Approved: 4/30/97
Date

MINUTES OF THE HOUSE COMMITTEE ON BUSINESS, COMMERCE & LABOR.

The meeting was called to order by Chairman Al Lane at 9:05 a.m. on March 21, 1997 in Room 526-S of the Capitol.

All members were present except: All members were present

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

Conferees appearing before the committee: Kirk Lowry, KTLA
Terry Humphrey, KTLA
Jolene Grabill, KTLA
Wayne Maichel, Kansas AFL/CIO
Ron Smith, KBA
Jerry D. Wisdom, claimant

Others attending: See attached list

Rep. Grant made a motion to approve the minutes of February 24 and 25. It was seconded by Rep. Geringer. The motion passed and the minutes were approved as written.

Action on: **SB 190 - Real estate appraisers' licenses or certificates.**
Rep. Pauls made a motion to pass out the bill favorably and place it on the Consent Calendar. It was seconded by Rep. Flora. The motion carried.

Action on: **HB 2509 - Board of technical professions, changing the board name, fee limits, reciprocity licenses, regulation of certain practices.**
Rep. Geringer made a motion to pass out the bill favorably. It was seconded by Rep. Crow. Rep. Pauls made a substitute motion to amend the bill by adding "and other technical professions" after the words "and landscape architects". It was seconded by Rep. Geringer. The motion carried. Rep. Geringer made a motion to pass out the bill favorably as amended. It was seconded by Rep. Crow. The motion carried.

Action on: **HB 2501 - am amended by the Business, Commerce and Labor Committee**
Rep. Beggs made a motion to pass out the bill as amended by the committee. It was seconded by Rep. Mason.

Rep. Flora made a substitute motion to go back to the original bill , extend the date to July, 1998, grandfather in all county appraisers, and let appraisers cross county lines to work. It was seconded by Rep. Grant. On a division of vote, it failed 6-8.

Going back to the original motion to pass out the bill as amended by the Business, Commerce and Labor Committee, the motion carried on a called division of vote.

Written testimony was passed out to the committee from John Proffitt, Allegiant Real Estate Appraisal Services, who was one of the opponents of the bill. (see Attachment 1)

Continued hearing on: **SB 346 - Supplemental workers compensation advisory council recommendations.**

Phil Harness, Director of the Division of Workers Compensation, prepared testimony that answered questions he was asked on March 20, 1997. (see Attachment 2)

Kirk Lowry, Kansas Trial Lawyers Association, returned to answer questions from the committee.

Chairman Lane asked Mr. Lowry why the attorney fees were amended into **SB 346** when all other provisions of the bill were voted on unanimously by the Workers Compensation Advisory Council. The question was answered by Terry Humphrey. She stated that the proposal was made by Sen. Harris, and Sen. Salisbury and

other Commerce Committee members amended it into the bill. He also asked if any thought was given to introduce it as a separate bill.

Jolene Grabill, Kansas Trial Lawyers Association, read the written testimony from Mary Darlene Barry, a workers comp claimant. (see Attachment 3)

Wayne Maichel, Kansas AFL/CIO, appeared before the committee as a supporter of the bill. They do not believe that claimants going to attorneys is a cost driver, but it is getting injured workers what they rightly deserve by the law.

Ron Smith, Kansas Bar Association (KBA), appeared before the committee as a supporter of the bill. The KBA supports the attorney fee provision in the bill as it is written. He offered an alternative, that the legislature get out of the business of regulating attorney's fees by statute. Included with his testimony is the MRPC 1.5 regulation. (see Attachment 4) He finished his testimony by answering questions from the committee.

Jerry D. Wisdom, claimant, appeared before the committee as a proponent of the bill. He is a firefighter who was injured on the job. He was offered a settlement which he felt was inadequate but was unable to hire an attorney to help him get a larger settlement. (see Attachment 5) He ended his appearance by answering questions.

The hearing on **SB 346** will be continued on Monday.

Chairman Lane adjourned the meeting at 10:02 a.m.

The next meeting is scheduled for March 24, 1997.

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: March 21, 1997

NAME	REPRESENTING
PATRICK NICHOLS	KTLA
Terry Leatherman	KCCI
Byd Corbin	KCCI
Roy T. Ketman?	DofA - DPS
David A. Shufelt	Dept Human Resources - Div Wrk Comp
Phil Harness	= = =
Elwaine F Pomeroy	KCA + KCAA
Jeffy D Wisdom	SELF
Kirk W Lowry	KTLA
Brenda Cook	J Small
Susan Baker	Heim + Weis
Janet Stubbs	KBIA
Steve Montgomery	MCI
JoLynn Copp	Kansas Insurance Department
Richard L Harris	KDHR - WORK Comp
Betty Rose	Bd of Technical Professions
Nancy Lindberg	Atty Gen
Jason Gelb	AG
Gail Bright	AG

HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE
GUEST LIST

DATE: March 21, 1991

NAME	REPRESENTING
Steve Zarnke	A.G.
Ron Smith	KS Bar Assoc
FRED LUCKY	KANSAS HOSPITAL ASSN
Mike Reecht	AT&T
Jane Schmeidler	KCCIA
Greg Brown	MID-Am Lumbermen
Rose Flores	Rep Flores wife
MARK BECK	KDOR
Judy Moler	KAC
Bob Storey	DMA
Brad Smoot	AIA
JEFF RUSSELL	SPRINT
Thomas Humphrey	KTLA
Glenda Greenwell	KTLA
John M Ostrowski	AFL-CIO
WAYNE MICHELS	AFL-CIO

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Real Estate Appraisal and Counseling Services
John W. Proffitt, Owner Kansas General Certification No. G-1186
1002 West Street Emporia, Kansas 66801 (316) 342-0840

March 11, 1997

House Committee on Commerce and Labor
c/o Representative Al Lane, Chairman
Room 115-S
State Capitol Building
Topeka, Kansas 66612

RE: House Bill 2501

Dear Representative Lane and Committee Members

I was in Topeka yesterday to present testimony before your committee on HB2501, which is the amended version of SB142. Since time ran short, I was unable to present testimony, and am unable to return today. Therefore, I am sending you copies of my letters to the Taxation Committee which originally held hearings on this bill last week. I hope that it is not too late to present this written argument opposing the bill. Frankly I wonder about having moved it out of the Taxation Committee in the first place. It is an amendment of a tax statute, why was it not left in the taxation committee?

I truly believe that counties need some relief from the current legislation, but this bill is not the way to accomplish it. Just extend the mandatory certification date to July 1999, and allow currently grandfathered appraisers to move from their current home county until that date. After July 1999, require all county appraisers to be certified with a general certification. Salary should not be an issue, competency and professionalism among county appraisers should. Don't allow the salary complaints to cloud what the real issue is.

If the RMA portion is left in the bill, leave it under the KREAB where it belongs. PVD has not demonstrated its ability to enforce action against appraisers who do not demonstrate competence. Further, there are no defined guidelines in the bill. The legislature, if this bill is passed, is giving PVD carte blanche to come up with some unspecified regulations. And those regulations could be very different than those used by KREAB.

Again, I believe that only one enforcement body should be designated in order to ensure uniform standards and enforcement procedures, and I believe that that body should be the KREAB. The rest of my comments are contained in the previous letters to the Taxation Committee. I hope you will take the time to read them.

Sincerely yours:

John Proffitt

John W. Proffitt
Kansas Certified General Real Property Appraiser No. G-1186

Business, Commerce
& Labor Committee
3/21/97
Attachment 1

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March 11, 1997

House Committee on Taxation
State Capitol Building
Topeka, Kansas 66612

RE: Senate Bill 142

Dear Committee Members

I have been watching with interest the status of S.B.142. I feel that I must write and express my concern over the bill. I feel that the bill has been weakened from the original bill, and from the legislature's intent when they originally required certification by county appraisers. I personally believe this bill moves us backward in terms of professionalism among county appraisers.

I see a number of concerns about the ability of the bill to adequately accomplish what is needed in terms of professionalism among County Appraisers, or protection of County Appraisers currently certified by KREAB from those that would be judged under standards as yet to be determined by the Department of Revenue. I will attempt to enumerate the issues that I see with the current language. I apologize for the length of the letter, however, the issues involved are complex.

Before I start, I should say that I am currently employed as the Commercial Real Estate Appraiser for Lyon County in Emporia, Kansas. The position I take on this bill is not to be construed as the position of Lyon County or the Commissioners of Lyon County, but my own personal opinion. I am quite sure, that the position is contrary to what the KAC is taking, and will be contrary to what many, if not most, County Appraisers will be taking. However, I believe the issue is worthy of an antagonistic view.

The predominant issues I see in the bill are as follows:
1. Professionalism among the County Appraisers
2. Ability of the Department of Revenue to adequately perform an oversight function
3. Equity of treatment among County Appraisers
4. Competency issues regarding appraisals
5. County Budgetary Issues

I believe it was the intent of the legislature when the original certification bill was passed to upgrade the professionalism among the county appraisers, and to provide minimum standards for their level of competency and performance. This is a noble public policy that will ultimately best serve the interest of the citizens of the state who own property, and the counties by having competent appraisers setting values on property. I also understand that there have been problems in recent times for the county appraisers in getting certified for their work experience through the KREAB. With the current legislation, the time frame will be unable to be met for most current

appraisers in counties, and the pool of qualified candidates for those counties that currently have, or anticipate vacancies is almost certainly inadequate.

So there is a legitimate need for some form of bill which will provide relief to the counties for the current certification requirement. However, I do not believe this bill is the best bill to resolve that problem. Simply by extending the time period before mandatory certification occurs for another two years to July 1, 1999 will accomplish the same thing. But we still need to address the best way to provide for competency among the county appraisers, and to ensure that the level of professionalism is raised and maintained.

It is my personal belief that there needs to be oversight for professional appraisal practices among all appraisers including county appraisers. USPAP specifically addresses the issues of the mass appraisal segment in its standards. If I as an appraiser understand and employ the appropriate methods of appraisal practice under those guidelines, I have nothing to fear from complaints filed against me. And I believe the enforcement standards need to be uniformly applied to all appraisers including county appraisers. Frankly, the only appraisers who need to fear review of their work are the ones who aren't performing work that meets the existing standards, or aren't willing to become qualified within the time period specified to meet those standards.

