

Approved: February 14, 1996  
date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 13, 1996 in Room 123-S of the Capitol.

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

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

Conferees appearing before the committee:

Philip Harness, Director, Workers Compensation Division  
Senator Lana Oleen  
Patrick R. Collins, Fire Chief, Riley County Fire Dist. #1, Manhattan  
James Keating, Vice-President, Kansas State Association of Fire Chiefs, Marysville  
James Todd, Kansas Firefighters Association  
Tom Wilder, Director of Government and Public Affairs, Insurance Department  
Terry Leatherman, Kansas Chamber of Commerce and Industry  
Timothy J. King, Kansas Trial Lawyers' Association, Wichita  
John Ostrowski, AFL-CIO  
Tom Caby, Kansas Self-Insurers Association

Others attending: See attached list

**SB 649:**                    **Omnibus workers compensation act**

Bob Nugent, Revisor of Statutes, briefed the Committee on the proposed changes to the Workers Compensation Act in SB 649. The amendments were proposed by the Workers Compensation Advisory Council and the Legislative Interim Committee. Mr. Nugent submitted additional amendments to clarify SB 649 and stated Section 11 needs additional clarification. Attachment 1

Philip Harness, Director, Workers Compensation Division, stated the Advisory Council met on February 9, 1996, and recommended the following additional amendments be incorporated into SB 649: 1) establish an alternative selection process for Administrative Law Judges (ALJ) similar to selection of Workers Compensation Board members; 2) fines for failure to insure be deposited into the Workers Compensation Fund; and 3) the Board be relieved of the duty to issue "ten-day approval orders".

Mr. Harness reviewed SB 649 setting forth the sections with which the Advisory Council agrees and the sections the Council disagrees, and offered certain amendments. Attachment 2

The Committee inquired as to whether the proposed amendment on Page 3, line 40, relating to volunteer firefighters, should be amended to be apply to all emergency personnel. Mr. Harness responded that the Council did not discuss this matter, but he would have no objection.

Senator Lana Oleen stated that SB 553, sponsored by Senators Hardenburger, Oleen and Tillotson, is incorporated into SB 649, regarding coverage of volunteer firefighters within the workers compensation act.

Patrick Collins, Fire Chief, Riley County Fire District, #1, appeared in support of the provisions of SB 649 regarding volunteer firefighters. Mr. Collins related the current legislation, interpreted by the Riley County Counselor, is not applicable to volunteer firefighters who are responding to an emergency, if injured in an accident, between their home and the place of the emergency. Attachment 3

In response to questioning, the Chief stated the denial of benefits had not been appealed.

James Keating, Vice-President, Kansas State Association of Fire Chiefs, appeared in support of SB 649. Mr. Keating stated his particular interest in the section relating to coverage of volunteer firefighters.

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on February 13, 1996.

Mr. Keating urged the Committee on behalf of the Kansas Association of Fire Chiefs to support workers compensation coverage of volunteer fire fighters from place of residence or employment. The Association requests the Committee strike the word "fire" as it appears in the phrase "fire alarm". This amendment would ensure that the volunteers are covered when performing additional duties such as "medical first response, rescue and hazardous material incident mediation. Attachment 4

James Todd, Kansas State Firefighters Association, appeared in support of SB 649. Mr. Todd testified the Association supported workers compensation coverage of all emergency personnel from residence or place of employment.

Tom Wilder, Director of Government and Public Affairs, Kansas Insurance Department, testified in support of Section 11 of SB 649. Section 11 establishes a two year statute of limitations on claims against the workers compensation fund. The statute begins to run from the date of the most recent hearing in any case in which the fund has been implead. The amendment will allow the Insurance Department to request the dismissal of over 500 pending cases where no activity has taken place for a number of years. The Insurance Department does not take a position with regard to any other sections of the bill. Mr. Wilder agreed to work with the Revisor and the Director to reword Section 11. Attachment 5

Terry Leatherman, Kansas Chamber of Commerce and Industry, testified in support of some sections of SB 649. Mr. Leatherman advised the Committee he also serves on the Workers Compensation Advisory Council which recommended many of the initiatives in SB 649. Mr. Leatherman stated the elimination of the Benefit Review Conference (BRC), should expedite the processing of claims. The initial intent of the BRC was to establish a system to mediate rather than litigate workers compensation cases. It has not worked. The BRC's have been held early in the process before the issues are fully developed and the mandatory review seems to violate a principle of mediation in that you can't resolve issues between parties who are being forced to participate. (KCCI does not support the amendment that would replace AMA Guidelines with competent medical evidence as is set forth in Section 3 of SB 649) The KCCI supports the employment of the Fourth Edition of the AMA Guides in Kansas for the evaluation of physical impairment. KCCI supports the optional use of independent medical examiners by an ALJ; the change to credit employers for overpayments by reducing future awards; lump sum settlement proposal by reducing the prohibition to nine months and eliminating the prohibition in cases where the employee changes employers; the administrative reform permitting one Board member to hear and decide preliminary hearing appeals; and the adoption of a selection process for ALJs similar to the Workers Compensation Board. (Attachment 6)

Mr. Leatherman stated many KCCI proposals are incorporated in SB 649. There are a number of additional proposals attached to the statement KCCI requests be considered.

