Approved: February 24, 1997
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 21, 1997 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Barone, Brownlee, Feleciano, Gooch, Harris, Jordan, Ranson, Steffes, Steineger and Umbarger.

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:
Terry Leatherman, Kansas Chamber of Commerce and Industry (KCCI)
L. J. Leatherman, President, Topeka Independent Living
Christine Davis, PKM Steel Service, Inc., Salina
Julie Bachman, Koch Industries, Wichita
Alan Weldon, U.S.D. #359, Wichita
Wanda Roehl, Director of Safety, Coleman Co., Wichita
Mike Helbert, KTLA, Emporia
Dennis Horner, KTLA, Lenexa
Jerry Slaughter, Kansas Medical Society
Ron Smith, General Counsel, Kansas Bar Association
Bob Mikesic, Independence, Inc., Lawrence
Roger Harsh, Independence, Inc., Lawrence
Shelly Krestine, Grants Manager, Kansas Council on Developmental Disabilities
Representative Michael R. (Mike) O'Neal

Others attending: See attached list

SB 289 - Workers compensation disability changes

Terry Leatherman, KCCI, testified in support of **SB 289** which contains six changes in the Kansas Worker Compensation Law. 1) alters the three tier work disability approach currently utilized in worker compensation claims by using functional impairment as the basis on which work disability cases are paid and establishing a method of determing "supplemental compensation" through a percentage difference in pre-injury and post-injury wages; 2) clarifies employer's right to direct medical care when claim is made and the case is not workers compensation, but determined by a judge it is; 3) establishes that fringe benefits are not included in calculations for employees who have voluntarily quit their employment, or have been terminated for reasons unrelated to workers compensation claim; 4) denies an application for review and modification if application is filed after all awarded compensation has been paid; 5) eliminates requirement of an employer to pay employee's attorney fees in review and modification cases, regardless of the outcome; and (6) proposes Administrative Law Judges, be selected in the same manner as members of Workers Compensation Board of Appeals. Attachment 1

SB 321 - Conforming workers compensation act to provisions of the Americans with Disabilities Act

Mr. Leatherman, KCCI and a member of the Workers Compensation Advisory Council, stated he is opposed to **SB 321** in its present form. He stated there is no information of which he is aware that Kansas employers are using workers compensation information about a prospective employee in order to discriminate against disabled individuals without detection. Employers are of the opinion that their access to workers compensation records are being monitored and a record kept. Mr. Leatherman stated he had presented a proposal to the Advisory Council; however, it appointed a subcommittee to make a recommendation. Attachment 2

SB 347 - Workers compensation reform

Mr. Leatherman stated **SB 347** reverses the 1993 workers compensation reform regarding attorney fees. The major objection is the striking of the language on Page 4, beginning on Line 31, which limits an attorney's compensation in cases where a written offer is given prior to an attorney's involvement in a case. Mr. Leatherman stated KCCI is not in favor of increasing the membership in the Workers Compensation Appeals Board. Attachment 3

Christine Davis, Human Resource Manager for PKM Steel Service, Inc. and the Workers Compensation Advisory Council, testified in opposition to **SB 321**. Ms. Davis stated an applicant/employer has recourse through the Americans with Disabilities Act, a totally separate and punitive act from workers compensation. Businesses are mandated to carry workers compensation insurance; therefore a prudent business will try to limit its workers compensation exposure by providing a safe work environment, holding regular safety training, and using effective hiring practices. One way employers protect themselves is by inquiries about prior workers compensation accidents and/or resulting disabilities. This information is requested only after an offer is made, and should be kept in a confidential medical file. Attachment 4

L. J. Leatherman, an attorney and President, Topeka Independent Living Resource Center (TILRC), testified in support of **SB 321.** Mr. Leatherman stated the "open" workers compensation records adversely affects both his clients and the consumers served at TILRC. Mr. Leatherman stated employers look to work history as a method of evaluating employees and having the workers compensation records open is a detriment to the employment of a number of disabled individuals. Attachment 5

Alan Weldon, Workers Compensation Supervisor, U.S.D. #259, testified in support of **SB 289**, particularly those sections relating to the employer's right to furnish the services of a health care provider of the employer's choosing, limiting the time available for review and modification, and disallowing attorney fees for review and modification. Attachment 6

SB 346 Supplemental workers compensation advisory council recommendations

Wanda Roehl, Director of Safety and Workers Compensation, Coleman Company and on behalf of the Wichita Employers Task Force, testified in opposition to **SB 321, and Sec. 5 of SB 346**. Ms. Roehl stated SB 321 prohibits employers from researching workers compensation claims on a person they have hired, which is a tool used to determine final placement of an employee and is not only to protect an employer. Such information is used to protect an employee from being injured unnecessarily due to a poor placement by an employer. **SB 346,** Sec. 5 strikes the ability to appeal acts, findings, decisions or rulings by the Administrative Law Judge. The financial burden for an appeal is on the employer and the employer would like to reserve the right to appeal acts, findings, decisions and rulings. Attachment 7

Mike Helbert, KTLA, Emporia, testified in support of **SB 347**, which recognizes that injured workers are going unrepresented because of the restrictions on claimant's attorney fees contained in the 1993 changes to the Workers Compensation Act. **SB 347** removes the burdensome limitations on the percentages that may be charged by attorneys representing injured workers and eliminates the mandatory obligation of employers to pay the employees attorney fees when the employee loses a review and modification hearing. Attachment 8

Julie Bachman, Assistant Manager, Workers Compensation Claims, Koch Industries, Inc., Wichita, testified in support of **SB 289.** Ms. Bachman stated Sec. 2 allows a straightforward wage loss calculation for supplemental compensation and Sec. 3 relieves employers from including the value of employer-paid fringe benefits in the average weekly wage of those who voluntarily quit or are terminated for reasons unrelated to the work-related injury. Ms. Bachman suggested an amendment on Page 8, Line 25, striking the word "~~shall~~" and inserting in lieu thereof the word "may". Attachment 9

Dennis L. Horner, KTLA, testified in opposition to **SB 289**. Mr. Horner stated benefits to injured workers have been reduced substantially the last couple of years. The costs of claims paid by workers compensation insurers in 1991 was $245,000,000, and in 1995, had plummeted to $159,000,000. Mr. Horner stated **SB 289** is designed to further erode benefits. Attachment 10

Ron Smith, General Counsel, Kansas Bar Association, submitted written testimony in support of **SB 347**. Attachment 11

Jerry Slaughter, Executive Director, Kansas Medical Society, submitted written testimony in support of **SB 346**, and in particular, Page 3, line 23, which requires the director of workers compensation to revise the medical fee schedule at least every two years. Mr. Slaughter expressed concern about, Page 13, Lines 8 -

15, which requires all health care providers to submit their entire fee schedule to the director for the purpose of establishing the fee schedule in the future, and also requires providers to submit "medical information by procedure, charge and zip code". Mr. Slaughter stated the section is unclear as to the effect of this change and the potential cost to providers. Attachment 12

Bob Mikesic, Advocacy Coordinator and Roger Harsh, Advocacy & Development Specialist, Independence, Inc., Lawrence, submitted written testimony in support of **SB 321.** Attachment 13

Shelly Krestine, Kansas Council on Developmental Disabilities, submitted written testimony in support of **SB 321.** Attachment 14

SB 285 - Sole proprietorship without employees exempt from workers compensation coverage

The Chair informed the Committee Representative O'Neal submitted a letter pointing out the conflict between **SB 137** and **SB 285.** Attachment 15

Upon motion by Senator Umbarger, seconded by Senator Barone, the Minutes of the February 20, 1997 meeting were unanimously approved.

The meeting adjourned at 9:00 a.m.

The next meeting is scheduled for February 24, 1997.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 21, 1997

NAME	REPRESENTING
TERRY LEATHERMAN	KCCI
DENNIS JACKSON	Rep. for Topeka Tourrettes Group
Jim McHoff	Kansas AFL-CIO
Seth Valerius	Kansas AFL-CIO
LJ Leatherman	TILRC; KTLA
Scott A. Stone	KAPE
Stephen Durrell	Attorney General's Office
George Schuckman	Div. of Wkr Comp.
Jim Huff	Workers Compensation
Duane Dark	Div of Workers Comp
Steven Kirsch	Dept of Adm.
Ray T. Peterson	Dept of Adm.
Doug Farmer	D.O.B.
Linda McCluney	KS Insurance Dept.
Sheli Sweeney	KS Div. of Workers Comp.
David Stanfield	" " "
Harry Brown	Dept of Admin, DPS
LON SMELSER	✓ ✓ ✓ ✓
Alan Weber	USD 259

J. P. SMALL — KOCH INDUSTRIES, INC.

SENATE COMMERCE COMMITTEE GUEST LIST

DATE: _____

NAME	REPRESENTING
S Duncan	Retired
Brad Smoot	AIA
Janet Stubbs	KBIA
Bob Brown	MID-AMERICA Lumbermans
Susan Baker	Heim & Weir
KEVIN ROBERTSON	KS. SELF INSURERS ASSN.
Christine E. Davis	PKM Steel Service Inc.
[illegible]	KTLA.
[illegible]	KTLA
Hal Hudson	NFIB/KS
Bill Curtis	Ks Assoc of School Bds
[illegible]	KGC
RAY LASPACH	RAYTHEON AIRCRAFT
[illegible]	BOEING
BILL GRANT	KCCI
John Peterson	Raytheon Aircraft

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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SB 289

February 20, 1997

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, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to comment in support of SB 289.