Frankly, I don't believe that the Department of Revenue is where oversight responsibility compliance of appraisal standards should reside. I think their role should appropriately be limited to setting the qualifications for County Appraisers eligibility list and administration of the eligibility examination. I have not seen them willing to take the harder steps of enforcement against county appraisers who have not been able or willing to meet PVD guidelines, let alone the ability to ensure compliance with USPAP standards for professional appraisal practices.

The potential would also exist for enforcement standards that would be unequal between the two organizations. I am a certified appraiser, and do not intend to give up my certification. The standards that KREAB judges complaints under could be significantly more stringent than those that non-certified RMA appraisers could be judged by. This duality would be completely unacceptable. There should be only one set of standards, and they should be administered uniformly across the board for all appraisers.

County appraisers do not deal solely with real estate values, and the Department of Revenue through the Property Valuation Department can best serve the interest of the state and the county appraisers by providing the tools and mechanisms to assist in the overall responsibilities that appraisers have in this state. There are a number of property types that haven't had their valuation guidelines updated since 1988 or 1989, grain elevators and feedlots would be examples. It would be better for PVD to concentrate on providing guidance for these types of properties, rather than getting involved in the oversight of appraisal regulations under USPAP.

It would therefore be my recommendation to either strike the RMA portion of the bill, or restore administration of mass appraisers, and establishment of the promulgation of rules and regulations to the KREAB which is the more appropriate place for such regulation. I think the strongest reason for keeping regulatory oversight with that body is their obvious lack of conflict of interest that is not readily apparent if the oversight is given to the Department of Revenue and PVD.

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At the same time, I must confess, I have not seen recent past members of the KREAB being willing to give credit to ad valorem appraisers for the work that they do in performing their mass appraisal function. This has severely limited the mass appraisers ability to obtain the general certification that they are required to have to perform appraisals on any properties other than residential. I see some members of the current board recognizing these past errors, and a willingness to attempt to resolve how best to certify the appraisal experience of county appraisers to provide for certification and still maintain the high standards set by USPAP.

USPAP has specific standards written for the mass appraisal segment, and there must be a willingness by the KREAB to recognize the specific limitations and methods utilized in the mass appraisal field. Credit must be given in order for county appraisers to obtain the appropriate certification level to appraise the properties in their counties. I believe I have seen a willingness on the part of some members of the KREAB to address and resolve those outstanding issues. If in the upcoming year, there has been no indication by the KREAB that they can or will establish reasonable guidelines under which mass appraisers can have their work certified, the issue could then be revisited by the legislature.

In light of past problems with recognition of the ad valorem segment of appraisers, perhaps there should be permanent representation on the Board from the mass appraisal field. I think this would aid in providing a knowledge base to the Board to those issued related to mass appraisal that they will be dealing with in establishing those guidelines initially, as well as dealing with questions and any complaints filed with the Board over time.

My personal belief is that those county appraisers who currently do perform their jobs well will be able to certify their work, and those that don't currently perform well will have significant trouble in certifying their work. It will be incumbent on the individual county commissions to monitor the status of their county appraiser through the certification process to see whether or not their appraiser can actually then achieve the certification by the time the new requirement would be established.

One problem with the KREAB/County Appraiser certification statute at the present time is that the current law allows for the county appraisers to have either a residential license or a general certificate from the KREAB to be appointed as a county appraiser, however, KREAB regulations further limit licensed appraisers to the appraisal of residential properties. There is one county appraiser who has had a letter of complaint filed with KREAB because he has rendered value on commercial properties while only licensed for residential appraisals with KREAB. I do not know the specifics of the case, however, there would exist the possibility that a county appraiser could be competent by training and education under USPAP standards to perform commercial appraisals, but would be specifically prohibited by KREAB regulations from appraising commercial and complex properties by virtue of his license limitation.

Under the proposed legislation, by offering county appraisers the RES and CAE designation under IAAO as an alternate method of certification, there would exist a dual standard. The RES designation would be similar to the KREAB residential license in terms of education and experience requirements, while the CAE designation would be comparable to the general certification requirement The competency provision under USPAP would still require sufficient training, education, and experience for an appraiser to render a value on a property, but my concern would be that there would be a number of appraisers who might take a shorter time track

to get an RES designation who would not be qualified for commercial property valuation, who would be rendering value on those property types.

I personally believe that from a competency standpoint, county appraisers should have a general certification or its equivalent. I believe that the appraisal of commercial real estate is sufficiently complex that it demands special training, education and experience. Further the competency provision in USPAP demands that appraisers limit themselves to the appraisal of properties for which they have adequately prepared themselves by education and training. I can't think of a county that doesn't have commercial real estate or at least one or two complex properties that would require a general certified appraiser to perform. As a general certified appraiser I readily admit that I am not competent to perform an appraisal on every property in this county. For a level playing field between the two oversight organizations, and to ensure competency among the county appraisers for all properties in all counties, limiting the designation option to the CAE under the alternate designation provision would be most appropriate.