Timothy J. King, Kansas Trial Lawyers' Association (KTLA), appeared in support of SB 649. Mr. King stated KTLA supports the amendment which makes the independent medical exam discretionary with the ALJ; the elimination of AMA Guidelines; the elimination of all Benefit Review Conferences; shortening and/or elimination of prohibition against lump sum settlements; penalty for failure to secure compensation insurance; and the review of preliminary hearing awards by a single member of the Board of Appeals. Attachment 7

Tom Caby, Kansas Self-Insurers Association, stated the Association supported continuation of the AMA Guidelines because they provide standards for the evaluation of physical impairment.

Upon motion by Senator Reynolds, seconded by Senator Steffes, the Minutes of the February 9 and February 12, 1996 meetings were unanimously approved.

The next meeting is scheduled for February 14, 1996.



Sec. 1: (Advisory Council) This section clarifies the status of volunteer firefighters. A volunteer firefighter would not be excluded from coverage, under the "coming and going" rule when responding to a fire call. The interim committee had no recommendation on this issue.

Sec. 2: (Advisory Council) This section eliminates the benefit review conference (BRC) entirely. The interim committee recommended only that the BRC be discretionary. Later sections of the bill replace the BRC with a mediation procedure.

Sec. 3: (Interim Committee) This section abolishes a reference to the AMA guidelines for impairment rating and replaces it with a "competent medical evidence" standard.

Sec. 4: (Interim Committee) This section changes the prerequisites for obtaining an independent medical examination. The IME is made discretionary and can only be ordered if two medical opinions differ as to the percentage of impairment.

Sec. 5: (Interim Committee) This section allows overpaid TTD to be credited against the final weeks of an award rather than against the workers compensation fund.

Sec. 6: (Interim Committee) This section reduces the waiting period before lump sum settlements may be reached from 2 years to 9 months.

Sec. 7: (Advisory Council) This section increases the criminal penalty for failure to provide workers compensation coverage from a C misdemeanor to an A misdemeanor. The interim committee did not study this issue.

Sec. 8: (Advisory Council) Abolishes a cross reference to BRCs. (See, Sec. 2)

Sec. 9: (Advisory Council) Excludes uncompensated officers and directors of nonprofit corporations from coverage unless they notify the director that they desire coverage. (New)

Sec. 10: (Advisory Council) Authorizes individual members of the Workers Compensation Board to hear appeals from preliminary hearings. (Interim Committee had no recommendation)

Sec. 11: (Interim Committee) Creates a two year statute of limitations on claims against the workers compensation fund. The statute begins to run from the date of the most recent hearing in any case in which the fund has been implead.

Sec. 12: (Advisory Council) Creates a mediation conference procedure to replace the abolished BRC. The conference is discretionary and may be only be ordered if both parties consent to the mediation conference. The ultimate decision making authority must be personally present at the meeting. (See, Sec. 2)

Sec. 13: (Advisory Council) Additional steps toward creating the mediation procedure.

Sec. 14: (Advisory Council) Increases criminal penalty for fraudulent and abusive practices under the act from a C to an A misdemeanor. (See Sec. 7)

Sec. 15: (Advisory Council) All references to BRCs are repealed. (Plus all the old amended sections) (See, Sec 2)

*Senate Commerce Committee  
February 13, 1996*

*Attachment 1 thru 1-3*

1 employer in such award for any amount or amounts paid by the employer  
2 to the employee as compensation prior to the date of the award.