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 47% 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.

SB 289 contains six proposed changes to the Kansas Worker Compensation Law. While I plan to touch on all six during my presentation today, I will spend most of my time on the bill's proposed change to the definition of work disability, found on pages 8 and 9.

There are essentially three stages in which to view a workers compensation case. The first stage is after a worker is injured, they receive medical care. It is everyone's hope the medical care

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Attachment 1-1 thru 1-5

ma .he worker whole, leaving the employee with no lasting effects of their injury, back on the and their workers compensation claim resolved.

Stage two involves workers who can return to work after fully recuperating from their injury, but medical science could not restore the individual to the physical condition they had prior to the injury. Since health care could not "make them whole," the worker is given money to attempt to make them whole. In Kansas, we use a formula to determine the amount of compensation, with the key being a doctor's assessment of the worker's "functional impairment." Guidelines developed by the American Medical Association guide the medical provider in determining functional impairment. When stage two concludes, the case is resolved, the employee is back to work, the doctors have made the worker as healthy as they can, and additional dollars are paid in compensation to make up for the lasting effects of an injury.

Stage three are cases where an employee's injury keeps them from returning to work. It is traditionally called a "work disability" case. It is also an area where Kansas has struggled. Today's work disability definition, which was developed in the workers compensation reform package of 1993, requires a determination of the percentage loss of job skills an employee has used over the past 15 years and the percentage difference in the employee's pre-injury and post-injury wages. These two percentages are then averaged to determine how long an injured worker will be paid work disability.

There are problems with both tests. The loss of job tasks over a 15 year period prompts compensation to be paid for skills the employee may no longer need, and is a poor barometer of the physical effects of injury. The wage test is an objective measure, which is good, but it also encourages an employee to avoid work to maximize an award. Overall, a major problem with our work disability definition is it throws the best test we have for physical injury, an employee's functional impairment, out the window.

SB 289 proposes a different approach to work disability and employs the three stage approach to all workers compensation cases. As in current law, if medical care makes the worker

wh ne case is resolved. At stage two, if there are lasting effects from the injury, the worker get compensation based on their degree of functional impairment. However, at the third stage, when an employee also suffers wage loss due to their injury, the current work definition is deleted. Functional impairment compensation, the best method we currently have to compensate an individual for loss of body function, will be paid in work disability cases.

In addition, an employee will receive "supplemental compensation" to compensate them for their wage loss. Supplemental compensation will be determined through a simple wage comparison. The percentage difference in pre-injury and post-injury wages will become the number of weeks of supplemental compensation awarded to the worker. For instance, an employee who was earning $500 a week, but after recovering from an injury earns only $400 a week, has suffered a 20% wage loss. In this scenario, the employee's 20% wage loss would lead to 20 additional weeks of supplemental compensation, in addition to their compensation for functional impairment.

One additional provision to the supplemental compensation concept addresses the problem involving an employee who avoids work in order to maximize compensation. SB 289 requires a judge to impute a wage, based on evidence presented, in cases where an injured worker is unemployed. This provision should address those occasional situations where an employee could return to work that is available.

There are five other changes proposed in SB 289.

HEALTH CARE PROVIDER IN DISPUTED CASES (PAGE 5, LINE 39)

Kansas law grants employers the right to direct medical care in workers compensation cases. This is a critically important right and responsibility, permitting employers to control their medical care costs.

If an employee makes a workers compensation claim which the employer disputes, the employee is left to pursue medical care on their own until a judge determines a claim is

co isable. When this happens, administrative judges are currently removing the employer's to direct the medical care.

SB 289 proposes to clarify this situation to be declaring that if an employer claims a case is not workers compensation, but a judge determines that it is, that employers will have the right to direct the medical care the worker receives from that point forward.

FRINGE BENEFITS IN WAGE CALCULATIONS (PAGE 11, LINE 5)

When determining financial compensation for an employee who is no longer working, fringe benefits are included in the calculations. SB 289 proposes to halt that practice in cases where an employee has voluntarily quit their job, or has been terminated for reasons unrelated to their workers compensation claim.

REVIEW AND MODIFICATION (PAGE 15, LINE 28)

In the 1993 reform of the workers compensation act, one of the key amendments changed the method for paying claims. Instead of receiving a small check for 415 weeks, the injured worker receives much larger compensation checks for a smaller window of weeks. Typically, all compensation checks are paid out in less than a year.

When this change occurred, nothing was done to shorten the window available for "review and modification," a workers compensation procedure where consideration is given to changing an original award. As a result, all compensation owed an employee may have been paid, but the window for review and modification remains open. SB 289 proposes that the review and modification window be closed when all compensation has been paid.

REVIEW AND MODIFICATION ATTORNEY FEES (PAGE 18, LINE 15)

Current law requires an employer to pay an employee's attorney fees in review and modification cases, regardless of the outcome. SB 289 proposes that this practice be eliminated, when the review and modification proceeding produces no change in the original award.

SELECTION OF ADMINISTRATIVE LAW JUDGES (PAGE 19, LINE 26)

SB 289 proposes Kansas employ the same method currently used to select members of Workers Compensation Board of Appeals in the selection of Administrative Law Judges (ALJs). That process would lead to an ALJ serving a four-year term in office. Currently, ALJs are classified employees of the state. Choosing ALJs would begin with applicants being considered by a Nominating Committee, made up of representatives of the Kansas Chamber and the Kansas AFL-CIO. The Nominating Committee must unanimously agree on all ALJ nominees. Their nominees would go to the Secretary of Human Resources, who would have the final appointment authority.

KCCI feels this change would bring greater accountability and judicial consistency to the ALJ process. This proposal also has been endorsed by the Kansas Workers Compensation Advisory Council.

Madam Chairperson, thank you for this chance to review the changes proposed in SB 289, which the members of the Kansas Chamber feel would make important changes to further improve the Kansas workers compensation system. I would be happy to answer any questions.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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SB 321

February 20, 1997

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by
Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Since the Kansas Chamber has been involved in the issue contained in SB 321, it is our feeling our efforts regarding the availability of workers compensation information might be useful during the Committee's deliberations on this bill.

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.

As a member of the Kansas Workers Compensation Advisory Council, I have been asked to address a concern that Kansas employers can find out workers compensation information about a prospective employee and use the information to discriminate against disabled individuals, without

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Attachment 2-1 thru 2-3

det n. Let me stress that I have received no information to suggest that this is a widespread employer practice. In fact, employers I have talked to about this matter thought their access to workers compensation records, especially by computer, was being monitored and a record was being kept. However, the supporters of SB 321 are right. The potential for abuse of rights assured by the Americans With Disabilities Act exists.

As an Advisory Council member, I have presented the following proposed solution to the problem.

> K.S.A. 44-550(b). Records open to public inspection, exceptions. (a) All records provided to be maintained under K.S.A. 44-550 and amendments thereto shall be open to public inspection, except that records relating to financial information submitted by an employer to qualify as a self-insurer pursuant to K.S.A. 44-532 and amendments thereto and records which relate to utilization review or peer review conducted pursuant to K.S.A. 44-510 and amendment thereto shall not be disclosed except as otherwise specifically provided by the workers compensation act. ***All requests for records maintained under K.S.A. 44-550 relating to an individual shall be submitted in writing, either by mail or electronic means. Requests relating to an individual shall be considered a record to be maintained and open to public inspection under K.S.A. 44-550***.

This amendment to K.S.A. 44-550(b) would maintain current law, yet require the Division of Workers Compensation to only release records on an individual when the request is made in writing. In addition, the Division must maintain these requests for information as an open record, and make them available upon request. The result of this change would create a clear paper trail if an employer uses workers compensation records in violating an individual's rights granted by the Americans With Disabilities Act.

Our main concern with the other approach to solving this potential for abuse, the closing of workers compensation records, is how wide a net is being used to catch this fish. The Division of Workers Compensation has estimated there are around 15,000 requests for records annually. A breakdown of where those requests comes from is not available. However, if records are closed, KCCI would presume the following information requests would be denied.

- Workers Compensation records which would be relevant in a civil trial
- Press inquiries into an individual's workers compensation records
- Payment information for the purpose of a child support investigation
- General information compiled by the Division of Workers Compensation
- An employer's post-offer inquiry relating to the employee's ability to perform the essential functions of a job.

Greater knowledge of the current uses of workers compensation records would go a long way towards calming employer concerns regarding closing workers compensation records. That is why KCCI presented the solution it did before the Advisory Council as a good faith attempt to solve a legitimate concern.

Thank you for the opportunity to comment on SB 321. I would be happy to answer any questions.

