members have operated under the current system and are willing and able to do so if no change occurs. We do not perceive this as a significant priority. However, it does represent an obstacle to the smooth administration of the system and the prompt and timely final resolution of claims.

ISSUE VI; The bill proposes to eliminate the benefit review officers, their powers and duties. The injured workers represented by our members occasionally have been able to utilize the benefit review conferences in a positive way. However, it does represent an obstacle to timely preliminary hearings and certainly generates substantial costs to the Division of Workers Compensation. Significant cost savings could be generated by repeal of the statutes and dissolution of this part of the Executive branch.

CONCLUSION; To make substantive changes in the terms and conditions of the Workers Compensation Act would be to act precipitously and without cause. The system functions now; costs are down, coverage is more available. To change would be to destablize the system and to tarnish the adequacy of the 1993 amendments. To remove the linch-pin of the 1993 compromise, and reinstate the concept of imputed wages would, in effect, break the contract to amend the benefit structure and the test for disability. Moreover, with declining costs, insurance is more accessible, and no reason exists at this time to make a change in the substantive law regarding the calculation of work disability or in hamstringing the court in its capacity to appoint neutral physicians to remove the partisanship in the system. We oppose this bill.

Respectfully submitted,

Patrick R. Nichols

Exhibit A 5/5

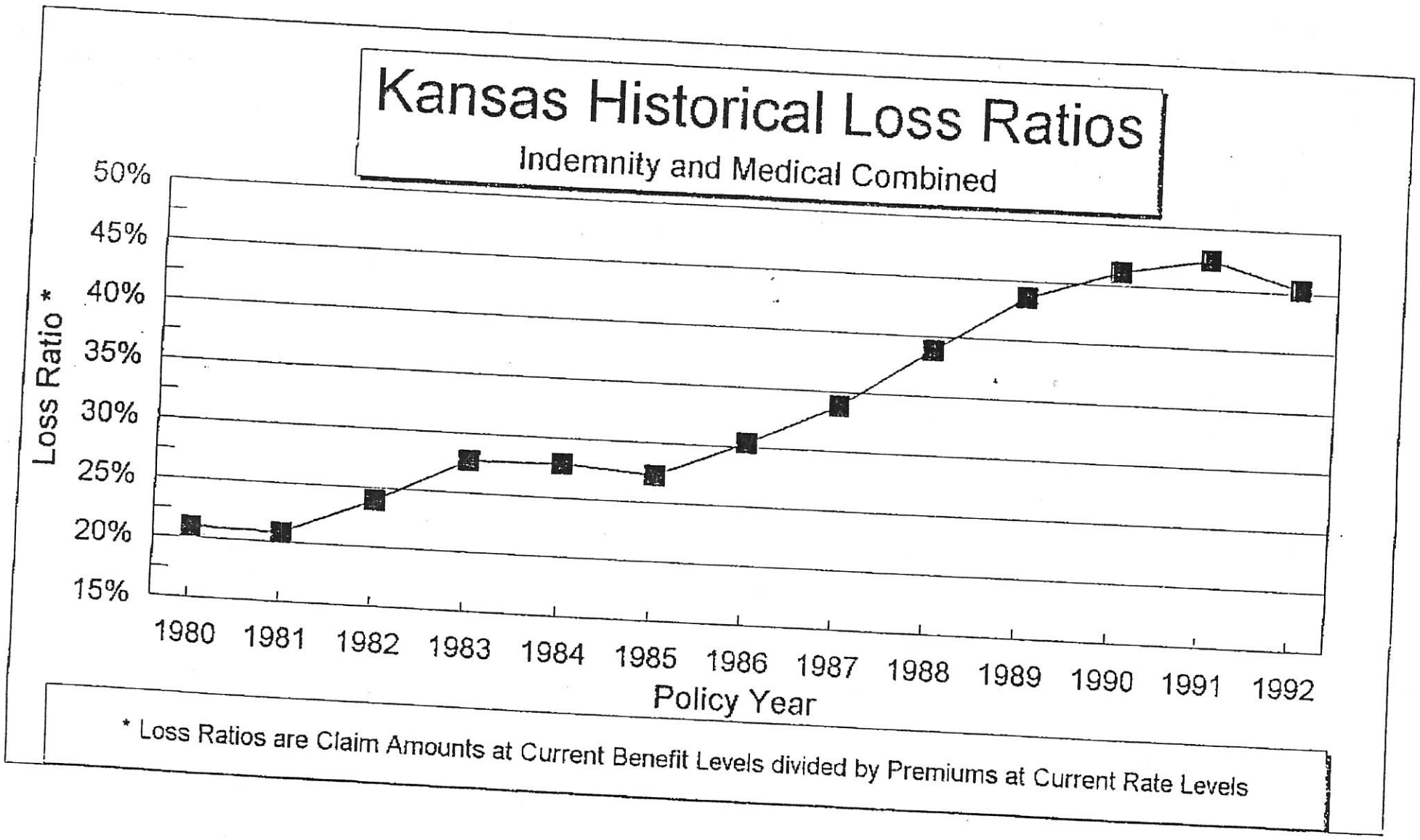

Kansas Historical Loss Ratios
Indemnity and Medical Combined
Loss Ratio *
50%
45%
40%
35%
30%
25%
20%
15%
1980
1981
1982
1983
1984
1985
1986
1987
1988
1989
1990
1991
1992
Policy Year
* Loss Ratios are Claim Amounts at Current Benefit Levels divided by Premiums at Current Rate Levels