3 (c) *In the event the claimant has been overpaid benefits as described*  
4 *in subsection (b) of K.S.A. 44-534a, and amendments thereto, and the*  
5 *claimant is entitled to additional benefits, the administrative law judge*  
6 *shall provide for the application of a credit against such benefits as de-*  
7 *scribed in subsection (b) of K.S.A. 44-534a, and amendments thereto.*

8 Sec. 6. K.S.A. 44-531 is hereby amended to read as follows: 44-531.

9 (a) Where all parties agree to the payment of all or any part of compen-  
10 sation due under the workers compensation act or under any award or  
11 judgment, and where it has been determined at a hearing before the  
12 administrative law judge that it is for the best interest of the injured  
13 employee or the dependents of a deceased employee, or that it will avoid  
14 undue expense, litigation or hardship to any party or parties, the admin-  
15 istrative law judge may permit the employer to redeem all or any part of  
16 the employer's liability under the workers compensation act by the pay-  
17 ment of compensation in a lump sum, except that no agreement for pay-  
18 ment of compensation in a lump sum shall be approved for ~~two years~~  
19 *nine months* after an employee has returned to work in cases in which  
20 the employee, who would otherwise be entitled to compensation for work  
21 disability, is not entitled to work disability compensation because of being  
22 returned to work at a comparable wage by ~~any employer~~ *the employer*  
23 *who employed the worker at the time of the injury giving rise to the claim*  
24 *being settled. Such prohibition against lump-sum settlements shall not*  
25 *apply to an employee who has returned to work at a comparable wage.*

[with a different employer

26 The employer shall be entitled to an 8% discount on the amount of any  
27 such lump-sum payment that is not yet due at the time of the award.  
28 Upon paying such lump sum the employer shall be released and dis-  
29 charged of and from all liability under the workers compensation act for  
30 that portion of the employer's liability redeemed under this section.

31 (b) No lump-sum awards, unless agreed to by the parties, shall be  
32 rendered under the workers compensation act except: (1) As provided in  
33 subsection (a) of this section, (2) in cases of remarriage of a surviving  
34 spouse as provided in K.S.A. 44-510b and amendments thereto, (3) in  
35 cases involving compensation due the employee at the time the award is  
36 rendered as provided in K.S.A. 44-525 and amendments thereto and in  
37 cases of past due compensation as provided in K.S.A. 44-529 and amend-  
38 ments thereto.

39 Sec. 7. K.S.A. 44-532 is hereby amended to read as follows: 44-532.

40 (a) Where the payment of compensation of the employee or the employ-  
41 ee's dependents is insured by a policy or policies, at the expense of the  
42 employer, or the employer is a member of a qualified group-funded work-  
43 ers compensation pool, the insurer or the qualified group-funded workers

1-2

1-2

1 review officer under K.S.A. 44-5,114 and amendments thereto and, upon  
 2 a full hearing on the claim, the amount of compensation to which the  
 3 employee is entitled is found to be less than the amount of compensation  
 4 paid or is totally disallowed, the employer and the employer's insurance  
 5 carrier shall be reimbursed from the workers compensation fund estab-  
 6 lished in K.S.A. 44-566a and amendments thereto, for all amounts of  
 7 compensation so paid which are in excess of the amount of compensation  
 8 the employee is entitled to as determined in the full hearing on the claim.  
 9 The director shall determine the amount of compensation paid by the  
 10 employer or insurance carrier which is to be reimbursed under this sub-  
 11 section, and the director shall certify to the commissioner of insurance  
 12 the amount so determined. Upon receipt of such certification, the com-  
 13 missioner of insurance shall cause payment to be made to the employer  
 14 or the employer's insurance carrier in accordance therewith.

and in excess of any amounts credited  
 against additional benefits due to the  
 claimant pursuant to KSA 44-525C and amt  
 thereto.

15 Sec. 9. K.S.A. 44-543 is hereby amended to read as follows: 44-543.

16 (a) As used in this section:  
 17 (1) "Nonprofit organization" means those nonprofit organizations ex-  
 18 empt from federal income tax pursuant to section 501(c) of the internal  
 19 revenue code of 1986, as in effect on the effective date of this act.

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

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

27 (b) Any employee of a corporate employer who owns ~~ten percent~~  
 28 ~~(10%)~~ 10% or more of the outstanding stock of such employer, may file  
 29 with the director, prior to injury, a written declaration that ~~he the em-~~  
 30 ~~ployee~~ elects not to accept the provisions of the ~~workmen's workers~~ workers com-  
 31 pensation act, and at the same time, ~~he the employee~~ shall file a duplicate  
 32 of such election with the employer. Such election shall be valid only dur-  
 33 ing ~~his the employee's~~ term of employment with such employer. Any em-  
 34 ployee so electing and thereafter desiring to change ~~his the employee's~~  
 35 election may do so by filing a written declaration to that effect with the  
 36 director and a duplicate of such election with the employer. Any contract  
 37 in which an employer requires of an employee as a condition of employ-  
 38 ment that ~~he the employee~~ elect not to come within the provisions of the  
 39 ~~workmen's workers~~ workers compensation act, shall be void. Any written decla-  
 40 rations filed pursuant to this section shall be in such form as may be  
 41 required by regulation of the director.