LEGISLATIVE TESTIMONY

Kansas Chamber of Commerce and Industry

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SB 347

February 20, 1997

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony Before the

Senate Committee on Commerce

by

Terry Leatherman
Executive Director
Kansas Industrial Council

Madam Chairperson and members of the Committee:

I am Terry Leatherman, with the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to express opposition to the provision in SB 347 regarding claimant attorney fees.

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.

SB 347 proposes to reverse the 1993 workers compensation reform regarding attorney fees. KCCI's principal objection to this change is the elimination of the provision found on page 4 of the bill, beginning on line 31. This provision limits an attorney's compensation in cases where a written offer is given prior to an attorney's involvement in a case.

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his provision means that when an employer, through their insurance carrier, makes a wr settlement offer before a claimant is represented, that the attorney will not receive a portion of that offer as a fee. Instead, their fee will be based on compensation they win the employee above that settlement offer.

KCCI believes this has been an important change in the law by prompting employers to make responsible settlement offers early in a workers compensation case. If the employer makes a bona fide offer that truly reflects the compensation value of the case, litigation isn't necessary and the case is resolved. If the employer attempts to undervalue the case in the settlement offer, then they have opened the door to litigation by presenting an economic incentive for the attorney to take the case to gain more compensation for the injured worker.

In reforming workers compensation in 1993 and since, it has been a legislative goal to promote employee-employer cooperation and to reduce litigation. Since this provision on page four of the bill sparks prompt and responsible case resolution, KCCI would urge it not be stricken.

As a final point, KCCI would also say the availability of claimant attorneys does not seem to be affected by current law limiting fees. In Topeka alone, our 324 page Yellow Pages include 20 pages of attorney listings, and also has 25 law firms advertising their expertise in workers compensation/work injury law.

KCCI would support the provision on page 5 of the bill to eliminate an employer's responsibility to pay an injured worker's attorney fees in cases where additional compensation is not awarded in a review and modification case. Finally, the Kansas Chamber would urge caution in SB 347's provision to increase the membership in the Workers Compensation Appeals Board from five to six members. This move would improve the Board's ability to render case decisions. In light of the Board's difficulties in keeping up with the volume of cases, this change would speed up the process. However, it would do so by sacrificing the consistency we currently have when all Board members are involved in case decisions. Since there are indications that the Board is progressing in

are ıved in case decisions. Since there are indications that the Board is progressing in eras its current backlog of cases, KCCI would respectfully suggest this issue might be set aside, for now.

Thank you for the opportunity to comment on SB 347. I would be happy to answer any questions.

Arguments Opposing Senate Bill No. 321:

Hello, my name is Christine Davis, a member of the Workers Compensation Advisory Council and Human Resource Manager for PKM Steel Service, Inc. a steel fabrication plant in Salina, Kansas. We employ approximately 95 individuals, of which 60 are production workers. I would like to direct my comments in opposition of Senate Bill No. 321. As a member of the advisory council, this issue has been discussed thoroughly and recommendations have been made and refuted. Senate Bill No. 321 is one of the recommendations offered and failed at our last advisory meeting. I believe the language of the bill is contradictory in nature, and places an undue burden on the employer to request information it is already entitled to. It also makes review and discussion of prior cases for precedent almost impossible.

My first assertion is that the disabled community's concerns over open records is more of an Americans with Disabilities Act concern rather than a worker's compensation issue. I certainly empathize with the cause as it relates to discrimination and feel employers have a moral and ethical responsibility to hire employees who are qualified to perform the essential functions of the position, regardless of their status.

As a matter of history, the Division of Worker's Compensation originated the "Dial-Up Research" program so employers could electronically file their Form 88's, and research past worker's compensation records, which effectively saved state tax dollars by reducing personnel hours spent in data entry and retrieval. Once the Americans with Disabilities Act went into effect, the Division clearly amended the process to avoid discriminatory usage by initiating a security code system and access to records tracking. In fact, I have enclosed a copy of the letter issued to my company from the Division in reference to issuing a security access code. The second paragraph reads "The Federal Americans with Disabilities Act and the Kansas Act Against Discrimination, prohibit employers from discriminating in hiring on the basis of a disability either real or perceived. Only after making a conditional job offer may an employer inquire into an individuals workers compensation accident history." It has come to my attention that medical records may also be obtained by oral or written request to the division. However, notification to an applicant of a request for records is to occur once a request is made. It is also my understanding the "Dial-up" procedure is being eliminated. My point is. . .if an employer currently inquires into the worker's compensation history of an applicant prior to a conditional offer of employment, or uses the information once received, in a discriminatory manner, the applicant/employer clearly has recourse through the American's with Disabilities Act, a totally separate and punitive act from Worker's Compensation.

Secondly, you may be wondering why business interests necessitate the need for access to the worker's compensation records. Businesses are mandated to carry worker's compensation insurance; a substantial bottom-line cost of doing business. Any prudent business, therefore, will try to limit their worker's comp exposure by providing a safe work environment, holding regular safety training, and using effective hiring practices. Since the 1993 worker's compensation reform, the Second Injury Fund was eliminated, and in essence left the employer as a "sitting duck" in the case of aggravated injuries, unless a pre-existing condition could be substantiated. We no longer could make medical inquires prior to an offer, yet we had no protection against aggravation of a pre-existing condition with the fund gone. One way the employer protects themselves is by inquiries about prior worker's compensation accidents and/or resulting disabilities. This information is requested only after an offer is made, and should be kept in a confidential medical file separate from the employee's personnel file, per provisions of the Americans with Disabilities Act.

Once the information is obtained, it should be accessed only for a couple of reasons. One might be for placement. If we know an employee has a current hearing loss, for example, we could place him in an area where the least amount of aggravation to his condition would occur, etc. If we are unaware of this condition, we could unknowingly place the employee in harm's way, potentially creating a worker's compensation injury. Another reason is for accommodation. I understand that the disabled community argues the disabled employee should be asking for accommodation if requested. However, my experience tells me that once an employee has been offered a position, he/she wants to put his/her best foot forward and might make light of or nondisclose what he considers a minor physical ailment and/or disability. He/she wants an employer to think they will be giving 100% to the new job. The reality is. . . in today's world, everyone is not 100% honest. If that were the case, we would never have to have pre-existing information for it would be volunteered.

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Attachment # 1 then 4-3

In closing, I wish to ask you to thoroughly review the language of Senate Bill 321 and to vote against it's recommendation. There are other recommendations which might provide a more feasible solution to the disabled community's concern. Thank you for your consideration!

Respectfully submitted,

Christine E. Davis

KANSAS **DEPARTMENT OF HUMAN RESOURCES**

DIVISION OF WORKERS COMPENSATION
800 S.W. Jackson, Suite 600
Topeka, Kansas 66612-1224

RECEIVED MAY 10 1995

Joan Finney, Governor

Joe Dick, Secretary

Pkm Steel Services Inc
Chris Davis
Po Box 1066 228 E Ave A
Salina KS 67402

A security access code has been assigned for accessing records of the Kansas Division of Workers Compensation to Chris Davis. Your access code is [redacted]. If your access code is lost, we cannot reissue the same access code to you. You must apply for a new access code.

The Federal Americans with Disabilities Act and the Kansas Act Against Discrimination, prohibit employers from discriminating in hiring on the basis of a disability either real or perceived.

Only after making a conditional job offer may an employer inquire into an individuals workers compensation accident history.

Sincerely
George Gomez
Program Director - Workers Compensation

Testimony of LJ Leatherman
Regarding Senate Bill 321

The Closing of Workers' Compensation Records

I am LJ Leatherman, a partner in the law firm of Palmer, Lowry & Leatherman. I am a Member of the Kansas Trial Lawyers Association, Adjunct Professor at Washburn University, President of the Topeka Independent Living Resource Center (TILRC), and I recently co-presented for Lorman Business Centers, Inc. regarding confidentiality of medical records in Kansas and Missouri. The "open" workers' compensation records by the State of Kansas adversely affects both my clients and the consumers served at TILRC.

As an introductory matter, I would like to discuss the different between the words "confidential" and "privilege." The word "privilege" refers to the Rules of Evidence and is applicable in a court of law. Questions of "privilege" do not arise unless and until there is a legal case instituted and evidence is sought in the course of that proceeding.

"Confidentiality" is a broader concept than "privilege." Confidentiality applies to disclosure of information to anyone, at any time, and in any context. Records are presumptively confidential; they may also be privileged. Unless a person has released or waived the rights of confidentiality and evidentiary privilege, a patient/worker/employee/employer has a reasonable expectation that his/her medical records will not be provided to a third party.

When a patient/client has lost his privilege against and has his medical records used as evidence in a court of law, that person retains the right to insist that his/her records remain confidential as to the world at large.

The easiest example, distinguishing confidentiality from privilege, is a

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Attachment 5-1 thru 5-4

hospital. In workers' compensation the privilege is waived and the hospital upon written request releases the information to the employer. That employer or carrier then turns parts of those records over to the workers' compensation division as part of the processing the case. These records are then compiled and kept by the Division of Workers' Compensation.