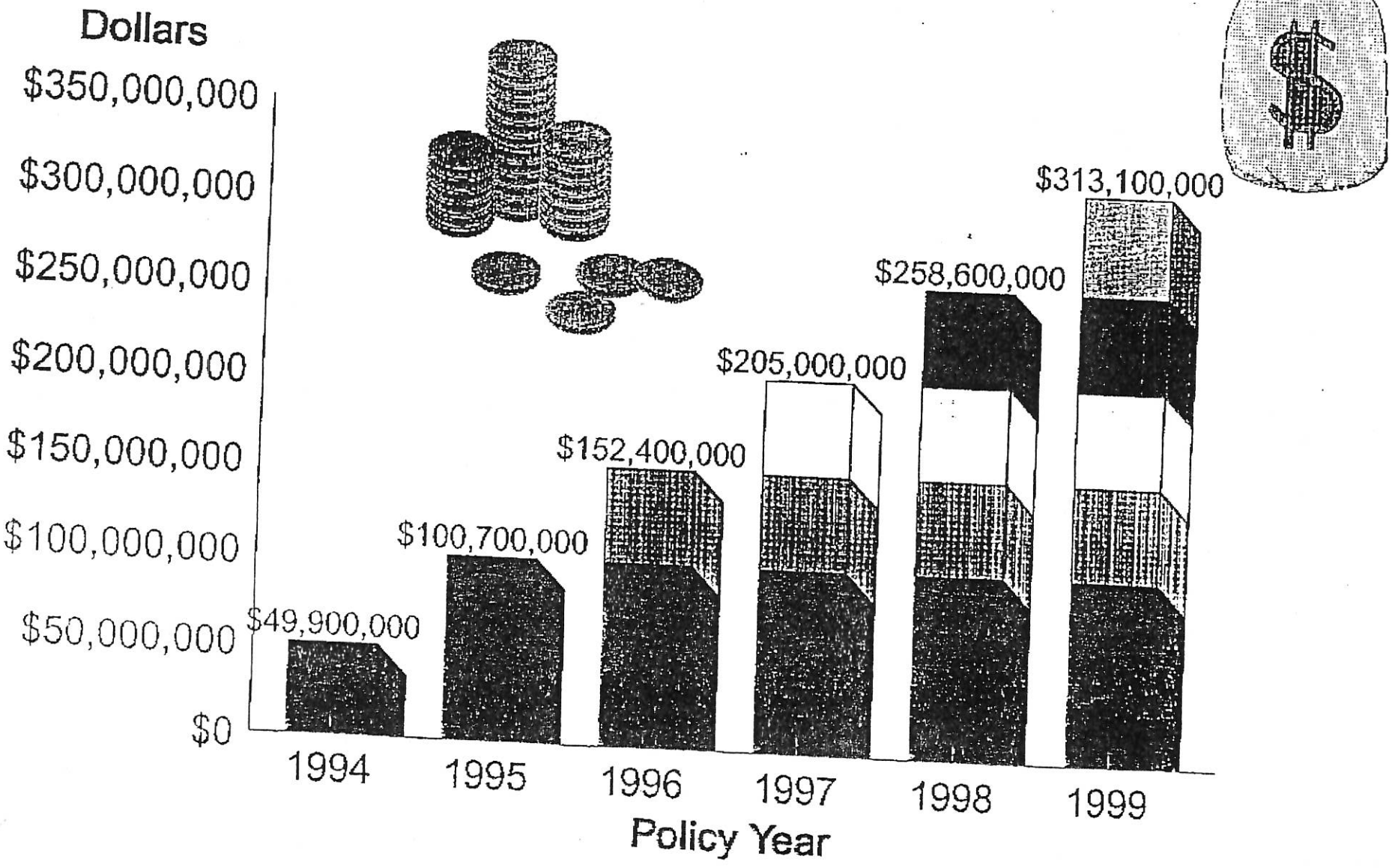
Exhibit B 5-9

WORKERS COMPENSATION INSURANCE EXPERIENCE

Prepared by Kansas Insurance Department

Year	Direct Premiums Written	Direct Premiums Earned	Direct Losses Paid	Direct Losses Incurred	Premiums Written to Losses Paid	Premiums Earned to Losses Incurred
1979	118,240,623	113,676,699	60,281,756	82,086,752	51.0	72.2
1980	141,189,216	138,145,343	72,697,056	102,896,246	51.5	74.5
1981	156,207,756	149,261,425	80,425,265	101,691,667	51.5	68.1
1982	154,944,245	152,315,135	88,345,714	107,979,341	57.0	70.9
1983	147,137,981	148,669,330	96,289,968	115,282,150	65.4	77.5
1984	141,097,000	140,223,000	106,701,000	125,520,000	75.6	89.5
1985	172,985,620	170,955,138	120,755,675	147,438,366	69.8	86.2
1986	208,167,277	202,033,619	134,554,116	170,153,475	64.6	84.2
1987	233,674,161	222,846,661	147,885,631	195,885,084	66.1	87.9
1988	257,039,527	259,548,305	164,553,813	208,332,654	64.0	80.3
1989	264,102,264	263,386,009	184,857,801	239,142,874	70.0	90.8
1990	291,804,714	293,048,038	222,309,953	265,726,660	76.2	90.7
1991	342,803,582	338,869,988	245,685,923	322,711,452	71.7	95.2
1992	364,184,283	360,759,612	234,729,527	289,992,534	64.5	80.4
1993	367,030,245	365,646,558	220,091,021	231,228,324	60.0	63.2

Cumulative Employer $avings due to Kansas Reform



TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE
SB 242
KANSAS AFL-CIO
JOHN M. OSTROWSKI
March 15, 1995

INTRODUCTION

The Kansas AFL-CIO opposes the passage of SB 242. This committee has often sought to reduce litigation relative to workers compensation matters. On the heels of major reform legislation, which apparently accomplished the goal of reducing premiums, additional legislation which will lead to litigation is unwarranted.

It is also true that, to a certain extent, SB 307 which affected all injuries happening after July 1, 1993 was a compromise. Neither side of the various issues could claim 100% success. Certainly, however, SB 307 primarily represented a reduction in benefits to injured workers of the State of Kansas. With falling premiums and expanding markets, there seems to be a serious question as to why further so-called reform is necessary.