42 (c) Any noncompensated volunteer officer, director or trustee of a  
 43 nonprofit corporation as defined in clause 3 of subsection (a) may elect

Report to Senate Commerce Committee  
On Senate Bill No. 649

February 13, 1996

Philip S. Harness, Workers Compensation Director and  
Chairman of Workers Compensation Advisory Council

At the Workers Compensation Advisory Council meeting of February 9, 1996, the members had their first opportunity to review the above-referenced legislation, consisting of 38 legal size pages. Before offering comments on the bill itself, the Advisory Council took action recommending to the Legislature the following amendments:

1. There should be an alternative selection process for Administrative Law Judges, similar to that for the Workers Compensation Board members, as further set out on the attached Exhibit A.
2. K.S.A. 44-532 fines for failure to insure should be deposited into the Workers Compensation Fund.
3. The Board should be relieved of the duty to issue "ten-day approval orders." (The Board issues an order stating that no interested party perfected a timely appeal and therefore the decision of the Administrative Law Judge is approved.)

As to the bill itself, the Advisory Council would offer the following:

- a. Section 1 purports to amend K.S.A. 44-508(f) to bring volunteer firefighters within the Workers Compensation Act, by taking the volunteer firefighter responding to a fire alarm out of the "coming and going" rule, where there is usually no coverage. As drafted, the language relies on a double negative, which may invite litigation. The Advisory Council prefers the language previously submitted, attached as Exhibit B.
- b. Section 4 purports to amend K.S.A. 44-510e by changing the mandatory referral by the Administrative Law Judge to an independent health care provider if the employer and the employee are unable to agree, and if at least two (2) medical opinions disagree, as to the percentage of functional impairment. This particular language is not the result of a recommendation of the Advisory Council but instead may be traced to the Interim Studies Committee.
- c. Section 6 of the bill purports to amend K.S.A. 44-531 to amend the lump sum settlement prohibition from two (2)

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*Senate Commerce Committee  
February 13, 1996*

*Attachment 2 thru 2-5*

years down to nine (9) months if the employee has continued working for the same employer. The Advisory Council also agreed that the prohibition against lump sum settlements should not apply to an employee who has returned to work for a different employer. The bill as drafted, places "comparable wage" instead of the concept of "different employer."

d. Section 7 of the bill purports to amend K.S.A. 44-532 to make the crime of failure to insure a Class A misdemeanor, rather than Class C misdemeanor, to bring it more in line with other more closely analogous crimes. In addition, the Advisory Council is recommending to the Legislature to pattern the law after that of the state of Missouri, adding an additional penalty equal to twice the annual premium the employer would have paid or \$25,000 whichever amount is greater.

e. Sections 2, 8, and 13 would strike benefit review in favor of mediation as recommended by the Advisory Council. However, Section 8 purports to amend K.S.A. 44-534a by removing references to the benefit review conference; the following language in subsection (b) should also be removed for purposes of congruity:

". . . or pursuant to an interlocutory order entered by a benefit review officer under K.S.A. 44-5,114 and amendments thereto . . ."

f. Section 10 purports to amend K.S.A. 44-551 to insert a provision that an appeal from a preliminary award may be heard and decided by a single member of the board. The Advisory Council also suggested that language be added to require that the appeals from preliminary awards be assigned on a rotating basis and that the author of the decision be required to sign.

g. Section 11 purports to amend K.S.A. 44-566a to insert a dismissal of Fund liability if there has been no determination of liability within two (2) years of the last hearing held in the case. This language was not presented, nor was it approved, by the Advisory Council. The amendment as drafted, seems inadequate as it would not dismiss Fund liability in the following examples:

(i) The example of where a preliminary hearing has been held but no final hearing has been held as the employee has been undergoing medical treatment for three or four years; the language would purport to let the Fund out.



(ii) The example of a Joint Petition and Stipulation being presented to the Director where there is no hearing and the right to proceed against the Fund is reserved.

(iii) Does hearing include any motion hearing?

(iv) What about a disappearing claimant?

EXHIBIT A

K.S.A. 75-5708 is amended as follows:

(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, 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.

Assistant directors and administrative law judges shall be selected by the director of workers compensation with the approval of the secretary of human resources, except that any administrative law judge appointed after July 1, 1996, shall be appointed in accordance with procedure prescribed for the selection of the workers compensation board and shall be appointed for a four year term. Any administrative law judge so appointed shall agree, prior to appointment to adhere to the specifications for the position designated by the director. Failure to adhere to said specifications may serve as grounds for suspension without pay or termination, pursuant to the provisions of K.S.A. 75-2949.