I know that budgetary issues will be paramount for counties, both in salary considerations for appraisers who have gained the education, experience and training to achieve these designations, and for the possibility of having special purpose properties appraised outside the traditional KSCAMA system. This will be especially true for counties with small numbers of properties. However, that should not mitigate our responsibilities statutorily to provide the citizens of this state with accurate appraisals of their properties. That will only be accomplished by ensuring that the appraisers rendering those opinions of value are qualified to do so. In the long run, this should provide for more equitable treatment of all property across the state, and by virtue of the professionalism and adherence to sound appraisal practice and methods, in the long run reduce appeals in the counties.

It is my hope that all appraisers, whether they are fee appraisers or county appraisers, would aspire to be professional in their work. I have been an appraiser for 10 years and have been involved in all levels from Savings and Loans and regulatory agencies, fee appraisals, and now ad valorem appraisals. I personally find the ad valorem field to be the most challenging in terms of rendering good values. I think there has been a feeling among other appraisal professionals and organizations in the past that ad valorem appraisers are really not professionals. Unfortunately, I think there have been some in our ranks who have contributed to that opinion through attitudes and work product, as there have been some in the fee world who have put black marks on their organizations in the same manner. It is time for us to end these differences, and establish mutual respect for the differing legitimate appraisal segments through our level of training and professional conduct in our practices.

I see this as an opportunity to increase our professionalism within our ranks, and to establish our reputation as professionals within the larger body of the professional appraisal community. I believe that the suggestions I have made will both provide a window of opportunity for those in the ad valorem appraisal community who want to achieve and maintain a standard of professionalism in the organization to do so, and it will ensure that the most competent appraisers will eventually be the ones selected to fill those rolls in the counties. Those unwilling to move up to the higher standards will be left, but at that point it will have been their choice to not participate.

Thank you for you time in allowing me to express my opinions.

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Sincerely yours:

John W. Proffitt
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March 11, 1997

House Committee on Taxation
c/o Representative Phill Kline
State Capitol Building
Topeka, Kansas 66612

RE: Senate Bill 142

Dear Committee Members

I would first like to thank you for the opportunity to present remarks to you this morning. I would like to offer a final letter for consideration before you vote on the bill.

It was obvious from testimony presented that county appraisers had an opportunity to obtain their certification during the initial years of the KREAB. This failure on the part of the appraisers to obtain that designation, and the county commissioners to monitor their appraisers during those early years, should not necessarily constitute an emergency on the part of the legislature now. However, I am not unresponsive to the plight of the counties at this late date, with no option for the appraisers to obtain certification from the KREAB.

The question before you as legislators, is what can you do that will best serve the interest of the counties, the appraisers, and the citizens of Kansas. It is my opinion that the best thing that could be done with regard to this bill is to simply extend the deadline from July 1, 1997 to July 1, 1999 and retain the balance of the existing legislation regarding certification. The original legislation was a step in the right direction to get the appraisers to become an organization of competent appraisal professionals at a level similar to what is found in the ranks of independent appraisers. The citizens of the state deserve this level of professionalism and competency. Competency at the level of the county appraiser, in my opinion, demands a general real property appraiser certification.

When I was raising my children, I didn't let them not clean their rooms just because they didn't want that responsibility. There are a number of county appraisers who simply don't want to be held to the standards that the KREAB would enforce. And frankly, I haven't seen PVD do such a wonderful job of enforcing their own standards in the various counties. Maybe the committee should have found out how many counties are currently out of compliance, and what PVD is doing about the appraisers in those counties. They are not, and they cannot be unbiased third parties in the enforcement application. Only KREAB can perform that function with impartiality, and I believe the legislators who drafted the current law saw that as a primary consideration.

From my own perspective, there should be only one appraisal standard, USPAP; and only one enforcement body, KREAB, the one that is impartial in its enforcement of those standards. The

potential for duality of standards and enforcement would be a major disservice to all appraisers, and it would be grossly unfair to those held to the highest standards and scrutiny.

Finally, I know that a number of proponents represented that the county appraisers as a group were in favor of the current bill. While they may have been in favor of the original bill which had the RMA being under KREAB, I'm not sure as many are still in favor of the bill with that portion of the bill having been moved under PVD. The fact that four or five county appraisers were willing to appear publicly as opponents to the bill against the position of KAC was telling in my opinion.

As I stated in my letter, I believe that the KREAB is willing to allow more mass appraisal hours for certification, they just want to see the appraisers produce documentation for the work they want to certify, and to ensure themselves that the work meets the requirements set forth under USPAP guidelines. That is both a reasonable and responsible request on their part. I think they will meet us half way, it's up to us to bring them the proof they need to consider the certification.

While I understand the counties position with regard to salary for general certified appraisers, I am also sympathetic with appraisers who have devoted the time and energy to obtain their certifications. In most cases, the amount of time actually spent in the appraisal field preparing for a general certification is well beyond the two year minimum required by KREAB. And if small counties can work together and share an appraiser, that cost can be divided among the counties. My personal opinion is that all positions ought to be market driven.

In your final analysis, I hope that the committee is willing to take the long view, and not focus on the immediate crisis, other than to extend the time limit to 1999. It is in the best interest of the counties, the appraisers, and the citizens of this state for all county appraisers to ultimately achieve a general certification, and that they be governed by an impartial agency. It is my hope that you will not pass the bill in its current form.