No one would contest that the hospital has a continuing duty of confidentiality. They cannot upload the medical records to the Internet simply because the patient has waived the privilege. How then, does the State of Kansas believe that it can ignore the worker's expectation of confidentiality?

With this concept in mind I testify as a proponent of Senate Bill 321. I have attached to my testimony a copy of an unemployment hearing response from an employer. I have redacted the names, because of my duty of confidentiality, and because they are not pertinent to the testimony for this Committee. As you can see, the insurance carrier for the employer ran a check of the Kansas Workers' Compensation records and found that my client had a restriction. This man had successfully worked for almost nine months at this job without requesting accommodation. He was, however, terminated for failure to disclose his restriction. Why?, Because the employer was not aware of the confidential information, until their comp carrier disclosed it.

This type of situation arises every day for persons who are disabled. It pits well-intentioned employers between their insurance carriers and their employees. The end result is that the disabled are discriminated against <u>because</u> of their disability, and not because of their ability. In this situation the employee is doubly disadvantaged. First, they have lost their

employment. As the Legislature stated in the unemployment compensation statute K.S.A. 44-702. This is a severe strain.

> Economic insecurity, due to unemployment, is a serious menace to the health, morals and welfare of the people of this state. Involuntary unemployment is therefore a subject of general interest and concern which requires appropriate action by the Legislature to prevent its spread and to lighten the burden which now so often falls with crushing force upon the unemployed worker and his family.

The State in knowing that these open records cause unemployment, should close the workers' compensation records.

The second detriment to the unemployed, disabled worker, is that employers attempting to act well within the law and with the best of intentions often stumble into the information. In the situation discussed above, my client answering honestly to the question "Why were you terminated?" would have to state he was terminated because of the restrictions from his prior workers' compensation claim. While The Americans With Disabilities Act prohibits an employer from asking the question "do you have any restrictions?", (42 U.S.C. 12121), here the protected information is brought into the conversation because of the breach by the Division.

Secondly, employers attempting to do what is in the best interest of their business oftentimes look to work history as a method of evaluating the employees. Here the worker has been terminated not because of his performance, but because of a disclosure of a workers' compensation accident. The time of his unemployment is then extended because he must make the disclosures regarding his termination. Every day that passes

makes him a less tenable employee.

For the factual situation presented and the reasons stated above, I request that the Senate adopt Senate Bill 321 and close the workers' compensation records, except as necessary for investigation of claims.

FEBRUARY 21, 1997
SENATE COMMERCE COMMITTEE
WORKERS COMPENSATION HEARING

Senator ~~Langworthy~~ and members of the Senate Commerce Committee, thank you for allowing me to speak in support of Senate Bill 289. I am Alan Weldon, the Workers Compensation Supervisor for The Wichita Public Schools.

To avoid duplicating what others may say, but I will limit my remarks to just three sections in SB 289: the employer's right to furnish the services of a health care provider of the employer's choosing, limiting the time available for review and modification, and legal fees for review and modification.

The first is on page 5, starting on line 39 and continuing to the top of the next page. There are situations when the employer and employee differ over medical care, for example, when the employer questions the validity of the claim, or over the efficacy of proposed treatment, and whether or not additional medical care is needed. When these questions arise, the claimant and the respondent usually end up before an administrative law judge. I recently had a claim where the authorized treating physician rated and released the employee stating that she had reached maximum medical improvement. Her attorney sent her to the physician of his choice for an independent medical exam. The question of additional medical care went before the administrative law judge. This ALJ decided in favor of the

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claimant and ordered the claimant's physician as the authorized treating physician.

The change proposed in Section 1 of SB 289 recognizes there will be differences in opinions regarding causation of some employees' physical problems, and that the employer should not lose its right to direct the medical care of its injured employee if it wishes to pursue these differences before the appropriate trier of fact. Under our present situation, an administrative law judge often appoints the claimant's physician as the authorized treating physician when the employer loses its argument in the preliminary hearing. I do not believe the employer should be penalized if it questions the validity of the employee's right to medical benefits. So I support this change.

The second issue is on page 15 of this bill beginning with line 28. It is a common practice at a settlement conference or at a regular hearing for the claimant's counsel to ask that future medical care and review and modification be left open indefinitely. When this request is made, it is usually granted by the administrative law judge. Last month I participated in a settlement conference involving one of the district's teachers who claimed a low back strain. We really did not settle anything because the claim can be re-opened at anytime in the future. Five years from now, the school district may terminate her for poor performance. She can claim chronic back pain affected her

classroom performance and ask for review and modification claiming workers compensation disability. The change in paragraph (c) of Section 4 will give us a definite time when the claim can be closed.

My last point is in Section 5, paragraph (c)(3). It is found on page 18 beginning with line 15. It states if Review and Modification involves no additional award, no attorney fees shall be awarded. Under the present practice, not only does the employer pay for its attorney, but we also pick up the claimant's attorney's fees as well. There is no disincentive for filing for a questionable review and modification of a claim. The claimant loses nothing and we pick up the cost for his/her attorney. If no fees are awarded when legal services involve no additional award of compensation, the claimant's attorney will make sure he has a good case before tying up the work comp court's and employer's time and expense in filing for review and modification.

I appreciate your allowing me to share my comments with you. I will yield to our next speaker.

The COLEMAN COMPANY, INC.

TESTIMONY TO SENATE COMMITTEE ON COMMERCE
By Wanda Roehl, Director of Safety and Workers' Comp, Coleman Company
February 21, 1997

Madam Chair and members of the Commerce Committee:

Thank you for this opportunity to testify regarding Senate Bill 321 and Sec. 5 of Senate Bill 346.

I am Wanda Roehl, director of safety and workers compensation for The Coleman Company, Inc. Our company manufactures outdoor recreation products, which are known and used throughout the world. I am testifying today not only on behalf of The Coleman Company, but also on behalf of the Wichita Employers Task Force, which is a group of employers that meet monthly to review proposed legislation, work comp laws, and share practices .

Senate Bill 321 would prohibit employers from researching workers compensation claims on a person they have hired.

The purpose of this research by the employer is to finalize the placement process and check to see that the employee was truthful about their ability to do the work they are being hired to do. We have used this service at my Company for approximately seven years and have never denied a person employment because of the results of the workers compensation check through Dial Up Research unless they have been untruthful or misrepresented a medical condition. This is a tool we use to determine final placement of the employee and is not only to protect our Company, but also to protect the employee from potentially being injured unnecessarily because of a poor placement by us.

If there is concern about discrimination, the potential for financial recovery from discrimination under the Americans with Disabilities Act is much greater than the potential for recovery for a workers compensation claim. Further, if there is concern about discrimination, as we access Dial Up Research, we use a password. The State could track what records we have accessed with our password and that tracking should be public record for the Division of Workers Compensation or anyone that may want to know if an employer has looked at their record.

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3600 N. HYDRAULIC/2111 E. 37th NORTH/WICHITA, KS 67219/P.O. BOX 2931/WICHITA, KS 67201/(316) 832-2653

In S.B. 346, Sec. 5, K.S.A. 44-551, the ability to appeal acts, findings, decisions, or rulings by the Administrative Law Judge has been struck from the language.

This change could significantly increase litigation. In fact, the result could be that an entire case would be litigated because of a ruling which could not be appealed. There are numerous occasions, such as Motion Hearings, Pre Hearing Settlement Conferences, and Penalty Hearings, where an ALJ will order IME's, TTD, penalties, etc. There are constraints to Judges' authority and judges do make mistakes as we all do. If the judge has ordered something outside his jurisdiction, we can appeal and get a quick answer from the Board on a minor issue. If this language is changed, we would have to wait and try the entire case, which would result in significantly more litigation.

The financial burden for appeal is on the Respondent or employer, and we would like to reserve the right to appeal acts, findings, decisions and rulings. For this reason, we oppose Sec. 5 of SB 346.

Thank you very much.

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TESTIMONY OF MIKE HELBERT
SENATE BILL 347
FEBRUARY 21, 1997

Good morning. I am Mike Helbert, a partner in the Emporia law firm of Helbert & Bell which provides legal services throughout East Central Kansas. A large part of our practice is the provision of legal services to workers who have received injuries under the Workers Compensation Act. I also serve as a member of the Executive Committee of the Kansas Trial Lawyers Association and testify today as a representative of KTLA. KTLA strongly urges passage of Senate Bill 347. Additionally, we would like to take this opportunity to commend Senator Harris for his work on this bill and his recognition that injured workers are going unrepresented because of the serious restrictions on claimant's attorney fees contained in the 1993 changes to the Workers Compensation Act. KTLA agrees with Senator Harris that this unintended consequence of the 1993 changes must be rectified if claimants and respondents are to operate on a level playing field under the Workers Compensation Act.

This bill proposes to level the playing field as it concerns attorney fees in two respects. First, Senate Bill 347 removes the burdensome limitations on the percentages that may be charged by attorneys representing injured workers. Second, it eliminates the mandatory obligation of Respondents to pay the Claimants attorney fees when the claimant loses a review and modification hearing. KTLA believes that these changes in KSA 44-534 are needed, and constitute a fair trade.

