

Approved: February 18, 1998  
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 17, 1998 in Room 123-S of the Capitol.

Members present: Senators Salisbury, Barone, Brownlee, Donovan, Feleciano, Gooch, 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:

Kathleen Sebelius, Commissioner of Insurance  
Julie Bachman, KOCH Industries, Inc.  
Terry J. Torline, Martin, Pringle, Oliver, Wallace & Swartz, Attorneys, Wichita  
Terry Leatherman, Kansas Chamber of Commerce and Industry  
Jim Martin, Chairman, KTLA Workers Compensation Committee  
Bill H. Raymond, Shultz & Lonker & Raymond, Chartered, Wichita

Others attending: See attached list

Kathleen Sebelius, Insurance Commissioner, reported to the Committee on the Workers Compensation Fund. Ms. Sebelius stated three years ago when her tenure as Insurance Commissioner commenced she found it necessary to determine the status of cases, audit them and match them up with the proper attorney. An audit was done by Stuart, Maue, Mitchell & James to look at administrative procedures, how funds were handled compared with other states, and to make recommendations. A number of the recommendations were immediately enacted including computerization, stringent billing guidelines for attorneys and a realignment of recordkeeping. (Attachment 1)

Ms. Sebelius stated three years ago there was an open case load of 9,000, which has been reduced to 6,800; the billing is current and attorney fees are down 40%. The new liability clause that the Second Injury fund terminate as of July 1994, enacted in the 1993 Workers Compensation legislation, has been challenged to the Kansas Supreme Court, asserting the legislature had not correctly written that provision. The Commissioner's office took the position that it was properly written and that the fund liability did cease, a position upheld by the Court. Liability has ceased as of July 1994. The funds liability is \$289,899,000, the payoff liability of the existing 6,800 cases. This is only for the Second Injury claims. The Fund will have new cases in terms of both reimbursement and when an employer is insolvent. The Fund will continue to pay in those cases where an employer either does not have insurance or is insolvent.

Ms. Sebelius briefed the Committee on the status of workers compensation in the state, stating there are 294 insurers that are approved to write business in the state, and 18 active group-funded workers compensation pools in the state, who have generated approximately \$350 million in annual premiums. The bill enacted in 1993 has had a dramatic effect on the market place. Since 1995, workers compensation costs have dropped a total of \$104 million. The final constitutional challenge to the law was overturned in July of 1997, so there is no longer any court challenge to the workers compensation law. The rating of companies as of July 1, 1997, is on a "file and use" basis rather than a "prior approval" basis, providing greater flexibility and increasing competition in the workers compensation market. (Attachment 2)

**SB 522 - Determining functional disability for repetitive motion injuries**

Julie Bachman, Claims Section, KOCH Industries, Inc., testified in support of **SB 522**, stating that as a result of the 1993 changes to the workers compensation act, employers lost the Second Injury Fund but gained the preexisting impairment credit in 44-501(c). Inconsistency has occurred as a result of this section because court decisions have found that dates of accidents in cumulative trauma injuries occurs on the last day worked and not at the onset of symptoms or at the initial medical treatment. "Last day worked" dates of

CONTINUATION SHEET

MINUTES OF THE SENATE COMMITTEE ON COMMERCE, Room 123-S Statehouse, at 8:00 a.m. on January 17, 1998.

accident rather than "date of onset" dates of accident enhance benefit levels for the injured employee. Passage of **SB 522**, will allow employees who promptly report cumulative trauma injuries will receive all benefits to which they are entitled with no offset for preexisting impairment. Employees who delay reporting their injuries and do not allow intervention may receive a reduction in their final impairment award. (Attachment 3)

Terry J. Torline, a Wichita attorney, testified in support of **SB 522**, stating the clarifying language in **SB 522**, found on Page 1, line 36, is necessary in establishing the date of an accident. Because current language is not specific, courts are holding that the date of accident is not necessarily the date to be used when attempting to determine what impairment of function is pre-existing. Current law allows workers who begin developing repetitive trauma conditions to delay reporting their problems to their employer until their condition has progressed to the point that they require surgery and disabling work restrictions. Employers are denied the opportunity to intervene early on in the disease process to impose restrictions or provide accommodated work to prevent the condition from becoming disabling. (Attachment 4)

According to Mr. Torline, passage of **SB 522** will reduce workers compensation costs by encouraging early reporting of repetitive trauma injuries. If a worker delays in reporting until the condition has become disabling, he or she will still be entitled to medical benefits and temporary total disability benefits. The worker's permanent partial disability benefits will be reduced by the amount of the functional impairment that existed prior to the date of accident.

Terry Leatherman, Kansas Chamber of Commerce and Industry, testified in support of **SB 522**, stating **SB 522** clarifies the legislative action of 1993 which establishes a preexisting condition exclusion in the workers compensation law. The question of when do you begin to offset for preexisting conditions has been raised in the courts and its ruling appears to be opposite of legislative intent. (Attachment 5)

James E. Martin, Chairman, KTLA Workers Compensation Committee, testified in opposition to **SB 522**. Mr. Martin stated **SB 522** will have an enormous and adverse impact on workers as it will effectively deny repetitive overuse claims on behalf of injured workers. **SB 522** appears to attempt to "fix" a specific date when an injury occurs, even when the injury is known to have occurred over a period of time. Repetitive use injuries develop over time and it is neither an easy nor a routine matter to fix the date of accident in such cases. These gradual types of injuries do not have a situation where one day the worker is fine and the next day the worker is disabled. The court determined these types of injuries are the result of a series of mini-traumas occurring each and every day worked, so there is no preexisting impairment upon which liability of the fund can be based. (Attachment 6)

Bill H. Raymond, Shultz, Lonker & Raymond, Chartered, testified in opposition to **SB 522**. Mr. Raymond stated he represented Mike Dumbauld in Dumbauld v Beech Aircraft Corporation, and Kansas Workers Compensation Fund. Mr. Raymond stated the definition of preexisting condition in repetitive use injury is a well settled area of law and does not require legislative attention. The passage of **SB 522** would have a great impact on Kansas case law. **SB 522** limits the compensation workers could receive. Current law requires employers to compensate injured workers for the amount of impairment or aggravation that is work related and provides that any award of compensation be reduced by the amount of functional impairment determined to be preexisting. (Attachment 7)

The meeting was adjourned at 9:05 a.m.

The next meeting is scheduled for February 18, 1998.