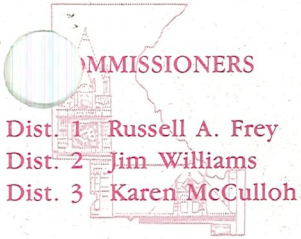
All administrative law judges appointed prior to July 1, 1996, shall continue in their present classified positions. When said seated administrative law judges vacate their current positions, such position shall be filled under K.S.A. 75-5708 as amended.

EXHIBIT B

44-508. Definitions. As used in the workers compensation act:

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(f) The words "arising out of and in the course of employment" as used in the 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. *Volunteer firefighters shall be construed to assume the duties of employment when they receive notification of an emergency.* 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. The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.



COMMISSIONERS  
 Dist. 1 Russell A. Frey  
 Dist. 2 Jim Williams  
 Dist. 3 Karen McCulloh

# RILEY COUNTY PUBLIC WORKS DEPARTMENT

RILEY COUNTY OFFICE BUILDING • 110 COURTHOUSE PLAZA  
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**DAN R. HARDEN**  
 COUNTY ENGINEER  
 & DIRECTOR OF  
 PUBLIC WORKS  
 Registered Professional  
 Engineer No. 7412

13 February, 1996

Honorable Senator Salisbury, Chair  
 Senate Commerce Committee  
 Statehouse Room 123

Chairperson Salisbury and the members of this committee, my name is Pat Collins. I am the Riley County Rural Fire Chief. I support the provisions of Senate Bill 553 that has been included with the legislation in front of you today.

The volunteer firefighters of this state are the backbone of the fire protection systems in any of the communities where we live. The volunteers we count on to be there twenty-four hours a day are our neighbors, friends, and family members. At a moments notice on the bleakest of stormy nights, these heroic individuals travel to and return from emergencies just like paid firefighters. The big difference between the two is that a paid firefighter on-duty, travels from their sleeping area or work assignment to the apparatus and to the fire being fully covered by workers compensation benefits. The volunteer may have to leave work, play, or family outings and travel several miles through various types of weather and traffic conditions before even reaching the fire station or fire scene. Then upon arrival coverage of workers compensation benefits would begin.

On July 10, 1995 while responding from his home to the Zeandale fire station for a grass fire which he had been paged to, Riley County Volunteer Firefighter Gary Soupene died in a fatal car wreck about 100 yards from his home. He had arrived home from work and according to friends had no plans to travel the road to town again that night. Gary Soupene's dedication to help his friends in the community led him down that path to pay the ultimate price.

According to current legislation as interpreted by the Riley County Counselor, Mr. Soupene was not an employee at the time of the accident because he had not reached his place of employment. Mr. Soupene did not have any direct dependents and there are no workers compensation claims filed. The question of would Mr. Soupene have been covered may never be answered. So this question still haunts the other 275 firefighters in Riley County every time their pagers go off.

*Senate Commerce Committee  
 February 13, 1996  
 Attachment 3 thru 3-2*

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 (913) 537-6333  
 FAX (913) 537-6338

• **PLANNING & ZONING**  
 (913) 537-6332

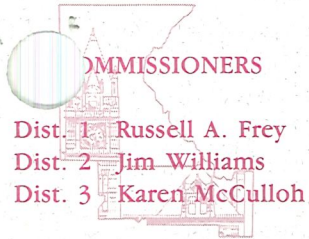
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 Terra Heights  
 University Park  
 Valleywood  
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• **SOLID WASTE BILLING**  
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• **WATER DISTRICTS**  
 Hunter's Island  
 Konza  
 University Park  
 Valleywood  
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**COMMISSIONERS**  
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 Dist. 2 Jim Williams  
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**DAN R. HARDEN**  
 COUNTY ENGINEER  
 & DIRECTOR OF  
 PUBLIC WORKS  
 Registered Professional  
 Engineer No. 7412

The future of almost 700 volunteer fire departments in the state rests in your hands. Please protect our greatest fire protection resources (the volunteers) by passing the provisions of SB 553 with my support and the support of Riley County.

Sincerely,

Patrick R. Collins, Fire Chief  
 Riley County Fire Dist. #1

• **EMERGENCY MANAGEMENT**

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• **PLANNING & ZONING**

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 University Park  
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• **SOLID WASTE BILLING**

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• **WATER DISTRICTS**

Hunter's Island  
 Konza  
 University Park  
 Valleywood  
 (913) 537-6330

**TESTIMONY OF  
JAMES KEATING, VICE-PRESIDENT  
KANSAS STATE ASSOCIATION OF FIRE CHIEFS  
SENATE BILL #553  
FEBRUARY 13, 1996**

The Kansas State Association of Fire Chiefs appreciates this opportunity to testify on behalf of Senate Bill #553, the proposed amendment to K.S.A. 1995 SUPP44-508 as used in the Workman's Compensation Act.