The provisions of KSA 44-536 that require the Respondent to pay the Claimant's attorney fees, even if the Claimant loses, have been a feature of our law for many years. The limitations on the citizens of our state to contract, however, came into effect in 1993. There is a commonly held misconception that the 1993 limitations were enacted after great deliberation, and in response to the perception that Claimant's attorney fees were a cost driver in the system. Both of these perceptions are false. The 1993 percentage limitations did not come out of any House or Senate Committee hearing process. These restrictions on a citizen's right to contract were added virtually no debate.

In addition, an injured citizen's attorney fees are not a claim cost driver. There is no category on the claims ledger for the injured citizen's attorney charges (unless it is in a review and

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Terry Humphrey, Executive Director

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modification procedure - which is another part of this bill.) The insurance company pays for disability benefits, medical benefits, and its own litigation costs and attorney fees. Curiously, the 1993 amendments did not place any limits on how much an attorney representing the employer or insurance carrier can charge per hour or for an entire case. WHY? The amount charged by the defense lawyer is very much a claims cost driver. The amount paid for the services of an injured citizen's attorney comes out of the disability payments received by the injured person. The reason that only claimant's attorney fees were limited is because the insurance industry does not want to operate on a level field.

There was also an impression that involvement by an attorney for the workers necessarily increases the costs of the claim. This perception is predicated on the Tillinghast "study". This document is unworthy of citation. It was not conducted in a reliable manner. Attached you will find the Merlino report. This analysis concludes that the Tillinghast study was unscientific and unreliable because the data gathering was not independently performed and the analysis was not structured so that the effects of real cost drivers (like the effects of medical costs in serious injury claims) could be evaluated and calculated. Therefore, the conclusion is completely untenable and unproven that this one variable, involvement of an attorney for the worker, is responsible for higher average claim costs.

Before 1993, attorneys representing injured workers have been allowed to charge up to 25% for their services. This practice had been in place since before World War II. In addition, the proposed fees to be charged to the worker, in every case, has to be approved by the workers compensation judge. If 25% is unreasonable, the judge will not approve it. That determination is made on a case-by-case basis as it should be.

Further, the Kansas Supreme Court regulated the reasonableness of attorney fees through Rule 1.5(d). this rule requires every attorney to tell his client that, if the proposed fee is thought to be excessive, the worker can take that complaint to Court, and have a hearing on that issues. There were numerous levels of protection already available to protect against an excessive fee request prior to passage of SB 307 in 1993. All of these levels of protections remain in effect today and would continue with the passage of SB 347.

The present environment has created situations where injured citizens cannot obtain representation. In a situation where a worker has been offered $10,000 and the claim is really worth $12,000 The Claimant will have a difficult time trying to obtain a lawyer to get the additional $2,000. WHY? Because the present law normally limits that attorney to a fee of $500.00 or less. Likewise,

in smaller cases, such as with minimum wage employees, it is difficult to get someone to take a case with such a marginal return. The same situation applies when an injured citizen is satisfied with the disability compensation but the offer does not include future medical. Consequently, the citizens of our state that need an attorney the most are the ones who are most likely to go without representation. It is indeed in these situations where injured situations can be taken advantage of. This nation has prided itself on the fact that each citizen should have the right to freely contract. One of the basic tenets of a free society is economic liberty. To impose restrictions of the ability of our citizens to contract is an infringement on that liberty, but its effect is much more damaging when it applies only to one side of a legal dispute. At the present time, the defense side of a worker's compensation claim has complete freedom to hire the best and the brightest to represent its interests. The injured citizen of this state does not have that right because access to legal counsel has been artificially blocked by restrictions on attorney fees.

The resurgence of our national and local economies is closely correlated with deregulation of our economy, and the removal of government intervention from our lives. The approximately 900 businessmen and women who are members of the Kansas Trial Lawyers Association are businessmen and women who hire employees, pay taxes and buy workers compensation insurance. We offer a service to the retail public that is no different from real estate brokers, accountants, or other service professionals. Kansas law currently defines what our services provided under the Workers Compensation Act are worth on the open market. Unlike most industries whose product prices are regulated by supply and demand, we are subjected to arbitrary price controls. Worse, this regulation is creating an oppressive system of justice where only the rich and insured can afford to hire the best specialists available to represent their interests.

Claimant's attorney fees were already well regulated in the early 1990's. There was no need for the 1993 limitations imposed on claimant's attorney fees. That arbitrary 1993 change has constructed a system where the size of the wallet determines whether justice is available.

You can correct this injustice by the passage of Senate Bill 347. I urge you to please pass the bill with the attorney fees portions of the bill intact with no amendments.

Thank you.

STATEMENT OF JERRY D. WISDOM
February 19, 1997

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

Jerry D. Wisdom
Telephone (816) 322-0687
Pager (816) 818-7083

RE: 2/21/97 TESTIMONY ON SB 289 BEFORE THE SENATE COMMITTEE ON COMMERCE

Madam Chair and Members of the Committee:

Hello, my name is Julie Bachman. I am the Assistant Manager, Workers Compensation Claims for Koch Industries, Inc., a qualified self-insurer under Kansas law. I am also a member of the Wichita Employers' Workers Compensation Task Force represented here today.

I will focus my comments on Section 2 (K.S.A. 44-510e) which changes the Work Disability concept to Supplemental Functional Disability, and Section 3 (K.S.A. 44-511) which pertains to average weekly wage.

WORK DISABILITY: The current law on Permanent Partial General Disability allows for compensation over and above the functional impairment rating if the employee is not "engaging in any work for wages equal to 90% or more" of pre-injury wages. This is commonly referred to as "work disability" and can be quite **complicated** to calculate because it requires:

- **a 15 year work history**
- **a doctor's opinion on lost ability to perform 15 years of historical work tasks which may have no relevence to prospective employment**
- **that the lost ability be averaged with the post-injury wage loss.**

In addition to its complexity, the Work Disability provision may provide employees with an incentive not to work and lead to increased litigation.

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To illustrate, consider the following case pending against one of our Task Force members:

A shop employee sustained a compensable back strain resulting in 5-8% impairment and cannot perform the essential functions of his shop job such as bending and lifting. Prior to his injury, while employed by the shop, the employee obtained an accounting degree and a manufacturing management degree (at the expense of the employer). Because he has lost the ability to perform shop work, and he **is not working** at present, he is seeking (and may recover) $100,000 in work disability. Surely this employee is not 100% occupationally disabled.

SUPPLEMENTAL FUNCTIONAL DISABILITY: We support SB 289 as it would correct the problems in the above scenario by requiring the Administrative Law Judge to impute a post-injury wage for the employee who is not working, thereby allowing a straightforward wage loss calculation for Supplemental compensation.

The **advantages** of the Supplemental compensation system are that it:

- **aligns the incentives of employees and employers to return injured employees to work**
- **is simple to administer**
- **is prospective, not retrospectively based on a 15 year job history.**

We would also recommend that on page 8, line 25, of SB 289, which reads, "the employee *shall* be entitled to supplemental functional disability," the word "shall" should be replaced with "may" since the Supplemental compensation is contingent upon the imputed wage.

AVERAGE WEEKLY WAGE: We support the proposal in Section 3 (K.S.A. 44-511) which relieves employers from including the value of employer-paid fringe benefits in the average weekly wage of those who voluntarily quit or are terminated for reasons unrelated to the work-related injury. For example, under the current law, an employee who chooses to relocate, retire or simply quit while disabled could actually take home more in Temporary Total Disability than they did pre-injury due to tax considerations, thereby destroying return to work incentives. Likewise, an employee who, by his own actions, loses fringe benefits, should not be entitled to more permanent partial disability compensation than if he had remained with the employer and continued to receive the fringe benefits.

Thank you for this opportunity to comment on SB 289. I would be happy to answer any questions that you may have.

KANSAS TRIAL LAWYERS' POSITION ON SENATE BILL 289 BY DENNIS L. HORNER LENEXA, KANSAS FEBRUARY 21, 1997

In 1993, the Kansas Legislature made sweeping changes in the Kansas Workers' Compensation Act. These changes were made to reduce the costs of compensation insurance and lower premiums. Benefits to injured workers were substantially reduced by the legislative enactments and have resulted in substantial reductions in claim costs paid by the employers and insurance carriers. The costs of claims paid by Kansas workers compensation insurers in 1991 was $245,000,000 but by last year had plummeted to $159,000,000. The proposals contained in Senate Bill 289 are designed to further erode benefits to injured Kansans and their families despite significant decreases in the costs to industry and increases in profits to insurance carriers as a result of the 1993 amendments. As spokespersons for injured workers, the Kansas Trial Lawyers submit the proposal contained in Senate Bill are harsh, regressive and unnecessary.

To simplify the comments to specific changes, this outline will reference the statute number, as well as page and line.