# SENATE COMMERCE COMMITTEE GUEST LIST

DATE: February 17, 1998

NAME	REPRESENTING
J.P. Small	KOCH INDUSTRIES
Jim MARTIN	Ks. TRIAL LAWYERS' ASS'N
Terry Torline	Wichita Employers Task Force
Hal Hudson	NFIB/KS
Bill Curtis	Ks Assoc of School Bds
Art Brown	Mid-Am Lumbermen Assn
Christy Caldwell	Topeka Chamber of Comm.
Ray + Doreen	Ks Dept of Admin
Susan Anderson	Hein + Weir
Jean Schmidt	Kansas Insurance Dept.
Anula (Graham)	"
Sandra McCorsy	KS Ins Dept.
Dick Cook	KS Ins. Dept.
Bill Wenzel	" " "
Tom Wilder	Kansas Insurance Dept
Kathleen Sebelius	KANSAS Insurance Dept
Chuck Nicholson	AARP
Ronald W. Jones	Kansas Workers Comp. Div.
Paul H. Horn	KDHR/WORK Comp



KATHLEEN G. SEBELIUS  
COMMISSIONER OF INSURANCE

***THE KANSAS WORKERS' COMPENSATION FUND***  
***K.S.A. 44-566(a)***

Year End Report  
1997

Senate Commerce Committee

Date 2-17-98

Attachment #1-1 thru 1-20

**THE KANSAS WORKERS COMPENSATION FUND**  
**K.S.A. 44-566(a)**

Year End Report  
1997

	<u>Page</u>
<b>I. <u>THE THIRD YEAR</u></b> .....	<b>1</b>
<b>II. <u>GENERAL INFORMATION</u></b> .....	<b>3</b>
A. NATURE & PURPOSE .....	3
B. COVERAGE.....	4
1. <i>Second Injury</i> .....	4
2. <i>Insolvent/Uninsured Employers</i> .....	5
3. <i>Reimbursement</i> .....	6
C. FUTURE LIABILITY.....	6
<b>III. <u>FINANCIAL</u></b> .....	<b>6</b>
A. FINANCIAL OVERVIEW .....	6
<b>IV. <u>TAIL LIABILITY/ACTUARIAL REPORT</u></b> .....	<b>8</b>
A. ESTIMATE OF KANSAS WORKERS' COMPENSATION FUND'S LIABILITY .....	8
B. ACTUARIAL REPORT OF 6/30/94 .....	9
<b>V. <u>LEGISLATIVE ISSUES</u></b> .....	<b>10</b>
A. STATUS OF POST-JULY 1, 1994 CASES .....	10
B. FUND DISMISSAL .....	10
<b>VI. <u>CONCLUSION</u></b> .....	<b>10</b>

- EXHIBIT 1 -- Actuarial Report Summary
- EXHIBIT 2 -- Case Report Request
- EXHIBIT 3 -- Actuarial Report Addendum
- EXHIBIT 4 -- Executive Summary

## I. The Third Year

Kathleen G. Sebelius, the 23rd Insurance Commissioner of Kansas, took office January 9, 1995. In her role as the Administrator of the Kansas Workers' Compensation Fund, the Commissioner inherited a bureaucracy that had seen little change since it was transferred to the Department of Insurance in the 1970s. The Kansas Workers' Compensation Fund, which administered approximately \$28.5 million in 1997, had a working staff of one attorney, one half-time attorney, one paralegal, one secretary, two half-time secretaries, three accountants, and two half-time law clerks.

In January 1995, at the time of transfer, the Fund was up to six months behind in payments to claimants and respondents. Much of this was caused by the lack of available personnel during the prior administration. The Fund attorney assigned to oversee the everyday activities of the Fund was on leave without pay from mid-September through mid-November, 1994, prior to her resignation in December 1994. Both the paralegal and the secretary terminated their positions in January, further adding to the difficult transition.

Immediately upon taking office, the Commissioner implemented several stop-gap measures. Brian Moline, the new General Counsel, took on the responsibility of oversight of the Fund while interviewing attorneys and handling his other numerous duties. Two temporary accountants were hired to catch up on the six month backlog of payments due claimants and respondents. The Fund was brought current on payments in April of 1995. Payments have remained current to the point of paying Claimants within two weeks of receiving proper documentation and Respondents within thirty days. This payment schedule is a significant improvement over past practices.

Brian Moline, General Counsel, also requested status reports on all open cases, and asked the approximately 100 Fund attorneys to verify our computer records on cases assigned to them. The review of all open files (approximately 9,300) continued until December of 1995. The information was updated in the master computer files and a current status was obtained on each file. Changes were made in over ten percent of the files. This file review continues internally on a daily basis. Each attorney is also required to submit a detailed report at least once a year on all active cases. Copies of these reports are included as exhibit 3. These steps allow the Commissioner to carry out her strong commitment of maintaining a database that reflects the true nature of the Fund's files. In addition, a computer rewrite of the Fund's working system on the AS400 has been completed. The rewrite allows the Fund to access valuable information not previously available. It includes the total amount of money paid to a certain Respondent, such as Boeing or Frito Lay, the total amount paid to a certain medical provider and a break down of payments made to a Claimant. The goal is to treat the Fund as a business and function more in the manner of an insurance carrier in processing these claims.

An audit of the Fund's internal procedures was conducted by Stuart, Maue, Mitchell and James pursuant to an RFP in June 1996. At that time, the firm found approximately seven

deficiencies in the general working of the Fund. These included; (1) woefully inadequate working and record maintenance space, (2) unacceptably small staff, which is required to process huge masses of critical legal and financial documentation, (3) inadequate computer and printer resources, (4) limited access to various databases, (5) inadequate "ports" to STARS, (6) unacceptably wide dispersal of employees over three floors, (7) use of both full-time and part-time employees to conduct required fund functions. The Commissioner immediately set about



addressing all of the concerns. Computers and printers were ordered for the employees and were in place in 1996. Access to the databases and STARS was given to each Fund employee. The space, staff, and wide dispersal concerns would be dependent upon the legislature allocating additional resources. The audit was extremely favorable to the Commissioner's handling of the Fund. In fact, the auditor in his conclusion stated,

While the methods used do not meet insurance industry standards and certainly, did not allow the department to exercise the desirable "control" over existing cases, such direct management control was impossible and improbable under the conditions facing these employees. In conclusion then, "Well done!" to all those involved in ensuring that the fund "worked".

A copy of the Stuart Maue Mitchell and James Executive Report is included as exhibit 1. Another complete audit of all of the Fund attorneys fees was conducted and individual internal audits continue at the rate of at least two a month. Because there was only a two and a half page general guideline in place in the prior administration, new and stricter billing guidelines (approximately 64 pages) were placed in effect in September 1996. There have been two substantive, detailed and restrictive guideline changes since the Commissioner took office.

## II. General Information

### A. Nature & Purpose

The purpose of the Workers' Compensation Fund is to encourage the employment of persons handicapped as a result of specific impairments by relieving employers, wholly or partially, of workers' compensation liability resulting from compensable accidents suffered by these employees. K.S.A. 44-567(a). *Morgan v. Inter-Collegiate Press*, 4 Kan. App. 2d 319, 606 P.2d 479 (1980).  
Responsibility for payments from and administration of the Fund lies with the Commissioner of Insurance. K.S.A. 44-566a(b).

## **B. Coverage**

There are three basic areas of coverage for employers and employees under the Kansas Workers' Compensation Fund. The first is second injury coverage, the second is insolvent/uninsured employers, and the third is reimbursement to employers on an overpayment of benefits.

### **1. Second Injury**

In order for an employer to be relieved of liability by the Kansas Workers' Compensation Fund, either in whole or in part, the employer must establish that it hired or retained a handicapped employee after acquiring knowledge of the preexisting handicap or that the employee intentionally misrepresented the existence of the handicap.

Handicap is broadly construed by the statutes and case law. Second injury cases are broken down into "but for" and contribution cases.

#### **a) "But For" Cases**

K.S.A. 44-567(a)(1) provides:

Whenever a handicapped employee is injured or is disabled or dies as a result of an injury which occurs prior to July 1, 1994, and the administrative law judge awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers compensation fund; and

Assuming the employer has the requisite knowledge of the employee's handicap, recovery from the workers' compensation fund is 100% pursuant to this section. This test is whether the injury or resulting disability, not the accident, probably or most likely would not have occurred "but for" the preexisting impairment. *Barke v. Archer Daniels Midland Co.*, 223 Kan. 313, 573 P.2d 1025 (1978). Medical evidence is not required to establish a "but for" case against the fund.