Our Association applauds the concern and efforts of those who have proposed this important amendment to the Fire Service of Kansas. This one sentence addition to the Act is of grave importance to the continued efficiency and existence of the 662 Volunteer Fire Departments of this State, consisting of 14,000 fire fighters.

In order to improve efficiency in delivery of services, many Volunteer Fire Departments have supplied their members with complete protective gear. When those members are alerted to respond to a call, the member then proceeds directly to the location of the call should it be closer, in lieu of the necessity to respond to the station to simply check in to be considered legally on duty and then respond on to the call.

A Volunteer Fire Fighter who leaves his or her place of residence or employment to save the lives and property of others certainly should deserve the complete coverage offered by the Kansas Workman's Compensation Act during the entire performance of their duties.

The Kansas State Association of Fire Chiefs supports this amendment and urges this Senate Committee's expedient passage of Senate Bill #553.

Our Association respectfully asks the Committee to consider striking the word (fire) from the added sentence. The amended sentence would then read: (An employee shall not be construed as being on the way to assume the duties of employment, if the employee is a volunteer fire fighter responding to a ~~fire~~ alarm.) We request this change due to the varied tasks that volunteer fire fighters are currently called on to perform, such as medical first response, rescue and hazardous material incident mediation.

*Senate Commerce Committee  
February 13, 1996*

*Attachment 4*



Kathleen Sebelius  
Commissioner of Insurance  
**Kansas Insurance Department**

**MEMORANDUM**

To: Senate Commerce Committee

From: Tom Wilder, Director of  
Government and Public Affairs

Re: S.B. 649 (Workers' Compensation)

Date: February 13, 1996

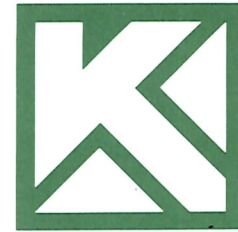
The Kansas Department of Insurance supports Section 11 of Senate Bill 649 which relieves the "second injury fund" of any liability unless the administrative law judge has determined that liability within two years of the last hearing held in the case. This amendment to K.S.A. 44-566a would allow the Insurance Department to request the dismissal of over 500 pending cases where no activity has taken place for a number of years. Currently, there is no mechanism in the law to dismiss fund cases for lack of prosecution.

The Insurance Department asks the Committee to favorably approve this Section of the bill. The Department does not take a position with regard to any other provisions in S.B. 649.

*Senate Commerce Committee  
February 13, 1996*

# LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry



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

SB 649

February 13, 1996

## 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:

My name is Terry Leatherman. I am the Executive Director of the Kansas Industrial Council, a division of the Kansas Chamber of Commerce and Industry. It is also my privilege to serve on the Kansas Workers Compensation Advisory Council, which recommended many of the initiatives in SB 649.

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 46% of KCCI's members having less than 25 employees, and 77% 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.

I plan to spend a majority of my time before you today reviewing some of the specific provisions in SB 649. I will conclude by highlighting some other workers compensation reform concepts which have not been proposed, but the Kansas Chamber feels merits consideration.

*Senate Commerce Committee  
February 13, 1996  
Attachment to show 6-6*



**BENEFIT REVIEW CONFERENCES** - Beginning on page 10, all references to the current B

Review Conference process is stricken. The current process is then replaced with a new mediation system on page 26 of the bill.

Benefit Review was conceived in 1993 as a system to mediate, rather than litigate, workers compensation cases. It has not worked. There have been two major reasons for its failure. First, Benefit Review Conferences have been held very early in the process, before the issues in a case have fully developed. Second, the mandatory aspect of Benefit Review seems to violate a principle of mediation in that you can't resolve issues between parties who are being forced to participate. These problems are addressed by making the mediation system voluntary and permitting either party to request mediation at any point in the process of their claim. Hopefully, these changes will make mediation an alternate road which many workers compensation cases will travel, rather than today's system where Benefit Review is nothing more than a speed bump towards litigation.

Other problems in the process which SB 649 attempts to resolve is mandating attendance by parties with authority to resolve a case and to have the mediation sessions held in person, rather than by teleconference.

**AMERICAN MEDICAL ASSOCIATION GUIDES** - On pages 14 and 15 of the bill, references to the American Medical Association Guidelines for the Evaluation of Physical Impairment are stricken. This reversal of using the AMA Guides and return to using "competent medical evidence" as the standard was recommended by the Workers Compensation Advisory Council. However, KCCI would urge the Committee to reject this reform and instead amend this provision to employ the Fourth Edition of the AMA Guides in Kansas.