K.S.A.44-510; Page 5, Line 39 to Page 6, Line 2

The statutory changes are designed to eliminate judicial discretion in the directing of medical treatment when the employer has refused to provide treatment. In practice, the Court often allows the insurance carrier to direct treatment in cases where it has refused to provide treatment to an injured worker. Where the Court is dissatisfied with the lack of effort to provide appropriate treatment, the Court has the discretion to direct treatment with health care providers to insure the worker receives prompt and appropriate treatment. The ALJ is in a good position to analyze the medical status of the worker and direct treatment when it is apparent the insurance carrier not providing medical attention commensurate with the obvious injuries.

To legislatively restrict the ALJ from directing some treatment in special cases improperly usurps the judiciary who we have appointed to impartially handle these matters and place total authority in the hands of the employers and insurance companies which have previously denied treatment. In it's current form, the Court may or may not exercise it's discretion in ordering medical treatment, depending on the facts of the particular case.

In many cases, the worker has sought treatment when the insuror refused. After a physician-patient relationship is established and treatment commenced, should the insurance carrier have the right to terminate that relationship? Certainly that is inefficient, expensive and time consuming.

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K.S.A. 44-510e; Page 8/Lines 5-11, 22-26, Page 9/Lines 3-4, and 8-18.

The proposed changes in this bill are wholesale attempts to modify statutes which were extensively changed in 1987 and 1993. In 1993, the legislature made broad sweeping changes in the Act due to requests from industry that were tied to insurance rates. The concept of work disability, which provides very basic benefits to injured workers who become displaced from their jobs as a result of work injuries, was changed so that benefits were substantially reduced. At the same time, vocational rehabilitation benefits were terminated. Arguments were made that the changes would encourage employers to retain injured workers at 90% of preinjury wages and avoid work disability. While some employers have retained workers, many have continued to find ways to terminate workers. Firing results in a significant loss of wage earning ability. In those cases in which a worker is fired because the employer refuses to accommodate him/her, the worker is entitled to work disability. However, those benefits were substantially reduced by the 1993 amendments and there are no longer vocational benefits which provide job placement or retraining. In essence, the most severely injured workers are left to their own ingenuity to obtain work and feed their families.

At the same time the proponents of this bill are seeking to further reduce benefits, the Kansas Department of Human Resources has released it's 1995-1996 annual report. The report contains statistics which are attached to this outline and designated as Appendix A. While we all abhor statistical analysis, the figures in the attached material provide cogent proof that selling worker's compensation insurance in Kansas is quite profitable. For the year of 1994, the insurance industry earned premiums of $312,116,539 and paid claims of $185,502,395 which results in a profit of $126,614,144. This computes to a profit of 60%. If we examine 1995, we find that earned premiums total $322,205,785 with losses paid of $159,776,412 leaving a profit of approximately $162,429,412.

These statistics reveal that the profitability of writing workers compensation insurance is awesome. Why should we now revisit four year old changes in the law which are making the insurance companies unreasonably wealthy at the cost of our injured citizens?

On Page 9, Lines 15-18, we find language which directs the trier of fact to impute wages to injured workers who are not employed at the time of the award. While that may seem a fair proposal, it has fatal pitfalls. Most displaced workers (those are the only ones who would not be employed) have severely reduced earnings and ability to earn. In those cases, some employees have sought retraining on their own in order to upgrade themselves vocationally. Vocational retraining is often necessary, a pursuit which is now left to the initiative of the workers. The proposal would impute wages to a person in school trying to obtain training so as to earn a comparable wage because the employer would not accommodate them. In essence, they are punished for attempting to better themselves by gaining education.

Example: I now represent a 32 year old mother of two that sustained an injury to her low

back. The employer temporarily accommodated her with a lighter job but fired her after six months because they claim the job position was only temporary. The worker's GED did not enable her to earn a comparable wage and she possessed few transferable skills. The worker sought assistance with the Kansas Department of Social and Rehabilitation Services/ Division of Vocational Services. After an assessment, the agency recommended schooling which my client now pursues. The employer is now suggesting she should have a wage imputed to her because she chose to obtain schooling in order to earn a comparable salary. If there are wages imputed, she will be punished for attempting to obtain training after she was fired for having medical restrictions imposed by the employer's physician.

If the claimant was not in school and refused to work, the Courts have determined that wages will be imputed. This proposal would penalize the workers who have the initiative and drive to better themselves when an employer fires them for having medical restrictions. The practical effect now is that the workers are paid slightly higher benefits which give them the opportunity to become retrained. This proposal would prevent that and prohibit injured workers with initiative from trying to overcome adversity. Public policy would suggest we should encourage injured persons to better themselves, especially when there is little cost to industry. This proposed amendment is totally unnecessary, especially given the current profitability of workers' compensation insurance and low levels of claim costs.

The proposed definition will not benefit low wage earners as who will find it very difficult to earn less than 90% of minimum wages unless they are totally disabled. Medical restrictions often preclude many minimum wage jobs, however, this proposal would make it impossible for a disadvantaged worker to receive work disability, even when the ALJ determines she/he are making reasonable efforts to obtain employment.

K.S.A 44-511; Page 11/Lines 5-8

The proposed amendment deals with the computation of average weekly wages. Because worker's benefits are directly tied to the wages, the calculation is very important to both worker and employer. In many cases, labor contracts are negotiated with lower hourly rates to retain better benefit packages. The proposal would exclude from consideration any fringe benefits which the employee agreed to work for even though the parties had agreed on the sum. In most cases where the employee is no longer employed, the employer will contend he/she left for reasons unrelated to the injury. Often, this is not accurate but will always be claimed if this statute is amended. This proposal will serve to increase litigation and therefore expenses.

As written, the proposal would allow the employer to exclude fringes if the employee is no longer working for them and would most likely allow them to include fringe benefits in post injury wages if the employee receives them. Such theory would be unfair to the injured worker who agreed to work for the fringe benefits prior to injury. At present, the Courts take into

consideration fringe benefits both before and after injury. Such an analysis is an "apples to apples" approach and seems more logical and fair.

K.S.A. 44-528; Page 15/Lines 28-31

This proposed amendment is designed to prevent workers from receiving any increased benefits if the injury becomes worse. Under current law, an employee may seek additional compensation after an award is entered if the medical condition resulting from the injury becomes worse. For example, a worker sustains an injury to a knee requiring arthroscopic surgery. The surgeon cautions the worker he may need a knee replacement in the future. The surgeon gives the worker a rating of 10% functional impairment based on the surgical findings. This rating would equate to approximately 20 weeks of benefits. By the time the worker reaches a settlement of hearing, the 20 weeks will most likely have expired. This means all benefits are currently due. If the worker tries his claim within a year, he will be precluded from requesting additional impairment if a subsequent knee replacement increases the impairment because he did not apply before the benefit period expired. In most cases, it would be impossible to obtain an award within the 20 week benefit period. There would never be an opportunity to apply for additional disability after the last surgery even though the impairment increased. This legislation would be a trap for the unwary injured worker.

As you can see, there is no logic in this proposal and it should be rejected.

K.S.A 44-536; Page 18/Lines 15-20

The purpose of the original statute was to promote cooperation between the insurance carriers and employees concerning future medical treatment. Virtually all awards provide for future medical treatment and many cases are litigated because the employee does not want to give up future medical care. Once the awards are entered directing medical care "upon application and order by the director" workers commonly find that the employer will not provide treatment. without a hearing. Post award hearings are very time consuming and expensive but insurance carriers would often rather fight than provide medical treatment. The employee is not in a financial position to spend monies trying to obtain medical treatment which was granted by the ALJ. Because of the financial disparity, we see employers push workers into court. The statute now provides that the insurance carrier be responsible for the worker's attorney fee in such cases and this should be left intact to avoid extensive litigation. It must be remembered that the insurance carrier which provides medical treatment without forcing litigation does not fact the assessment of fees.