*b) Contribution Cases*

K.S.A. 44-567(a)(2) provides:

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

If the handicapped employee's impairment contributes causally to the injury or disability, the Workers' Compensation Fund may be liable for a portion of the compensation and benefits awarded to the claimant. The apportionment of the award is based on the amount of disability attributable solely to the second injury and the extent that the preexisting impairment contributed to the second injury.

**2. Insolvent/Uninsured Employers**

K.S.A. 44-532a states:

(a) If an employer has no insurance to secure the payment of compensation as provided in subsection (b)(1) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workmen's compensation act, or such employer cannot be located and required to pay such compensation, the injured worker may apply to the director for an award of the compensation benefits including medical compensation, to which such injured worker is entitled, to be paid from the workers' compensation fund. If the director is satisfied as to the existence of the conditions prescribed by this section, the director may make an award, or modify an existing award, and prescribe the payments to be made from the workers' compensation fund as provided in K.S.A. 44-569 and amendments thereto. The award shall be certified to the commissioner of insurance, and upon receipt thereof, the

commissioner of insurance shall cause payments to be made to the employee in accordance therewith.

The Workers' Compensation Fund may be required to pay benefits to injured workers where the employer has no insurance and is financially unable to pay compensation to the injured worker or in situations where the employer cannot be located to pay such compensation. The Fund currently has approximately 449 open insolvent employer cases. There have been 544 cases in this area since 1990.

### **3. Reimbursement**

Reimbursement pursuant to K.S.A. 44-556(d), K.S.A. 44-534a(b), and K.S.A. 44-569(c) all encompass paying a respondent for money expended during a workers' compensation case that should not have been paid for a variety of reasons.

These amounts are certified to the Director of Workers' Compensation and then paid by the Fund with no litigation or involvement by the Workers' Compensation Fund before being ordered to pay.

### **C. Future Liability**

Pursuant to legislation enacted July 1, 1993, the Kansas Workers' Compensation Fund has no liability for any dates of accident after July 1, 1994, in the second injury category of coverage, but this area is currently under litigation. In October of 1996, the Fund received a favorable decision on this issue from the Kansas Court of Appeals. *Shain v. Boeing*, 22 Kan. App. 2d 913 (1996), held that the Fund has no liability for claims arising after July 1, 1994. Please refer to page ten under Legislative Issues, Post-July 1, 1994 cases. The Fund remains liable for uninsured/insolvent employers and reimbursement cases. Please refer to page five.

## **III. Financial**

### **A. Financial Overview**

The Workers' Compensation Fund was created and exists pursuant to K.S.A. 44-566a and receives its funding from essentially two sources: (1) assessments against insurance carriers and

self-insurers, K.S.A. 44-566a(b); and (2) payments by employers where an employee is killed in an otherwise compensable accident, but in which there are no eligible dependents, K.S.A. 44-570 (non-dependent death).

Receipt Analysis

FY1997

Assessment Receipts	\$26,640,951.56
Gen. Fund Entitlement	0.00
Non-Dependent Death Receipts	\$154,000.00
Misc. Reimbursements	<u>\$200,045.43</u>
TOTAL RECEIPTS	\$29,994,996.99
Previous Year Carryover	\$26,980,038.72
Canceled Checks	<u>224,121.52</u>
TOTAL FUNDS AVAILABLE	\$54,199,187.23

FY1996

Assessment Receipts	\$33,010,078.80
Gen. Fund Entitlement	0.00
Non-Dependent Death Receipts	\$203,500.00
Misc. Reimbursements	<u>\$170,378.94</u>
TOTAL RECEIPTS	\$33,383,957.74
Previous Year Carryover	\$31,469,560.82
Canceled Checks	<u>246,193.51</u>
TOTAL FUNDS AVAILABLE	\$65,099,712.27

FY1995

Assessment Receipts	\$42,352,785.43
Gen. Fund Entitlement	0.00
Non-Dependent Death Receipts	0.00
Misc. Reimbursements	<u>154,600.63</u>
TOTAL RECEIPTS	\$42,507,386.06
Previous Year Carryover	37,515,761.63
Canceled Checks	<u>193,152.69</u>
TOTAL FUNDS AVAILABLE	\$80,216,300.38

FY1994

Assessment Receipts	\$63,951,643.95
Gen. Fund Entitlement	0.00
Non-Dependent Death Receipts	92,500.00
Misc. Reimbursements	<u>207,845.97</u>
TOTAL RECEIPTS	\$64,251,989.92
Previous Year Carryover	16,716,488.98
Canceled Checks	<u>0.00</u>
TOTAL FUNDS AVAILABLE	\$80,968,478.90

FY1993

Assessment Receipts	\$47,987,400.35
Gen. Fund Entitlement	0.00

Disbursement of Expenditures

FY1997

Administrative Costs	.89%
Compensation Costs	62.28%
Vocational Rehabilitation	.80%
Medical Costs	28.02%
Other Operating Expenses	1.62%
Attorney Fee Expenses	<u>6.39%</u>
	<u>100%</u>
Outside Counsel	\$1,825,810.17

FY1996

Administrative Costs	.88%
Compensation Costs	64.20%
Vocational Rehabilitation	.90%
Medical Costs	24.96%
Other Operating Expenses	1.00%
Attorney Fee Expenses	<u>8.06%</u>
	<u>100%</u>
Outside Counsel	\$3,053,561.45

FY1995

Administrative Costs	9.62%
Compensation Costs	62.93%
Vocational Rehabilitation	1.12%
Medical Costs	25.79%
Other Operating Expenses	<u>0.54%</u>
	<u>100.00%</u>
Outside Counsel	\$4,241,869.88

FY1994

Administrative Costs	11.01%
Compensation Costs	63.58%
Vocational Rehabilitation	1.28%
Medical Costs	23.51%
Other Operating Expenses	<u>0.62%</u>
	<u>100.00%</u>
Outside Counsel	\$4,343,495.23

FY1993

Administrative Costs	12.36%
Compensation Costs and	65.26%

Non-Dependent Death Receipts	64,750.00
Misc. Reimbursements	<u>139,334.49</u>
TOTAL RECEIPTS	\$48,191,484.84
Previous Year Carryover	1,587,744.72
Canceled Checks	<u>42,541.31</u>
TOTAL FUNDS AVAILABLE	\$49,821,770.87

Vocational Rehabilitation	
Medical Costs	21.62%
Other Operating Expenses	0.76%
Refunds	<u>0.00%</u>
	100.00%
Outside Counsel	\$3,837,959.67

FY1992	
Assessment Receipts	\$35,961,471.11
Gen. Fund Entitlement	0.00
Non-Dependent Death Receipts	166,500.00
Misc. Reimbursements	<u>162,906.20</u>
TOTAL RECEIPTS	\$36,290,877.31
Previous Year Carryover	14,390.64
Canceled Checks	<u>20,392.62</u>
TOTAL FUNDS AVAILABLE	\$36,325,660.57

FY1992	
Administrative Costs	10.96%
Compensation Costs	68.36%
Medical Costs	19.98%
Other Operating Expenses	0.70%
Refunds	<u>0.00%</u>
	100.00%
Outside Counsel	\$3,579,980.88