The major complaint with the AMA Guides has been the qualifications of contrasting health care evaluators bears little weight when both are required to use the Guides. However, KCCI contends that abandoning the Guides will do little to reverse the decisions rendered by

Administrative Law Judges on these matters, and will return Kansas to having no standard to determine the degree of an employee's workers compensation injury.

**INDEPENDENT MEDICAL EXAMINERS** - On page 15, beginning on line 12, the use of independent medical examiners is changed to become optional for an Administrative Law Judge. In addition, an IME could not be assigned unless both sides of a workers compensation case have demonstrated disagreement over an impairment rating. KCCI supports these changes to address operational problems that have arisen since the 1993 introduction of IMEs into the process. However, it should be made clear that this issue was discussed, but not approved, by the Workers Compensation Advisory Council.

**BENEFIT OVERPAYMENT** - Page 17, beginning on line 3. As with IMEs, the benefit overpayment issue was discussed, but not approved by the Workers Compensation Advisory Council. KCCI does support this change to credit employers for benefit overpayments by reducing future awards, rather than requiring employers to seek reimbursement from the Workers Compensation Fund.

**LUMP SUM SETTLEMENTS** - On page 17, beginning on line 22, is compromise language developed by the Workers Compensation Advisory Council. KCCI has consistently maintained that lump sum settlement prohibitions were unnecessary. However, the Kansas Chamber does support the SB 649 proposal which addresses the problem by reducing the prohibition to nine months and eliminates the prohibition in cases where the employee changes employers.

Beginning on line 24, this reform includes the following language, "Such prohibition against lump sum settlements shall not apply to an employee who has returned to work at a comparable wage." My files do not indicate this language was developed by the Council, and it appears contrary to our intent. Absent an explanation otherwise, KCCI would suggest this line be stricken.

**WORKERS COMPENSATION BOARD PRELIMINARY APPEALS** - On page 22 of the bill is an administrative reform permitting one Workers Compensation Board member to hear and decide preliminary hearing appeals. Concern over the backlog of cases before the Board prompted

Advisory Council support of this attempt to streamline the appeal process. However, further Council language directing the Board to consider preliminary appeals on a rotation basis has not been, but should be, included.

**ADMINISTRATIVE LAW JUDGE SELECTION PROCESS** - SB 649 does not address the idea of adopting a selection process similar to the Workers Compensation Board for Administrative Law Judges. However, the Advisory Council did vote to support such a change at its February 9 meeting and KCCI would urge language developed by the Council to be included in this bill.

Beginning last summer, KCCI member committees have been reviewing the Kansas workers compensation system in an attempt to identify ways to further improve the process. The ideas the Kansas Chamber developed were taken to the Workers Compensation Advisory Council for consideration. Many of our proposals have been included in SB 649 and several others were not. Those reform items which are not in SB 649 are summarized on the final page of my testimony. Rather than review them today, KCCI would respectfully request the opportunity to explain their merits before the Subcommittee that has been announced to review workers compensation legislation.

Thank you for this opportunity to comment on SB 649. I would be happy to attempt to answer any questions.

## KCCI WORKERS COMPENSATION ISSUES FOR 1996

### 1. WORK DISABILITY DEFINITION

*Problem:* Problems exist regarding both prongs of the current test to determine work disability compensation. The test comparing job skill loss over a 15 year period is difficult to determine and measure, has little relevance and appears to conflict with the Americans With Disabilities Act. The prong comparing pre and post injury wage loss encourages an employee to avoid work to maximize an award.

*Solution:* Delete the current definition of work disability from the law, and replace it with a system of supplemental compensation benefits for workers who cannot return to employment paying 90% of their pre injury wage. A supplemental compensation proposal must: establish functional impairment as the base for compensation; determine supplemental compensation through measurable standards; limit the weeks of supplemental compensation which could be awarded; and, not reward an employee for avoiding work they are capable of performing.

### 2. PREEXISTING CONDITIONS

*Problem:* Current law appears to exclude considering an employee's preexisting conditions in cases involving work disability.

*Solution:* In cases where a preexisting condition contributed to an employees claim for work disability, amend the law to make clear an employer is only responsible for compensation for the aggravation of the condition.

### 3. REVIEW AND MODIFICATION

*Problem:* Due to the 1993 reform of the law leading to quicker payout of a workers compensation claims, review and modification requests are being considered when a total award has been paid.