We again remind the legislature that on a national scale Kansas has extremely low rates. On a national scale, Kansas also pays meager benefits for injuries. The low payout reduces incentives for safety and cost efficiency in handling claims. Indeed, Kansas' safety record in the workplace is quite depressing.

Before reviewing SB 242, we would remind the legislature of some of the items from the 1993 legislation which reduced or eliminated benefits for injured workers and their families:

* 10-day notice (legitimate injuries that take place in the workplace are uncompensated in any fashion due to the shortest statute of limitations existing in any law)

* a cap on benefits which treats the high wage earner unequally and destroys any meaningful wage replacement for workplace injuries

* scheduling of shoulder injuries such that any worker who relies on his/her upper extremities to work is penalized

* slashing of claimant's attorney's fees such that many workers can no longer find representation for valid claims and no worker can hire an attorney to secure rights such as medical treatment because the taking of a fee is illegal

* total elimination of vocational rehabilitation such that injured workers cannot restore their earning capacity except in highly unusual cases

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* offsets for preexisting conditions such that a standard of health is now imposed on every Kansas employee for every known medical condition

* elimination of unauthorized medical for evaluation purposes, while simultaneously retaining the insurance carrier's right to hand pick select physicians, and severely limiting the ALJ's ability to assign different physicians for injured workers

* redefining compensability, and creation of additional defenses, such that more injured workers are excluded for work-related injuries from the system completely.