FY1991	
Assessment Receipts	\$17,030,545.83
Gen. Fund Entitlement	3,930,000.00
Non-Dependent Death Receipts	129,500.00
Misc. Reimbursements	<u>94,490.41</u>
TOTAL RECEIPTS	\$21,184,536.24
Previous Year Carryover	3,758,996.78
Canceled Checks	<u>22,563.44</u>
TOTAL FUNDS AVAILABLE	\$24,966,096.46

FY1991	
Administrative Costs	11.45%
Compensation Costs	69.49%
Medical Costs	18.10%
Other Operating Expenses	0.96%
Refunds	<u>0.00%</u>
	100.00%
Outside Counsel	\$2,645,923.33

FY1990	
Assessment Receipts	\$17,137,820.37
Gen. Fund Entitlement	4,000,000.00
Non-Dependent Death Receipts	55,500.00
Misc. Reimbursements	<u>177,766.44</u>
TOTAL RECEIPTS	\$21,371,086.81
Previous Year Carryover	3,767,063.29
Canceled Checks	<u>2,485.56</u>
TOTAL FUNDS AVAILABLE	\$25,140,635.66

FY1990	
Administrative Costs	12.15%
Compensation Costs	66.93%
Medical Costs	19.91%
Other Operating Expenses	0.97%
Refunds	<u>0.04%</u>
	100.00%
Outside Counsel	\$2,402,730.45

Included in Administrative Costs are attorneys fees, deposition costs, court costs, investigation fees, medical reports, funeral costs and Insurance Department administrative costs, including salaries.

**IV. Tail Liability/Actuarial Report**

**Estimate of Kansas Workers' Compensation Fund's Liability**

Because of the nature of workers' compensation cases, it is impossible to be certain as to the specific dollar amount of tail liability. For litigated cases that have left future medical open, liability on behalf of the Fund will continue until the claimant's death. In addition, liability for

1-10

insolvent/uninsured employers remains active even after July 1, 1994. The reimbursement statutes also remain in effect.

An estimate of the payout per year produced by Casualty Actuaries is included as exhibit 4.

**B. Actuarial Report of 6/30/94**

Commissioner Ron Todd requested that Casualty Actuaries, Inc., complete an estimate of the Kansas Workers' Compensation Fund unfunded liability. The report was received in December of 1994.

The president of the actuarial company summarized the findings of the report in a May 18, 1995 letter which is attached as exhibit 1. His findings were that over the remaining life of the Fund, the best estimate of liability was:

1. Impled Claims	\$174,808,000
2. Offset for Date Purge	50,787,000
3. Potential Claims	<u>64,304,000</u>
Total Unpaid Liability	\$289,899,000

This figure is a "best estimate" and is on the low end of a medium liability range from \$264,842,000 to \$313,258,000. Our liability for this upcoming year will be over \$40 million. Anticipated payout would be through the year 2014.

There were two problems with the information provided by the Insurance Department which was used by Casualty Actuaries, Inc., to come to these conclusions. The first was that there were several purges of the computer information on Workers' Compensation without a hard copy being kept anywhere. This made it impossible to determine what the liability had been during those years, thus creating a gap in the information used to determine future liability. The second problem was that the company was provided incorrect information from the Insurance Department's database when the computer started adding columns instead of printing separately. This was discovered and was compensated for early in the process. A copy of the summary is included as exhibit 2.

**V. Legislative Issues**

**A. *Status of Post-July 1, 1994 Cases***

As of 1/15/98, the Kansas Workers' Compensation Fund has virtually eliminated all July 1, 1994 cases that had been previously open. This is based on the impleadings which have included a date of accident.

The Workers' Compensation Fund's position has always been that the clear intent of the legislature was to limit Fund liability to accidents occurring prior to July 1, 1994.

**B. *Fund Dismissal***

There are four recognized ways to settle Fund liability in a case. The first is an award pursuant to K.S.A. 44-569. Second is a joint petition and stipulation pursuant to K.A.R. 51-3-16. Third is a settlement hearing. Finally is a blanket dismissal by the parties. In addition to these, last year, former Senator Mike Harris sponsored a time limit for prosecuting a case against the Fund. If no action has been taken against the Fund by the other parties within a given time period, the Administrative Law Judge has the authority to dismiss the Fund with prejudice upon motion by the Fund. This was placed into effect last year.

**VI. Conclusion**

The Commissioner of Insurance has been and will continue to be committed to improving the administration of the Kansas Workers' Compensation Fund in all areas of concern.





May 18, 1995

Honorable Kathleen Sebelius  
Commissioner of Insurance  
420 SW 9th Street  
Topeka, KS 66612-1678

Re: Workers Compensation Fund Actuarial Report - Summary

Dear Commissioner,

Paula Greathouse requested that I prepare and send to you a summary of the major points covered in the Casualty Actuaries, Inc. report of the unpaid liabilities of the Kansas Worker Compensation Fund, herein referred to as "the Fund."

For actuarial analysis purposes, it is convenient to consider the liabilities of the Fund in three segments, defined by the data available from state files. Together the three segments cover all of the Fund liabilities. The analysis indicates the following unpaid amounts:

Indicated Fund Unpaid Liability (in thousands of dollars)  
as of June 30, 1994

Implead claims	\$ 174,808
Offset of data purges	50,787
Accidents for which the Fund has not yet been implead	64,304
Total Fund unpaid liability	\$ 289,899

CAI also recommends that:

- a) the Fund improve upon the data captured on computer files so that date of accident is added, in addition to implead date and dates of transactions, and
- b) the Fund establish procedures so that data purges do not lose valuable historical data. The procedures should specify that purges take place only on the Fund's fiscal anniversary, and that archive copies of the file be made both before and after the purge, and that no other transactions take place between the before and after archive copies are made.

Reserves are intended to cover the cost of future payments for claims that have already occurred, whether the Fund has yet been implead or not. As in all predictions of the future, the estimate of future payments comes with a range of estimate. We have calculated the most likely range of total unpaid liability as falling between \$264,842,000 and \$313,258,000. All figures in the report are given prior to discount to present value. That is, the estimates do not anticipate income from investment of Fund assets.

Administrative Law Judge has the authority to dismiss the Fund with prejudice upon motion by the Fund. This was placed into effect last year. The Fund has had one case decided by an Administrative Law Judge in favor of the statute and one against. Both cases are currently in front of the Board of Appeals awaiting hearing.

VI. Conclusion

The Commissioner of Insurance has been and will continue to be committed to improving the administration of the Kansas Workers' Compensation Fund in all areas of concern.

1-14

The first reserve figure is the estimate of the unpaid portion of "implead claims" currently on record in the Fund's computers. These estimates carry the least amount of uncertainty of any of the three reserve categories. The second reserve figure, "offset of data purges," is CAI's estimate of the amount by which our estimate of implead claims are understated because of the purges from the Fund's computer files. Because of the actuarial assumptions required to bridge the missing data, the estimate for this incremental portion has less statistical reliability than the reserve for cases remaining on the Fund's computers. The third figure is the estimate of the Fund's liability for accidents that have occurred prior to July 1, 1994 and for which the Fund has not yet been implead. This portion of the reserve is based on a 600 claim sample of past Fund cases.

The uncertainties underlying the estimates arise from, but are not limited to:

- ① fortuitous nature of the circumstances leading to impleading the Fund;
- ② statistical uncertainty in extrapolating past trends and emergence patterns;
- ③ incomplete information on Fund data files, such as accident dates; and
- ④ purges of closed claims from Fund data files.