John W. Proffitt
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TESTIMONY BEFORE THE HOUSE BUSINESS, COMMERCE AND LABOR COMMITTEE

SENATE BILL NO. 346

RE: WORKERS COMPENSATION ADVISORY COUNCIL DISCUSSION ON ATTORNEY'S FEES; APPEALS TO THE WORKERS COMPENSATION BOARD

BY PHILIP S. HARNESS, DIRECTOR, DIVISION OF WORKERS COMPENSATION

Chairman Lane and Committee Persons:

During the discussion on Senate Bill No. 346 which occurred on Thursday, March 20, 1997, two (2) issues were directed at the Director for a follow-up response:

1. The extent of discussions before the Workers Compensation Advisory Council concerning attorney's fees.

2. Appeals taken to the Workers Compensation Board.

Attempting to answer those two (2) issues in chronological order, I would offer the following excerpts of minutes of the advisory council accompanied by the dates of the meeting for the committee's review:

1. August 21, 1995 - "... The next item discussed was a limited time period to file for review and modification. Management was concerned that there is no termination or closure of a case after payouts have been made. They suggest that the case be administratively closed after payouts. It was stated that since the laws changed in 1993 for payment, review and modification should be updated to reflect those laws. Labor is concerned with this idea because it does not allow for future medical treatment. Under current law an employee has 415 weeks for review and modification of the compensation award; but infinity for future medical treatment. **Another concern with the review and modification procedure is that currently the employer is required to pay claimant's attorney fees even if unsuccessful. Discussion took place on having the claimants pay for their own attorney fees if unsuccessful. A concern was that attorneys would not take such cases for fear of not being paid. No recommendation at this time...".**

2. November 9, 1995 - "...The next issue discussed was review & modification hearings, **especially concerning payment of attorney fees.** Management would like to see the window for review and modification to end when the payment is complete. **They would also like the claimant to pay for their attorney fees if the claimant loses.** Labor is unable to agree to shortening the window at this time. They feel like there are a lot of issues involved and are not prepared to discuss those issues at this time. The issue was tabled until the next meeting...".

Business, Commerce & Labor Committee
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Attachment 2

3. December 8, 1995 - **"...Discussion took place on review and modification and attorney fees. Labor suggested that they would not have a problem with the claimant paying their own attorney fees when they lose their review and modification cases if management would agree to return the attorney fees prior to 1993. Management would like time to consider it..."**.

4. January 17, 1996 - **"...Review and modification hearings and attorney fees was the next item for discussion. Management considered a proposal from labor regarding return of attorney fees to pre-1993 law; labor had considered a proposal from management regarding a claimant paying for his or her own attorney fees for review and modification hearings. The council is not able to recommend this to the legislature at this time..."**.

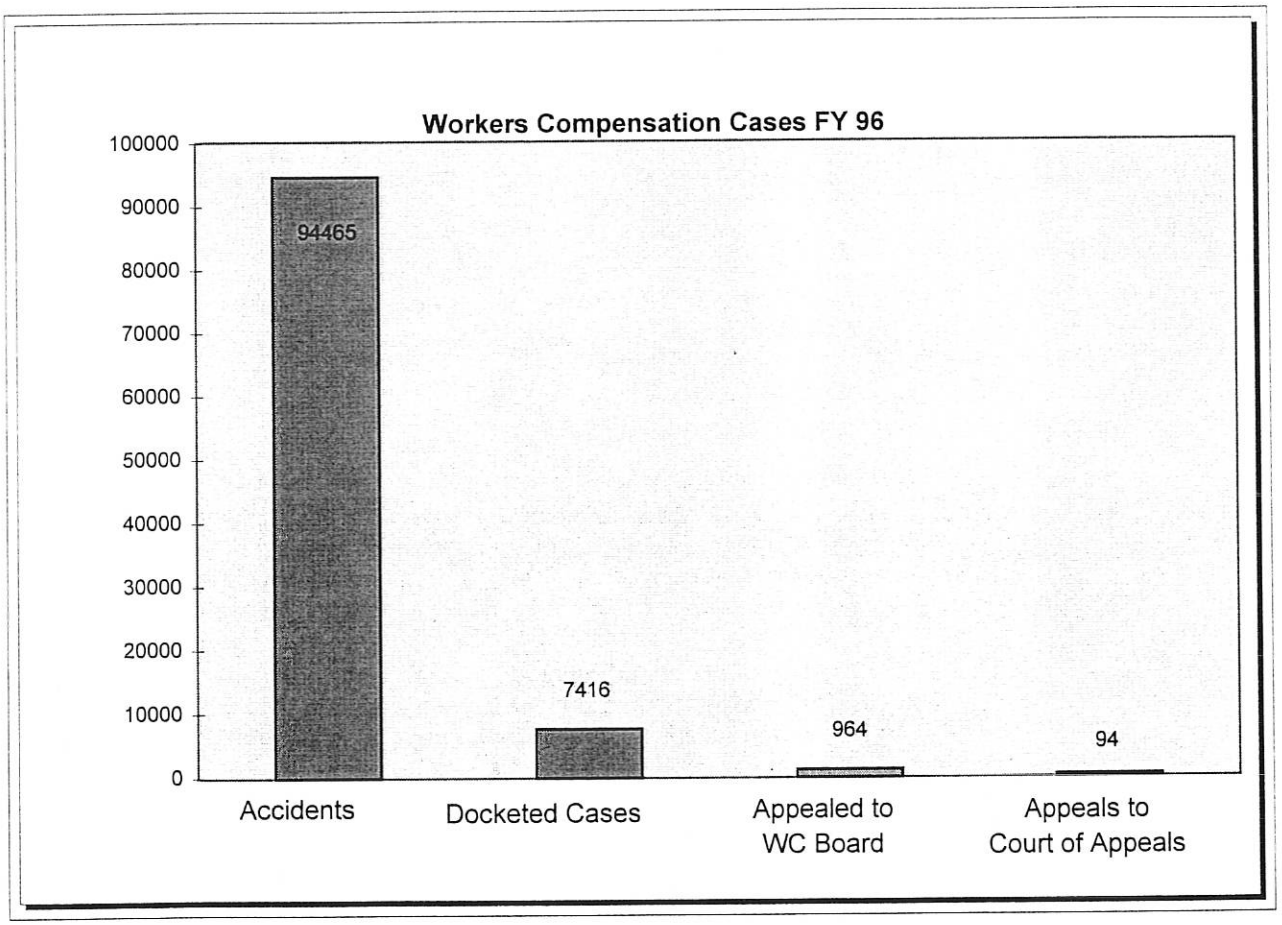
5. February 9, 1996 - "...The next new item pertains to fee arrangements. **A sample contract was given to each council member. The sample purports to be able to exceed the maximum attorney fee contained in the statute based upon a knowing and voluntary waiver by the claimant. The council indicated the attorney fee issue was visited earlier and that no further comments are needed. It was suggested checking prior council minutes to be sure the council's statutory obligation has been met. This waiver/motion for attorney fee has not been acted on by the Division. Industry indicated they do not think any attorney can waive statutory fees. Labor and Industry agreed that no discussion should be held on this as it is an <u>individual</u> case..."**.