It is also true that many of the provisions of SB 242 were contained in previous pieces of legislation. Much of this bill is merely a resurfacing of those ideas which were previously negotiated, compromised, or rejected.

BILL REVIEW

Section 1, p. 1, LL 41-43: Certainly, the idea of a fair definition for "work disability" received much discussion and debate in 1993. In fact, insertion of the work disability was one of the final pieces of the puzzle. This would reopen the compromise of 1993 and will cause further litigation by again changing the definition of work disability. There has been no court interpretation dealing with this section, and with increased insurance profits, falling rates, and increased competition in the insurance market, one would have to presume that the present definition is accomplishing the 1993 intent.

Additionally, and most importantly, this is a return to the "abilities" test which was so vigorously fought by various organizations in 1993. It was generally accepted that a litmus test is what the individual is able to earn in the marketplace. The fear of an individual sitting at home to increase his workers compensation benefits is ill founded. By returning to work, all claimants mathematically receive a raise due to the accelerated payout. If the worker is able to return to comparable wage, he will generally receive approximately 150% of his preinjury earnings.

For example, a worker with a $450 average weekly wage earns approximately $23,400 per year. If that worker has a 12% functional impairment, he will receive 49.8 weeks of compensation at $300 per week. This is a total of $14,940. Thus, in the year following injury if the worker returns to work, he will receive $32,292. This represents approximately 138% of his preinjury wage. Most workers would be pleased to return to work with a raise. Similarly, a worker with less than a return to work at comparable wage receives an incentive. The concern of dodging employment is misplaced. Those few cases of concern will be dealt with on a

case-by-case approach by the judges.

Lastly, there is no basis or standard upon which a judge can compute a wage. Such will obviously lead to increased litigation.

Section 1, p. 2, LL 12-19: Removal of this section will lead to increased litigation. What is happening under the current scheme is that employers are choosing more moderate physicians in the first instance. Thus, claimants understand that they have nothing to gain by appointment of a "neutral" or "middle-of-the-road" physician. Deletion of this provision will permit insurance carriers to again choose unreasonable physicians in the first instance. That, in turn, will force the claimant to an evaluating physician, and then we will come full circle to the administrative law judge appointing a neutral physician.

Section 2, p. 4, LL 29-31: Under the present system, the "personalities" of the administrative law judges are quite diverse. While at first blush this change looks appropriate, it will make the prehearing settlement conference somewhat useless. The prehearing settlement conference judge will not be able to give meaningful input into how the decision might come out. It would be more appropriate to have administrative rules governing the prehearing settlement conference procedure, with some type of penalty for failure to follow the procedure. This would include mandatory attendance by someone with settlement authority.

Section 3, p. 5, LL 3-7; Section 5, p. 7, LL 27-33: First of all, it is not clear whether we are talking about disability compensation benefits and medical benefits or merely disability compensation. It is presumed that the intent is for compensation benefits. As it currently stands, claims are carefully evaluated. This procedure would have a chilling effect on claimant's receipt of benefits with the ever present penalty that despite a good faith dispute, benefits could be forced to be repaid. Also, if the claimant has the burden of proof, voluntary payments of compensation will require the taking of evidence by claimant to prove the obvious. At the very least if respondent claims an overpayment, there should be a shifting of the burden of proof.

Section 4, p. 5, LL 17-22: A very hard fought provision to avoid overreaching by any employer. The provision seems to work quite well in practice, and prevents employers from forcing claimants to forfeit benefits. Detrimental to claimants for the removal of this provision, and appears to not be causing a problem for insurance carriers.

Section 7, p. 8, LL 8-10: This is strictly a policy decision with horror stories and success stories on both sides. Until there is some meeting of the minds as to whether or not the implemented programs of ombudsmen and benefit reviews are successful or unsuccessful, it would be appropriate to leave the programs in place for an additional year.