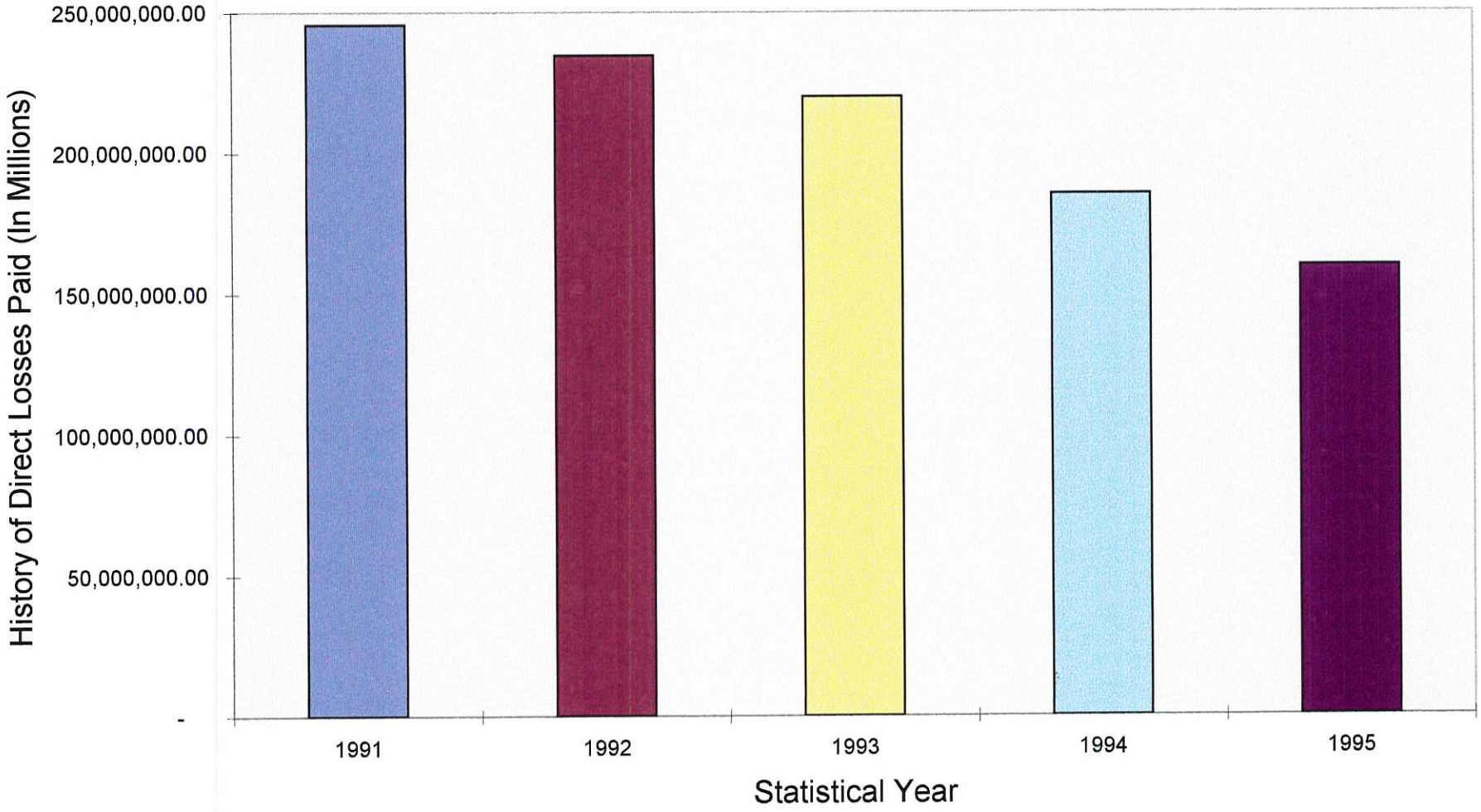
K.S.A 75-5708; Page 19/Lines 25-38

At the present time, our administrative law judges are appointed by the Department of Human Resources and are under civil service. Once appointed, the judges are subject to civil service

rules, regulations and ethical considerations. Since they do not have to run for office again, they are theoretically removed from political pressure. The current proposal would require the reappointment of our judges every four years meaning they would have to be in good favor with the " powers" at that time. Such a procedure would lead to pressure on the judges to do the currently popular thing and perhaps decide case not on the facts and law be on some basis that would draw favor from the administration. No honorable person would want a judiciary subject to political power every four years and the removal from civil service protection would certainly foster inappropriate pressure on the judges.

In summary, the Kansas Trial Lawyers Association opposes the proposals and amendments contained in Senate Bill 289 and encourages it's rejection in total. Kansas families are economic units who cannot afford to be damaged in the workplace without a meaningful way to obtain restitution for their injuries. Kansans have already had their benefits for lost earning capacity cut to meager levels. Further cuts are not warranted and reflect an insurance company attitude of greed and profit at any costs to families.

Kansas Workers Compensation Insurance Experience: Direct Losses Paid



Source: Kansas Department of Human Resources Workers Compensation Annual Report
Fiscal Year 1995-1996 Page 50 Table VIII. Table Prepared by Kansas Insurance Department

Kansas Trial Lawyers Association
CATI:97SCC.sb289 2/20/97

2-01

WORKERS COMPENSATION INSURANCE EXPERIENCE

Prepared by Kansas Insurance Department

TABLE VIII

Year	Direct Premiums Written	Direct Premiums Earned	Direct Losses Paid	Direct Losses Incurred	Premiums Written to Losses Paid	Premiums Earned to Losses Incurred
1980	141,189,216	138,145,343	72,697,056	102,896,246	51.5	74.5
1981	156,207,756	149,261,425	80,425,265	101,691,667	51.5	68.1
1982	154,944,245	152,315,135	88,345,714	107,979,341	57.0	70.9
1983	147,137,981	148,669,330	96,289,968	115,282,150	65.4	77.5
1984	141,097,000	140,223,000	106,701,000	125,520,000	75.6	89.5
1985	172,985,620	170,955,138	120,755,675	147,438,366	69.8	86.2
1986	208,167,277	202,033,619	134,554,116	170,153,475	64.6	84.2
1987	233,674,161	222,846,661	147,885,631	195,885,084	66.1	87.9
1988	257,039,527	259,548,305	164,553,813	208,332,654	64.0	80.3
1989	264,102,264	263,386,009	184,857,801	239,142,874	70.0	90.8
1990	291,804,714	293,048,038	222,309,953	265,726,660	76.2	90.7
1991	342,803,582	338,869,988	245,685,923	322,711,452	71.7	95.2
1992	364,184,283	360,759,612	234,729,527	289,992,534	64.5	80.4
1993	367,030,245	365,646,558	220,091,021	231,228,324	60.0	63.2
1994	338,173,750	312,116,539	185,502,395	192,914,048	54.9	61.8
1995	312,745,351	322,205,785	159,776,412	139,528,898	51.9	43.3

Legislative Testimony

KANSAS BAR ASSOCIATION

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TO: Members, Senate Business & Commerce Committee

FROM: Ron Smith, KBA General Counsel

SUBJ: Attorney fee limits in Workers Compensation matters

DATE: February 20, 1997

The KBA supports returning the workers compensation attorneys' fee statute to a straight 25% of the amounts recovered.

Prior to 1908, the regulation of the bar was left to statutory enactments or individually by clients who sued their lawyers. In 1972, the Judicial Article of our state constitution was rewritten to give the Supreme Court the overall administrative responsibility for the practice of law and court administration.

Prior to 1957, there was no statutory control over the percentage of recovery that attorneys could contract to recover in the workers compensation case. In 1957, the legislature put the attorneys fee limit at 25%, which at that time was considered to be merely codifying the existing practice in the legal community. That limit remained unchanged until 1993, when we adopted current law. The belief in 1993 was that since the injured worker was giving up some recoveries that before that time he or she was entitled to, the worker's lawyer should "make up" that difference by being restricted to a lower fee contract. We predicted then that such changes in the contract limits in *some* smaller cases would make it difficult to hire a lawyer. That prediction has come true. In reality what happened was that by making the cases worth less and reducing the fee contract percentages, more borderline cases became unprofitable for attorneys to be involved. The claimant faced an inability to hire lawyers and thus became subject to the mercy of their employer's offer. A workers compensation claim, no matter how valid, is going to be greatly devalued if the claimant is unable to hire good counsel to work with the employer.

We believe that even if you went back to the pre-1957 situation, no limits, the customary fee would still be 25% and Model Rule of Professional Conduct (MRPC) 1.5(a) would still protect claimants from higher amounts being sought by contract if the attorney could not justify the higher percentage.

MRPC 1.5 applies to every fee contract, but especially contingent fee contracts. I've attached a copy of the rule. As you can see it requires attorneys to put the contract in writing, and furnish the client with an accounting upon distribution of the award or settlement upon recovery. The rule also allows the client *on his or her own* to contact a judge and have the judge review the reasonableness of the contract. The older ethics rules of lawyers only prohibited "excessive" fees. MRPC 1.5 is much broader and allows the Court and the Disciplinary Administrator to regulate all fee contracts for "reasonableness." These MRPC 1.5 limitations were implemented in 1988, long after 1957 codification of the 25% rule. Case law indicates many cases where the Kansas appellate courts have reviewed MRPC 1.5 on reasonableness of fees. We feel we "police our own" quite well. Many of these cases are lawyer discipline cases.

In addition, this spring the KBA is implementing a statewide fee dispute committee. The Johnson and Sedgwick County bar associations already have such committees for 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 includes mediation of workers comp claims.

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If the Commerce committee does not want to adopt an unregulated system and let the Model Rules limit the "reasonableness" of the fee on a case by case basis – which we also would support – then returning the law to a 25% recovery limit is a corrective step that needs to be taken to lessen the hardship caused by the 1993 law.

Thank you.

Cases involving
MRPC 1.5 since 1988

920 P.2d 433	260 Kan. 605	Brantley, Matter of
914 P.2d 948	259 Kan. 893	Scimeca, Matter of
907 P.2d 124	258 Kan. 740	Geeding, Matter of
907 P.2d 844	258 Kan. 762	Tuley, Matter of
899 P.2d 1004	258 Kan. 108	Miller v. Botwin
895 P.2d 603	257 Kan. 662	Shultz, Matter of
883 P.2d 779	256 Kan. 196	Schultz, Matter of
877 P.2d 423	255 Kan. 797	Jenkins, Matter of
855 P.2d 963	253 Kan. 444	King, Matter of
845 P.2d 649	252 Kan. 367	City of Wichita v. B G Products, Inc.
840 P.2d 526	251 Kan. 844	Plettner, Matter of
825 P.2d 130	250 Kan. 84	Board of County Com'rs of Sedgwick County v. Willard J. Kiser Living Trust
815 P.2d 550	249 Kan. 248	Evans v. Provident Life & Acc. Ins. Co.
807 P.2d 109	248 Kan. 352	Ryder v. Farmland Mut. Ins. Co.