As to the number of cases appealed to the board, I would offer the attached tables.

Thank you for your courtesy in receiving this testimony and the Division is, of course, happy to answer any questions regarding it.

WORKERS COMPENSATION CASES
FISCAL YEAR 1996

Number of Accident Reports Filed with the Division of Workers Compensation	94,465
Number of Cases Litigated with the Division of Workers Compensation	7,416
Number of Cases Appealed from Administrative Law Judge to Workers Compensation Board	964
Number of Cases Appealed from Workers Compensation Board to Kansas Court of Appeals	94



Testimony of Mary Darlene Barry.
Shawnee, Kansas
(913) 631-7218

Senate Bill 347
Senate Commerce Committee

My name is Darlene Barry. I support the change in attorney fees introduced in Senate Bill 347. Why? I currently have an appeal of my own case on file with Worker's Compensation. I have no lawyer. I tried and tried, and couldn't find one. I represent myself and have heard nothing about the case from the Division in months.

My case was turned down by four lawyers all of whom told me that the Kansas law controlled the way they could charge me for their legal services under the Workers Compensation Act. The last lawyer told me that because I had a settlement offer from the Insurance Company, he couldn't earn enough money from my case to justify his time and to cover the costs of the case like the cost of medical records. He also told me I truly did need a lawyer, because It is important to me to keep the possibility of future medical benefits alive and that is not part of the settlement offer from the Insurance Company.

In fact, it is so important to me to keep my claim open for future medical benefits that, like I said, I have filed a claim on my own. However, it is very scary and frustrating to represent myself against the whole Workers Compensation System and the Insurance Company. I don't know all the ins and outs and legal jargon. Without a lawyer, there's no one to explain my rights. This worries me.

As I said, my case is not resolved, and therefore I am not comfortable talking about the specifics of it. I will simply say that after 15 years of employment with the Shawnee Journal, and without missing a day, I had an injury covered under the Workers Compensation Act. To make it short, the nerves in both my arms popped one day because I had used them too hard over the years on the paper's computer typographical machine. As one of the doctors said, it was just like stretching a rubber band over and over and over again. After so many times, the rubber band snaps in two. That is what the nerves in my arms did. They snapped in two. I can no longer use my fingers, hands, or arms for anything but the simplest of tasks. I can no longer drive any significant distance, just to the grocery store and back. My arms are in constant pain and I have a lot of trouble with burning in my arms.

Business, Commerce
& Labor Committee
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Attachment 3

Since I am in my 50's, I am very worried that this injury will get worse over time. That's why I must be allowed to have compensation for medical benefits in the future.

I was sent to doctor after doctor after doctor, and none of them told me what to do to get relief.

Maybe, if I could have found representation, they would have insisted on some diagnostic testing early in the process.

Maybe, if I could have found representation, this case would not be dragging on so long, I would have gotten the cost of future medical benefits handled earlier and the case could have been resolved quicker, saving the taxpayers money in the administration of my claim through the Workers Compensation System.