*Solution:* Change the time period for a request for review and modification to the number of weeks of compensation payments awarded in a case.

### 4. REVIEW AND MODIFICATION ATTORNEY FEES

*Problem:* Current law requires attorney fees for a claimant to be paid by an employer in review and modification cases, regardless of the merits of the review request.

*Solution:* Amend the law to require an employee to pay their own legal fees in review and modification cases where a request for additional compensation or health care is denied.

## 5. LIFETIME LIMITS

*Problem:* In cases where an employee has multiple compensable injuries, the cumulative award for an employee can exceed the law's maximum limitation for a permanent total injury.

*Solution:* Amend the law to make clear that the maximum compensation an employee can receive during their lifetime cannot exceed the maximum compensation for a permanent total disability.

## 6. WILLFUL INJURY

*Problem:* The current law requirement for employers to demonstrate an employee "willfully" failed to use protection against injury establishes an unreasonably high burden in cases where an employer attempts to protect workers, yet an avoidable injury occurs.

*Solution:* Replace the word "willful" with "intentional" in the law, thereby lessening the employer's burden, yet maintaining the no fault nature of workers compensation.

## 7. WAGE CALCULATIONS FOR BENEFITS

*Problem:* When calculating an employee's wage for compensation benefits in cases where the employee has not returned to work, regardless of the reason for separation, the employee's fringe benefits are included in the calculations.

*Solution:* Eliminate the inclusion of fringe benefits in the wage calculation for workers compensation.

## 8. DIRECTING MEDICAL IN DISPUTED CASES

*Problem:* In Kansas, employers have the right to direct medical care in workers compensation cases. However, in cases where an employer disputes responsibility for a claim, the employee has been granted the opportunity to select their health care provider.

*Solution:* Amend the law to permit employers to assign health care providers in disputed workers compensation cases, without admitting responsibility for the claim.

## 9. WRITTEN NOTICE

*Problem:* An extremely large window exists in today's workers compensation system for the filing of a workers compensation claim.

*Solution:* Amend the law to require an application for a workers compensation hearing be on file within two years of the date of accident.

**SENATE BILL 649**  
**LEGISLATIVE TESTIMONY**

PRESENTED BY TIMOTHY J. KING  
KANSAS TRIAL LAWYERS' ASSOCIATION  
FEBRUARY 13, 1995

The Kansas Trial Lawyers' Association represents the interest of thousands of middle class Kansans, consumers of a variety of legal services including representation in Workers' Compensation cases. Traditionally, KTLA has encouraged legislation to further the interests of these consumers who in turn represent a significant portion of the electorate.

Item by item, the analysis of our organization as to some of the various proposals in the bill is as follow:

1. **Court Ordered Functional Ratings**

The current status requires an ALJ to get an opinion from a doctor not retained by either party. This slows down the progress of the case and costs the respondent money. KTLA supports this amendment in that it makes this independent medical exam discretionary with the ALJ.

2. **Elimination of AMA Guidelines**

The Third Edition (Revised) of the Guides to the Evaluation of Permanent Impairment is inherently unreliable and invalid. Furthermore, this text is out of print and unavailable to the public. KTLA supports its elimination.

3. **Elimination of All Benefit Review Conferences**

Benefit Review Conferences have proven to be entirely ineffective in resolving issues in a claim.

*Senate Commerce Committee  
February 13, 1996  
Attachment 7 thru 7-2*

Additionally, they are costly and greatly slow down the process. KTLA heartily endorses the abolition of Benefit Review Conferences.

4. **Shortening and/or Elimination of Prohibition Against Lump Sum Settlements**

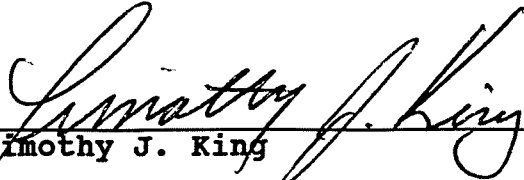
In the event the parties to a litigated compensation claim are able to reach an agreement to its settlement, it only makes sense that they should be able to carry out this agreement within a reasonable period time. Shortening the prohibition against lump sum settlements to nine (9) months accomplishes this goal while still protecting workers.

5. **Penalty For Failure to Secure Compensation Insurance**

It is simply good government to do all possible to ensure the law regarding securing compensation insurance is followed. Furthermore, this puts all employers on a level playing field.

6. **Review of Preliminary Hearing Awards By a Single Member of the Board of Appeals**

KTLA heartily supports this amendment. Anything that can be done to streamline and lessen the work load of the Board is encouraged. This will ensure a prompter resolution of appeals arising out of preliminary hearing awards.

  
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Timothy J. King