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 Origin

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 recommendations 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 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.

KANSAS MEDICAL SOCIETY

February 20, 1997

TO: Senate Commerce Committee

FROM: Jerry Slaughter
Executive Director

SUBJECT: SB 346; concerning workers compensation and the medical fee schedule

The Kansas Medical Society appreciates the opportunity to appear today in support of SB 346, which makes several changes in the workers compensation law. Our interest in the bill centers around the change on page 3, line 23, which requires the director of workers compensation to *revise* the medical fee schedule at least every two years. This provision was basically the change that this committee approved last year, which unfortunately died in House committee. Current law just requires that the schedule be reviewed annually. We support this change for the following reasons:

(1) the fee schedule has just been revised, after nearly three years of efforts on our part to make it more reflective of current conditions. At the time it was revised last year, the data on which it was based was in some cases 5 years old;

(2) while we greatly appreciate the current director's following through with the revision, repeated attempts by the provider community to get previous directors to even review, let alone revise, the fee schedule were unsuccessful. Directors change over the years, and future directors may not feel inclined revise the fee schedule, no matter how out of date it gets;

(3) if fees for treating injured workers fall well below the rest of the commercial marketplace, health care providers will restrict the numbers of workers compensation patients they see, not unlike the unfortunate situation that exists in the Medicaid program, which has access problems;

(4) it is basically unfair for the business community, and their insurers, to expect health care providers to subsidize their insurance costs through unreasonable reimbursement policies. In fact, the revisions to the fee schedule this past year had a negligible impact on workers compensation insurance premiums, as those costs actually went down for business.

We do have a question about the change on page 13, lines 8-15. This language appears to require all health care providers to submit their entire fee schedule to the director for the purpose of establishing the fee schedule in the future. In addition, it also requires that providers submit "medical information, by procedure, charge and zip code...." We are unclear about the effect of this change, and are concerned about the potential for cost and hassle to providers to meet this requirement. There may be a better way to gather the information the director is seeking, and we would be happy to help him get this information short of requiring more paperwork and time of providers.

We appreciate the opportunity to offer these comments.

Senate Commerce Committee
February 21, 1997
Attachment 12

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February 20, 1997

Dear Members of the Senate Commerce Committee:

I am writing to ask for your support of Senate Bill 321, which amends the workers compensation act to restrict public access to workers compensation (wc) records. Senate Bill 321 does include provisions that allow access to workers compensation records *when there is a legitimate reason*. Such time would be when an employer and insurance carrier need access in order to resolve a current claim for workers compensation. Otherwise a person would have to obtain a court order in order to access the records.

Many people believe employers need open access to workers compensation records in order to screen out people who are abusing the system. Senate Bill 321 does allow the director of the division of workers compensation access to wc records to investigate fraud or abuse. As you know, there are also additional state laws that provide ways to deal with fraud and abuse of the workers compensation system.

Kansas does not need open public access to workers compensation records. It is a violation of privacy and makes it too easy for employers to discriminate against people with disabilities by not hiring qualified people with disabilities who happen to have a prior workers compensation claim. The burden should be on employers to justify each time they want access to workers compensation records.

We people with disabilities want to work and accept the fact that we must be qualified. The Americans with Disabilities Act (ADA) and the Kansas Act Against Discrimination (KAAD) both include provisions that make it clear that the hiring decision should be based on an individual's ability to perform the essential functions of the job, with or without reasonable accommodation. (Not every person with a disability needs reasonable accommodation.)

Employers should not be accessing workers compensation records to find out if a person has a disability and what accommodations they may need. (During the January 23, 1997 Workers Compensation Advisory Committee meeting, two business representatives thought this was legal practice.) According to the Equal Employment Opportunity Commission, an employers responsibility to provide reasonable accommodation is triggered by the request from an individual with a disability. This may occur anytime during the application or period of employment.

Under the ADA and KAAD it is discrimination for an employer to go on a fishing expedition to try and find out if a person has a disability, and then use that information to not hire a qualified individual with a disability. The current open access to workers

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INDEPENDENCE INC.

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compensation records makes it far too easy for employers to discriminate in this way against qualified individuals with disabilities.

Please help employers stay focused on making hiring decisions based on a person's current ability to do the job by voting favorably for Senate Bill 321.

Thank you for your time and consideration of this matter.

Sincerely,

Bob Mikesic
Advocacy Coordinator

Roger Harsh
Advocacy & Development Specialist

Kansas Council on Developmental Disabilities

BILL GRAVES, Governor
TOM ROSE, Chairperson
JANE RHYS, Executive Director

Docking State Off. Bldg., Room 141, 915 Harrison
Topeka, KS 66612-1570
Phone (913) 296-2608, FAX (913) 296-2861

"To ensure the opportunity to make choices regarding participation in society and quality of life for individuals with developmental disabilities"

SENATE COMMITTEE ON COMMERCE

2/21/97

Testimony in Regard to S.B. 321 AN ACT RELATING TO THE CLOSING OF WORKERS COMPENSATION RECORDS.

Madame Chairperson, Members of the Committee, I am submitting written testimony on behalf of the Kansas Council on Developmental Disabilities in support of S.B.321, relating to the closing workers compensation records.

The Kansas Council is a federally mandated, federally funded council composed of individuals who are appointed by the Governor. At least half of the membership are persons with developmental disabilities or their immediate relatives. We also have representatives of the major agencies who provide services for individuals with developmental disabilities. Our mission is to advocate for individuals with developmental disabilities to see that they have choices regarding their participation in society.

The Council supports S.B. 321 as we believe that open workers compensation records encourage discrimination against persons with disabilities by allowing employers to "peek" into an applicant's medical history prior to hiring them. Despite passage of the Americans with Disabilities Act and state legislation, employers' misguided fears about hiring persons with disabilities has perpetuated. Millions of dollars are spent each year on rehabilitation, job training and placement, and assistive technology to enable citizens to work. Open workers compensation records are a barrier to personal independence and reducing dependence on state and federal benefits.

Thank you for your consideration of this bill and for your support of individuals with disabilities who want to work.

Shelly Krestine, Grants Manager
Kansas Council on Developmental Disabilities
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Senate Commerce Comm
February 21, 1997
Attachment 14

STATE OF KANSAS
HOUSE OF REPRESENTATIVES

MICHAEL R. (MIKE) O'NEAL

104TH DISTRICT
HUTCHINSON/NORTHEAST RENO COUNTY

LEGISLATIVE HOTLINE
1-800-432-3924

CHAIRMAN:
EDUCATION COMMITTEE
MEMBER:
FISCAL OVERSIGHT
TOURISM
RULES AND JOURNAL COMMITTEE
JOINT COMMITTEE ON GAMING COMPACTS

MEMORANDUM

To: **Members of the Senate Commerce Committee and interested parties**

From: **Rep. Mike O'Neal**

Re: **Conflicts between S.B. 137 and S.B. 285**

At the public hearing on S.B. 285 this morning in your Senate Commerce Committee, Workers Compensation Director Harness pointed out that there is an inherent conflict between this proposal and S.B. 137, which the Committee passed out and the Senate adopted recently. Both measures, as you know, deal with the issue of subcontractors in the workers compensation arena.

In S.B. 137 you addressed the problem of uninsured sub-contractors and their employees by requiring coverage when they do work for contractors. S.B. 285 would allow a sole proprietor to exempt himself from coverage by giving a n affidavit to the contractor that he has no employees for whom the act applies. The problem with the language of S.B. 285 is that it does not address the situation brought up by Sen. Harris, wherein the sub-contractor employer gives the contractor an affidavit and then hires an employee or employees after the date of the affidavit. An injured employee under those facts would have a claim against the contractor under K.S.A. 44-503 under circumstances where the contractor thought he was protected.

A possible remedy would be to allow a self-employed sole proprietor without employees to exempt himself from coverage and provide the contractor with a release of liability or hold harmless agreement. Any employees would have to be covered by the sub, and, in the event of a failure to obtain insurance, would be statutory employees under K.S.A. 44-503. You don't want a situation where, as Mr. Gibson described, you have contractors subject to general tort liability claims. That problem is resolved in S.B. 137.

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The above remedy, if pursued, would require amendment of S.B. 137 in the House, and would require amendment of S.B. 285 in your committee to limit its application to the self-employed sole proprietor without employees. Keep in mind that, contrary to the testimony of the conferees on this bill, being a sole proprietor does <u>not</u> mean that there are no employees. I would be happy to answer any questions you may have. I appreciate that you had a good deal of material to cover in your committee meeting today.