CAI found the data summaries to be consistent between valuation dates within two constraints:

1. the Fund reported that the data files were purged of some closed claims on two occasions. At both occasions, the Fund did not make a backup copy of the file prior to and immediately after the purge, thus making the amount and summaries of purged data impossible to obtain; and
2. the summary report as of June 30, 1994 contained large amounts of expenses paid, which remain unexplained, and which differ from the comparable summaries contained in the detailed claim report. This problem was overcome by using alternative data sources, and has no effect on the conclusions.

In addition, CAI found that date of accident was not recorded on Fund data files. With this data item missing, liabilities can only be determined for those claims for which the Fund has been implead. The liabilities accruing during the period between accident and implead date was derived from the patterns observed from a sample of 500 open and 100 closed claims.

The estimated ultimate costs and corresponding indicated reserves are summarized on Exhibit 1 for the different types of Fund payments: payments to claimants, expenses, and the offsetting reimbursements recovered from claimants or insurance companies.

Sincerely,

Robert F. Lowe

1-15

**KANSAS WORKERS COMPENSATION FUND  
SUMMARY OF INDICATED RESERVES  
Valued as of June 30, 1994**

	(1) Paid thru June 1994 <small>(Exh 2, cols 2,3,4)</small>	(2) Estimated Ultimate Cost Fund Pattern <small>(Exh 2, cols 7, 8)</small>	(3) Smoothed <small>(Exh 2, cols 15, 16)</small>	(4) Indicated Reserves Fund Pattern <small>(Exh 2, cols 10, 11)</small>	(5) Smoothed <small>(Exh 2, cols 18, 19)</small>
Compensation	105,517,360	223,441,992	228,344,183	117,924,632	122,826,823
Medical	34,162,831	75,369,965	77,274,203	41,207,134	43,111,372
Other Compensation	21,654	21,654	21,654	0	0
Vocational Rehabilitation	1,640,154	3,469,322	3,540,679	1,829,168	1,900,525
Expenses	19,736,368	28,472,837	28,513,058	8,736,469	8,776,690
<b>Subtotal Gross Reserves</b>	<b>161,078,367</b>	<b>330,775,770</b>	<b>337,693,777</b>	<b>169,697,403</b>	<b>176,615,410</b>
Reimbursements	(1,653,606)	(3,390,099)	(3,460,649)	(1,736,493)	(1,807,043)
A. Net reserves	159,424,761	327,385,671	334,233,128	167,960,910	174,808,367
B. Reserves mis-estimated due to data purges					50,786,849
C. Reserves for accident-implead gap					64,303,733
D. Expected unpaid reserves (A) plus (B) plus (C)					289,898,949
<b>Probable Range</b>				<b>Lower Bound</b>	<b>Upper Bound</b>
A. Net reserves from above				166,680,290	174,808,367
D. Reserves mis-estimated due to data purges				33,857,900	67,715,799
E. Reserves for accident-implead gap ((B) plus 10%)				64,303,733	70,734,106
F. Expected Upper Range (Sum of (A), (D), and (E))				264,841,923	313,258,272

CASUALTY ACTUARIES INC.

1/2/6

**KANSAS WORKERS COMPENSATION FUND**  
**Recap of Reserves by Case Type and Payment Type**  
**June 30, 1994**

1-1-1

Payment Type	Case Type (Section of Kansas Statute)							Total All Case Types
	Insolvent Insurance Companies A	Non Dependent Death D	Insolvent Employer I	Regular Second Injury (Monthly) M	Reimbmt to Insurance Company R	Regular Second Injury Claims S	Insolvent Employer (Monthly) Y	
Comp Paid	1,211,875	127,356	1,597,732	25,555,530	2,160,010	168,487,706	4,553,512	203,693,722
Other Comp	0	0	0	0	0	0	0	0
Medical Paid	154,651	35,159	624,788	9,561,523	696,290	56,492,718	3,929,970	71,495,099
Voc'l Rehab	53,087	11,230	2,241	569,092	53,257	2,343,308	119,581	3,151,795
Expense	7,215	20,995	327,492	956,747	3,459	12,889,149	350,043	14,555,100
Subtotal	1,426,828	194,739	2,552,253	36,642,891	2,913,016	240,212,882	8,953,106	292,895,716
Reimbursmt	0	(1,825,025)	(171,380)	(118,840)	(52,249)	(489,815)	(339,457)	(2,996,767)
All Payment Types	1,426,828	(1,630,285)	2,380,873	36,524,051	2,860,767	239,723,067	8,613,648	289,898,949

CASUALTY ACTUARIES, INC.

CASE REPORT

Docket No. \_\_\_\_\_

\_\_\_\_\_  
Claimant

\_\_\_\_\_  
Respondent

Claimant's Attorney: \_\_\_\_\_

Respondent's Attorney: \_\_\_\_\_

Y     N    Settlement between claimant and respondent? (If yes, attach Form 12.)

Y     N    Award? (If yes, attach copy of award.)

TFD paid: \$ \_\_\_\_\_

Medical paid: \$ \_\_\_\_\_

PPD paid: \$ \_\_\_\_\_

Other paid: \$ \_\_\_\_\_

TOTAL PAID \$ \_\_\_\_\_

If not settled, status of settlement discussions:

\_\_\_\_\_  
\_\_\_\_\_

Synopsis/Status of Case:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Can file be closed:  Y     N

Estimated time to conclude case: \_\_\_\_\_

Estimated attorney fees to close case: \_\_\_\_\_

Estimate of Fund's Liability (if not already established): \_\_\_\_\_

KANSAS WORKER'S COMPENSATION FUND CASE SUMMARY

1. Name of Case: \_\_\_\_\_ Date: \_\_\_\_\_

---

---

---

2. Date of Accident:

---

3. Description of Injury:

---

---

---

---

---

---

---

4. Description of Pre-Existing Impairment. If Caused by Accident, Date of Accident:

---

---

---

---

---

---

---

5. Employer's Knowledge:

---

---

---

6. Is the Pre-Existing Impairment of Such Character the Impairment Constitutes a Handicap in Obtaining or Retaining Employment:

---

---

---

1-19  
~~1-20~~

7. Present Injury or Disability Would not have Occurred but for the Pre-Existing Impairment:

---

---

---

8. Extent Pre-Existing Impairment Contributed to Resulting Injury:

---

---

---

9. Percent of Permanent Partial Disability (Functional):

---

---

---

10. Work Restrictions:

---

---

---

---

---

---

11. Percent of Work Disability:

---

---

---

12. Worker's Compensation Benefits Paid to Date:

a. TTD: \_\_\_\_\_

b. Medical: \_\_\_\_\_

c. PPD: \_\_\_\_\_

d. Voc. Rehab.: \_\_\_\_\_

e. Misc.: \_\_\_\_\_

Total: \_\_\_\_\_



13. Respondent's Settlement Proposal:

---

---

---

---

---

---

---

14. Worker's Compensation Fund Attorney's Recommendations:

---

---

---

---

---

---

---

15. Chronology of Treatment:

---

---

---

---

---

---

---

---

---

---

---

---

21  
1-27

Casualty Actuarial, Inc.

December 29, 1995

Paula Greathouse  
Kansas Insurance Department  
420 S. W. 9th  
Topeka, KS 66612

Re: Kansas State Fund  
Cash Flow Profile

Dear Ms. Greathouse,

The cash flow analysis requested by Chairman Lungwitz accompanies this cover.