If I could have found representation, maybe I wouldn't be so angry now that a state law has prevented me from contracting with the lawyer of my choice and from getting fairly treated for my injury.

You can't change this experience for me, but you can change it for other people who, like me, get injured on the job in the future. I hope you remember my story when you decide what to do on this bill.

Please pass SB 347.

Mary Darlene Barry

Mary Darlene Barry

KANSAS BAR ASSOCIATION

1200 SW Harrison St.
P.O. Box 1037
Topeka, Kansas 66601-1037
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Memorandum

TO: Members,
House Business, Labor & Commerce Committee

FROM: Ron Smith, General Counsel

SUBJ: workers compensation attorney fee limits

DATE: March 19, 1997

The KBA supports the new percentage regulatory system for workers compensation attorney fees in SB 346 as amended by the Senate. It is an improvement over the 1993 law. However, we would suggest you go to the next logical step – remove statutory regulation of fees altogether.

The Courts – and certainly experienced ALJs – can insure that attorney fees to workers compensation claimants are reasonable. They review fee agreements on a case by case basis now. They make decisions every day whether the results to the claimant merit the fee charged. The current judicial system regulating fees allows you to return regulation of attorneys fees to the judicial branch – and ALJs.

Government has always taken a paternalistic view of how to "help" people. It is the nature of government assistance. Businesses and insurance companies, of course, have no statutory limit on how to hire an attorney. They can hire them by the hour, a fixed fee, a contingent fee where appropriate, or hire the attorney as an "in-house" employee. Government does not regulate how businesses hire attorneys, nor should it.

Claimants in comp cases do not have those options, generally because they do not have resources to fall back on, or borrow, to pay an attorney by the hour or a fixed fee. Limiting the fee statutorily will not improve that situation. The question then becomes, does *more* government regulation of the fee contract help or hurt the situation?

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Even with the new amendments for attorneys fees there will still be a few small claims that do not attract lawyers. The free market system would suggest claimants have the maximum flexibility to structure a fee with a lawyer. That means no contingent fee limit at all. *Even without a statutory rate, I doubt that any court or any ALJ would allow the fee – even an unregulated fee – to exceed 25%.* But to give the client the maximum flexibility to hire an attorney, you could lift the statutory fee limit entirely.

The false assumption of statutory regulation is that contingent fee limits will protect clients from overreaching attorneys. If attorneys take advantage of their clients over fees, they jeopardize their license to practice law. I do not know any attorneys who want to do that. Mark Anderson, the Disciplinary Administrator, tells me he is routinely involved in fee disputes in a variety of areas, and that the judicial system is good about clearing up such situations without clients having to sue their lawyers.

Further, the KBA is implementing a statewide fee dispute committee. It is intended to handle all sorts of fee disputes, including comp claims if needed (although this is typically done through the ALJ). The Johnson, Wyandotte and Sedgwick County bar associations already have such committees for disputes arising in their counties. In a fee contract environment unregulated by statute, these committees can be used to mediate fee contract disputes between clients and their lawyers, and include mediation of workers comp claims – assuming the ALJ does not do so. There is no cost for the service and it should be operational this summer.

Lawyer ethics rules 1.5 require:

- contingent fees agreements to be in writing;
- district judges (or ALJs) to review the fee contracts for reasonableness without the need of clients filing lawsuits against lawyers (or vice versa);
- preparation of a written post-settlement accounting setting forth the fee division;

The current system of judicial regulation of the bar is sufficient to regulate the few cases where overreaching might occur. Letting the workers' comp fee contacts fall under MRPC 1.5 regulation allows the legislature to return contracts for comp claims to judicial regulation of fees.

Thank you.

MRPC 1.5
With Judicial Comment

(a) A lawyer's fee shall be reasonable. The factors to be considered in determining the reasonableness of a fee include the following:

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

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

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

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

(b) When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation.

(c) A lawyer's fee shall be reasonable but a court determination that a fee is not reasonable shall not be presumptive evidence of a violation that requires discipline of the attorney.

(d) A fee may be contingent on the outcome of the matter for which the service is rendered, except in a matter in which a contingent fee is prohibited by paragraph (f) or other law. A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, and the litigation and other expenses to be deducted from the recovery. All such expenses shall be deducted before the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the client's share and amount and the method of its determination. The statement shall advise the client of the right to have the fee reviewed as provided in subsection (e).

(e) Upon application by the client, all fee contracts shall be subject to review and approval by the appropriate court having jurisdiction of the matter and the court shall have the authority to determine whether the contract is reasonable. If the court finds the contract is not reasonable, it shall set and allow a reasonable fee.

(f) A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony, support, or property settlement; or

(2) a contingent fee for representing a defendant in a criminal case; or

(3) a contingent fee in any other matter in which such a fee is precluded by statute.

(g) A division of fee between lawyers who are not in the same firm may be made if the client is advised of and does not object to the participation of all the lawyers involved, and the total fee is reasonable.

(h) This rule does not prohibit payments to former partners or associates or their estates pursuant to a separation or retirement agreement.