If you or Chairman Lungwitz have questions I will be glad to respond. As explained in the accompanying report, the numbers are presented without discount to present value. In order to have a present value meaningful, the money must be provided up front, and placed in an investment that will yield the assumed discount rate.

Since the State has not placed the money in invested escrow as of June 30, 1994, a present value calculation is meaningless.

Sincerely,



Robert F. Lowe

1-20  
~~1-23~~

KANSAS STATE FUND

Cash Flow Analysis

December 29, 1995

2008	2,097,240	(1,127,447)	769,793	1,969,793	2,097,240
2009	3,716,318	(32,352)	1,098,820	4,782,866	3,716,318
2010	5,153,842	(58,933)	952,105	6,047,014	5,153,842
2011	273,218	(2,268)	164,918	435,868	273,218
2012	583,424	(3,922)	81,231	660,733	583,424
2013					
2014					
2015					
2016					
2017					
2018					
2019					
2020					
2021					
2022					
2023					
2024					
2025					
2026					
2027					
2028					
2029					
2030					

23  
1-27

KANSAS STATE FUND

Cash Flow Analysis

Casualty Actuaries, Inc. was requested to estimate the cash payments during future fiscal years for the reserves recommended in our report dated December 13, 1994 to the Insurance Commissioner of the Kansas State Fund. The following schedule is based on the claims development patterns contained in the report. The estimates are made as if looking from June 30, 1994, and ignore the fact that as of this writing the entire fiscal year ending June 30, 1995, and part of the next fiscal year have passed.

Estimated Future Cash Payments on Claims Not Closed as of June 30, 1994

Paid During Fiscal Year Ending June 30:	"Formula" Cash Flow	Anticipated Reimburse- ments	Estimated to Replace Data Purges	Not Yet Implead Claims	Total Cash Flow
1995	35,833,843	(346,652)	10,304,242	0	45,791,433
1996	23,847,853	(252,585)	6,857,597	11,663,758	42,116,624
1997	16,501,193	(165,372)	4,745,020	9,145,322	30,226,163
1998	13,310,392	(141,997)	3,827,485	6,291,436	23,287,316
1999	10,914,993	(113,821)	3,138,673	4,969,312	18,909,157
2000	10,100,213	(113,320)	2,904,378	4,066,476	16,957,747
2001	8,969,150	(96,454)	2,579,134	3,708,822	15,160,652
2002	8,786,179	(92,170)	2,526,520	3,309,221	14,529,749
2003	8,426,472	(84,647)	2,423,084	3,206,013	13,970,922
2004	7,924,353	(81,826)	2,278,696	3,081,868	13,203,091
2005	7,260,037	(74,036)	2,087,668	2,904,548	12,178,217
2006	6,738,295	(68,896)	1,937,638	2,668,938	11,275,974
2007	6,188,955	(56,099)	1,779,672	2,473,475	10,386,003
2008	5,067,349	(47,677)	1,457,147	2,274,531	8,751,351
2009	3,716,318	(35,329)	1,068,650	1,888,253	6,637,892
2010	2,173,845	(26,639)	625,102	1,405,211	4,177,520
2011	573,518	(5,568)	164,919	851,002	1,583,872
2012	282,454	(3,955)	81,221	270,574	630,294
2013	-	-	-	114,072	114,072
2014	-	-	-	10,901	10,901
Totals	176,615,410	(1,807,043)	50,786,849	64,303,733	289,898,949

24  
1-25

The term "claims not closed" refers to a) those claims in the files of the Kansas State Fund on which future claims are expected, and b) those accidents for which the Fund will be implead in the future, and are therefore not yet in the files of the Fund.

The term "formula cash flow" refers to unpaid amounts calculated from data in the files of the Fund as of June 30, 1994 which, as explained in the December 1994 report, is understated due to data purged from Fund files. The understatement is estimated and added to the total cash flow in the column titled "estimated to replace data purges."

The above numbers are presented without discounting for potential investment income. Any estimate of the effect of investments of funds must assume that the entire amount of the present value of the above anticipated payments is placed in high quality, reliable investments.

25  
1-25

# Evaluation of the Workers' Compensation Fund



Kansas State Department of Insurance

under

Proposal No. 31470



final report issued

June 7, 1996

S.M.M. & J.  
S.M.M. & J.  
S.M.M. & J.  
S.M.M. & J.  
S.M.M. & J.  
S.M.M. & J.

I. EXECUTIVE SUMMARY

A. Stuart, Maue, Mitchell and James, Ltd.

Stuart, Maue, Mitchell and James, Ltd. (SMMJ) has been providing legal auditing, claims auditing, and litigation consulting services to a wide range of clients, including but not limited to major insurers and corporations as well as state and municipal governments, since 1985. SMMJ is the oldest and largest such firm and is the industry leader in nationwide auditing of legal billings resulting from complex multistate or multinational litigation, national class-actions, multidistrict litigation, and major bankruptcies and has, in addition, established a nationwide reputation as being perhaps the nation's premium legal auditing firm. SMMJ's professional staff is comprised of experienced attorneys, including those with significant senior level risk and claims management experience and an accounting staff consisting of a seasoned mix of Certified Professional Accountants and individuals possessing either accounting or advanced business degrees.

B. Findings

The Kansas State Department of Insurance Workers' Compensation Fund

operations are severely handicapped by:

- a) Woefully inadequate working and record maintenance spaces;
- b) An unacceptably small staff, which is required to process huge masses of critical legal and financial documentation;
- c) Inadequate computer and printer resources;

1-27

- d) Limited and inadequate access to various databases, most specifically, the Workers' Compensation Database maintained by the Department of Human Resources Workers' Compensation Division;
- e) The absence of sufficient "Ports" on the State's "STAR" wide area computer network in order to access the limited information now available to fund employees;
- f) The unacceptably wide dispersion of employees necessarily involved in handling fund documentation; and finally,
- g) The use of both "part time" and "full time on a part time basis" employees in order to conduct required fund functions.

Despite the significant and serious deficiencies described above, the internal administrative practices utilized by the Department of Insurance have enabled the Fund to operate in an acceptable manner. Thus, given the numerous and serious deficiencies specified the administrative procedures utilized are, while far removed from and markedly short of, insurance industry standards outstanding.

In order to overcome these deficiencies SMMJ would recommend hiring seasoned adjusters. It can be stated that major insurers usually assign from two hundred to six hundred (200-600) claims to each adjuster, with the number assigned to each dependent on the peculiarities (Reserve Value, Injury Severity, necessity of ongoing medical treatment, etc.) of the files as well as on the experience level of the adjuster. Each such adjuster should be provided a computer with access to the "Workers' Compensation Database" via the "STAR" LAN. While it would also be preferable that each and every employee handling second injury files have an individual "port" on the net, economic reality prevents this solution. An initial estimate, subject



to subsequent modification, would be one port for each adjuster, with all other Fund employees, required to share such access with another employee.

Any attempt to even roughly estimate the actual requirements of the Kansas Fund, either in required equipment or employees required, is clouded by the current unsettled future of the fund. However, at least one, preferably two, experienced adjuster(s) should be retained to "ride herd" on legal billings received during the "run-down" period in order to better control both legal costs and defense attorneys.

C. Guidelines to Regulate Outside Counsel

These guidelines, while generally acceptable, fail to definitively establish specific requirements for exactness and completeness in attorney fee and expense billings.

Specific recommendations:

1. Each professional fee entry shall include, in the order given below, the following:
  - a) Date of service;
  - b) Initials of the individual attorney providing the service;
  - c) Time required to provide the service, in tenths (0.1) of an hour increment (i.e., 0.4, 0.7, 0.2, etc.)
  - d) The service provided. Each line entry will include only one service (i.e., Prepared answer to complaint.). Block entries describing several services (i.e.: Prepared for, attended and summarized deposition) are not acceptable.
  - e) All billed service provided entries will include a full description of the service provided (i.e., "Telephone conversation with Attorney J. Blow in re: Deposition of witness Dr. W.T. Door." not "Telecon" nor "Telecon with Atty."

2. The last page of the billing statement shall include (and only include) the following: A listing of all initials used on that billing to identify service providers, the complete name of the service provider identified by those initials, his/her function (i.e., attorney, paralegal) the billing rate at which that service provider's time is billed, and both the total hours and total fee charged by that individual.
3. Each billing for disbursements and costs (i.e., mileage, toll fees, investigators, service of process, etc.) should be fully itemized, listing dates, person incurring the expense, the vender or entity receiving said payment, and sufficient other information to determine the relationship and necessity of the expense to the file billed.

D. Systems Used to Track Current File Status

Files are tracked manually and accurate current status is dependent on timely reporting by outside defense attorneys. This is antiquated, slow, and undependable. The Workers' Compensation Division's database contains current and frequently updated data. The Fund should have complete and ready access to this data.

1. Availability of Data

"In-House" Fund employees do not, except for the accountants, have either the computer resources or the necessary "STAR" network access to the Workers' Compensation Division database. All data is obtained and processed "manually."

2. Monitoring of Outside Counsel

A high case load, combined with an excessive number of outside defense counsel, and an inadequately sized staff that does not have sufficient time to demand and process frequent case reports or even effectively monitor quarterly

attorney billing precludes effective monitoring of outside attorneys. As described above, access to the existing Workers' Compensation database will remedy this situation. Independent periodic audits of outside counsel billings should be conducted, either on a random basis of all counsel or as a targeted investigation of those attorneys whose billings indicate questionable practices.

3. Staffing of Second Injury Fund --

The present staffing of the Fund is inadequate. While present employees are, in general, qualified to perform presently assigned duties, their training and pay scales fall far short of those accorded "Case Handling" staffs in the Insurance Industry, wherein, the management of claims is handled by well-experienced claims representatives. Ideally, experienced adjusters should be employed and used to establish and maintain "Insurance Industry Standards" claims files. It is considered that this standard, initially, be applied only to "New" files as bringing all existing claims files to this standard would be cost prohibitive. At this time, and under the uncertainties concerning ultimate retention of the fund, it is recommended that two (2) experienced claims adjusters be retained to establish and maintain "insurance industry" claims files for new incoming claims. These adjusters should also be tasked with the responsibility of upgrading older files and, as the political fate of the Fund is

determined, making recommendations concerning system and equipment requirements under the changing circumstances.

E. Recommendations

1. Second Injury Fund

Since an operating and well-designed Workers' Compensation Fund is of prime importance to industries seeking to relocate either within or without their present state, it is highly recommended that Kansas consider re-enacting a Workers' Compensation Statute without the often abused and "impossible to monitor," "But-For" provision. It is considered that fund coverage should be limited to those either Permanently (or nearly) totally disabled. Workers' Psychic injuries without a physical injury should not be covered. It is felt that failure to resurrect Second Injury Coverage will prove highly detrimental to future industrial development within the state. During consideration of any successor statute, great care should be exercised to ensure that the resulting statute does not place an unfair assessment burden on small businesses.

2. Financing of the Fund

Fund should be financed by an assessment on Workers' Compensation policies written, with an additional "over-ride" levy based on claims paid. This will spread the cost of fund operations over all companies benefiting from Fund operation (all workers' compensation insurers writing coverage in Kansas are,

in actuality, "Re-Insured" by the fund) while, at the same time, penalizing those companies whose insured have created situations resulting in Fund payouts.

3. Fund Expenses

All operating expenses of the Fund should be considered unallocated expenses and charged to the fund in order to minimize charges against the state budget.

4. Fund Personnel

Experienced Claims Representatives should either be employed directly by the state or obtained contractually from a Third Party Administrator. Additional personnel will also be required. The exact number of employees required can best be determined by conducting a statistical analysis of the data presently available in the Workers' Compensation Database. It is noted that some programming will be required in order to obtain this information in an acceptable report format

5. Fund Equipment

State of the art computer resources and local or wide area network equipment permitting ready access to the Workers' Compensation Division database should be obtained. The amount and cost of such equipment can not be determined until the statistical analysis described in the "Fund Personnel" section, immediately above is conducted.

II. GENERAL RECOMMENDATIONS

Decrease the number of outside defense attorneys to permit more efficient monitoring by Fund employees and to decrease unnecessary expenses caused by duplication of fees and expense, particularly those associated with travel to hearings. Statute should provide that all claims against the fund be initiated by, and limited to, the injured workers, not impleadings by insurers and/or employers. A provision of state statute should require impleading the Fund not later than the "Initial Hearing." Legal Billings should be submitted in electronic format in order to increase processing speed and to permit electronic monitoring and auditing thereof. It is suggested that SMMJ has the computer equipment, the specialty software and the experience necessary to accomplish this screening at minimum expense, should the department chose to utilize "Out Sourceing" for this function.

Despite the many and varied problems encountered and described herein, auditor must comment on the excellent, if not outstanding, effort being made by present Fund staff. It is only their devotion to duty and dogged efforts that have permitted the fund to continue operations. Despite the numerous and serious deficiencies noted during this audit, these employees were able to "keep the paperwork" flowing, to timely assign cases to outside counsel, and to make all payments required. While the methods used do not meet insurance industry standards and, certainly, did not allow the department to exercise the desirable level of "control" over existing cases, such direct management control was impossible and

improbable under the conditions facing these employees. In conclusion then, "Well done!" to all those involved in ensuring that the fund "worked."

1-35

Kansas Insurance Department  
February 17, 1998

WORKERS COMPENSATION UPDATE

- There are 294 workers compensation insurers that are approved to write business in the state. There are also 18 active group-funded workers compensation pools in Kansas.
- There are an estimated 47,000 Kansas businesses in the voluntary and assigned-risk market. Kansas employers pay approximately \$300 million in annual workers compensation premiums. The group funded pools generate approximately \$50 million in annual premium.
- The National Council on Compensation Insurance (NCCI) recently submitted a rate filing which is effective January, 1998. Overall, the voluntary market loss costs decreased 12.7% while the assigned risk plan rates decreased 17.2% for an overall combined decrease of 13.2%. These rate decreases should save Kansas businesses over \$39 million. Since 1995, workers compensation costs have dropped a total of \$104 million.
- In June, 1997, the Kansas Insurance Department sent out an RFP for companies to bid on the administration of the state "high risk" pool for workers compensation insurance (the Kansas Workers Compensation Insurance Plan). This is the first time that this contract had been submitted to competitive bid. The new three year contract, effective January 1, 1998, was awarded to NCCI as the new Plan Administrator and Travels Insurance Company and Commercial Union Insurance Company as the servicing carriers.
- In 1997, the Department also completed a market conduct examination for the five workers compensation assigned risk servicing carriers. Information from the examinations was compiled and scored to determine if the carriers were performing in accordance with the performance standards in their contract.
- On July 1, 1997, most commercial lines of property and casualty insurance went from "prior approval" to "file and use" for the filing of rates. Currently, the rating organization must file workers compensation loss costs for prior approval and the insurers file their loss costs multiplier on a file and use basis. This change gives the carriers more flexibility which will increase competition in the workers compensation market.
- The Insurance Department licensed two new rating organizations in 1997 which could provide competition for NCCI in the filing of rates. Currently, neither of these two organizations have rate filing approved by the Department.