Comment

Rule 1.5 as adopted contains 1.5(a) and (b) as promulgated in the Model Rules. [Paragraphs] (c), (d) and (e) have been modified. The Kansas Committee recommended adoption of Model Rule 1.5 with no changes. Rule 1.5 as adopted followed a study of attorney fees by a special committee of the Kansas Judicial Council formed pursuant to Concurrent Resolution 5053 of the Kansas House of Representatives adopted April 8, 1986. The rule as finally adopted took into consideration Model Rule 1.5, the Kansas Committee recommendations and the recom-mendations of the special committee of the Kansas Judicial Council.

Basis or Rate of Fee

When the lawyer has regularly represented a client, they ordinarily will have evolved an understanding concerning the basis or rate of the fee. In a new client-lawyer relationship, however, an understanding as to the fee should be promptly established. It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, or to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding. Furnishing the client with a simple memorandum or a copy of the lawyer's customary fee schedule is sufficient if the basis or rate of the fee is set forth.

Terms of Payment

A lawyer may require advance payment of a fee, but is obliged to return any unearned portion. See Rule 1.16(d). A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyer's special knowledge of the value of the property.

An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way contrary to the client's interest. For

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example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise, the client might have to bargain for further assistance in the midst of a proceeding or transaction. However, it is proper to define the extent of services in light of the client's ability to pay. A lawyer should not exploit a fee arrangement based primarily on hourly charges by using wasteful procedures. When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications. Applicable law may impose limitations on contingent fees, such as a ceiling on the percentage.

Division of Fee

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist, or when a lawyer refers a matter to a lawyer in another jurisdiction. Paragraph (g) permits the lawyers to divide a fee by agreement between the participating lawyers if the client is advised, does not object, and the total fee is reasonable. It does not require disclosure to the client of the share that each lawyer is to receive.

Disputes Over Fees

If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer should conscientiously consider submitting to it. Law may prescribe a procedure for determining a lawyer's fee, for example in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages. The lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure. The fact that a fee may be lower than the customary fee charged in the locality for similar service shall not be a basis for finding the fee to be unreasonable.

Older Pre-1988 Code Comparison

DR 2-106(A) provides that, "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee." It also provides that, "A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee." The factors to be considered in determining reasonableness are identical to those in Rule 1.5(a). EC 2-17 states that, "A lawyer should not charge more than a reasonable fee . . . ."

There is no counterpart to Rule 1.5(b) in the Disciplinary Rules of the Code. EC 2-19 states that, "It is usually beneficial to reduce to writing the understanding of the parties regarding the fee, particularly when it is contingent."

With regard to Rule 1.5(g), DR 2-107(A) permits a division of fees only if: "(1) The client consents to employment of the other lawyer after a full disclosure that a division of fees will be made. (2) The division is in proportion to the services performed and responsibility assumed by each. (3) The total fee does not exceed clearly reasonable compensation . . . ." Rule 1.5(g) permits division without regard to the services rendered by each lawyer if the client is advised, does not object, and the total fee is reasonable.

DR 2-106(B) provides that, "A lawyer shall not enter into an arrangement for, charge, or collect a contingent fee for representing a defendant in a criminal case." Rule 1.5(f) expands the prohibition to certain domestic matters and other matters precluded by statute. Rule 1.5(h) is identical to DR 2-107(B).

There is no counterpart to Rule 1.5(c), (d), and (e) in the Code.

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STATEMENT OF JERRY D. WISDOM

SENATE BILL #346

I am a firefighter with Consolidated Fire District #2 of Northeast Johnson County and have been for 11 years. Veteran firefighter for 16 years.

My firefighting duties include driving apparatus and functioning under emergency conditions fire suppression and hazardous material mitigation, emergency medical intervention in life threatening environments. In carrying out the above duties, I am required to:

1) Carry or drag extremely heavy hose, equipment and victims, if necessary

2) Have the agility to work on unstable ground, work on ladders, below grades, and often on aerial apparatus.

3) Though it is not a requirement that one must be able to run, in fact, it is specifically stated that one should not run on fire ground, it is imperative that one must have the ability in the event emergency dictates same.

4) Must be in reasonably fit physical condition to perform the above tasks.

On May 1, 1996 I sustained personal injury during the course of my employment. While quickly exiting the door of a burning building, I ruptured my achilles tendon which, in turn, has caused injury to my back due to my altered gait. I missed in excess of 5 months work due to this injury.

I have been told that I have reached maximum medical improvement and have received a permanent disability rating. I still have pain in my ankle. Standing or walking for an extended period of time fatigues the ankle. Pursuant to doctor's orders, I can no longer run as she has said unequivocally that the ankle will be reinjured if I do so. I have now been fitted for a permanent leg brace.

For a time I considered retirement. There is a distinct possibility that I may be terminated.

The insurance company has offered me a settlement offer of less than $4,000.00 I feel this is totally inadequate. For this reason I tried to hire an attorney to help me obtain a fair settlement. I have spoken with four attorneys to date, three of whom are workers' compensation specialists. Due to the fact that a settlement offer has been made, no one is willing to take my case since there is simply not enough to pay their fee.

I would like to see the law changed so that injured employees would be able to find attorneys to represent them in their workers' compensation claims.

Jerry D. Wisdom

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