Senate Commerce Committee

i:\u/a/w/wrkcmp/wcupdate.doc

Date 2-17-98

Attachment # 2





February 17, 1998

LEGAL DEPARTMENT  
CLAIMS SECTION

**JULIE BACHMAN**  
ASSISTANT MANAGER  
WORKERS COMPENSATION CLAIMS

SENATE BILL 522

Hello, I am Julie Bachman with Koch Industries, Inc. out of Wichita, a qualified self-insurer with employees throughout the state of Kansas. I am also a member of the Wichita Employers Task Force along with Boeing, Raytheon, Cessna, Learjet, Coleman, the City of Wichita, Sedgwick County, USD 259, and many other Wichita employers interested in Workers Compensation issues. I am here to testify in support of Senate Bill 522.

As part of the 1993 changes to the Kansas Workers Compensation Act, employers lost the Second Injury Fund but gained the preexisting impairment credit in 44-501(c) which, in part, reads:

“The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.”

It sounds fair, but unfortunately the language doesn't do what it was intended to do. A recent Court of Appeals decision found that an employer in our Wichita group could not take credit for preexisting impairment because the condition did not pre-exist the date of **onset** of symptoms some 16 years prior to the date of accident.

We have inconsistency because court decisions have found that dates of accident in cumulative trauma injuries occur on the last day worked and not at the onset of symptoms or at the initial medical treatment. Therefore, claimant attorneys routinely file even single trauma claims with “each and every day worked” as the date of accident to overcome late notice problems on the back end and to avoid preexisting conditions on the front end. “Last day worked” dates of accident rather than “date of onset” dates of accident also enhance benefit levels for the injured employee.

We have a case pending in which the employee began treating for carpal tunnel syndrome 3 months after being hired. He was a weight lifter. He did not report the injury as being work-related but soon had bilateral wrist surgeries under our Group Benefits. When he left Koch 11 months after surgery, he filed a workers compensation claim alleging each and every day worked as his date of accident. Under the current case law, he may have provided timely notice and have no preexisting condition, while we as the employer have been prejudiced by not being given the chance to intervene early on.

With passage of SB 522, employees who promptly report cumulative trauma injuries will receive all benefits to which they are entitled with no offset for preexisting impairment. Those employees who delay reporting of their injuries and do not allow intervention may receive a reduction in their final impairment award. Thank you.

Senate Commerce Committee

Date 2-17-98

My name is Terry J. Torline. I am an attorney in Wichita practicing in the workers' compensation area. I represent various employers in the Wichita area and I am also a member of the Wichita Employer Task Force Group. I have been asked to speak to you in favor of Senate Bill 522.

The language clarification to 44-501(c) found in Senate Bill 522 is important to employers for various reasons. In Kansas, the aggravation of a pre-existing condition has long been held to be a compensable injury. Employers are required to pay workers' compensation benefits to injured employees even if the aggravation is only minor and the overwhelming majority of the medical problem and accompanying functional impairment pre-existed the accidental injury date. Prior to July 1, 1993, employers were given some relief by being allowed to obtain reimbursement from the Kansas Workers' Compensation Fund for pre-existing conditions which caused or contributed to the resulting handicap and disability.

However, as you are all aware, the Kansas Workers' Compensation Fund was eliminated by the 1993 legislative changes to the Act. Although the Fund was abolished, the pre-existing impairment of function language was adopted. The language provides that an injured worker's award will be reduced by the amount of functional impairment determined to be pre-existing. Although employers are still responsible for paying for the medical and temporary total disability benefits associated with the aggravation of a pre-existing problem, the intent of this language was to eliminate the need for an employer to pay for any impairment of function which pre-existed the worker's date of accident.

The language proposed in Senate Bill 522 is necessary because the current language of 44-501(c) does not specifically state that functional impairment which exists prior to the worker's date of accident is to be considered pre-existing. Because the date of accident is not specified in the current language of the statute, it is being argued and courts are holding that the date of accident is not necessarily the date to be used when attempting to determine what impairment of function is pre-existing.

For example, after the pre-existing language was added to 44-501(c) in 1993, the Kansas Court of Appeals decided several cases which held that in repetitive trauma cases, the last day of exposure to work duties which aggravate the condition is the date of accident. Typically, this is the last day of work before going off for surgery. These rulings were very significant since the date of accident is perhaps the single most important date in a worker's compensation claim because it is the date from which all of the worker's other rights are determined. Such rights include determining whether the worker has given timely notice of an injury to the employer, whether the written claim is timely and calculating the worker's average weekly wage.

These decisions were then followed by another Court of Appeals case in which the Court determined that the date of accident was the last day of work. However, the Court ruled that none of the impairment of function which existed during the sixteen (16) years prior to the last day of work was pre-existing, despite the fact that the worker had been experiencing problems during this entire period of time. In essence, the Court held that the worker had sustained one sixteen (16) year long injury and could recover for all of the imp: Senate Commerce Committee

Date 2-17-98

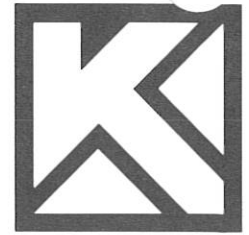
Attachment # 4-1 thru 4-2

developed during those sixteen (16) years.

This last decision not only runs contrary to the legislative intent of 44-501(c), but it also encourages late reporting of injuries which has the effect of substantially increasing workers' compensation costs to employers. Under the current state of the law, workers who begin developing repetitive trauma conditions can delay reporting their problems to their employer until their condition has progressed to the point that they require surgery and disabling work restrictions. Employers are effectively denied the opportunity to intervene early on in the disease process to impose restrictions or provide accommodated work to prevent the condition from becoming disabling.

Passage of SB 522 will reduce workers' compensation costs by encouraging early reporting of repetitive trauma injuries. If a worker notifies the employer immediately when the symptoms begin, the employer has the ability to prevent further progression of the disease. Additionally, if reported early, the worker will have no pre-existing impairment of function. If a worker delays reporting until the condition has become disabling, he or she will still be entitled to medical benefits and temporary total disability benefits; however, the worker's permanent partial disability benefits will be reduced by the amount of the functional impairment that existed prior to the date of accident.

# LEGISLATIVE TESTIMONY



Kansas Chamber of Commerce and Industry

835 SW Topeka Blvd. Topeka, KS 66612-1671 (785) 357-6321 FAX (785) 357-4732 e-mail: [kcci@kspress.com](mailto:kcci@kspress.com)  
SB 522

February 17, 1998

## 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 explain why the Kansas Chamber supports passage of SB 522.

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 522 proposes to clarify the legislative action of 1993 to establish a preexisting condition exclusion in the Kansas workers compensation law, and it does so very consistently with legislative intent. Many Committee members no doubt recall the debate over preexisting conditions during the workers compensation reform years. KCCI and others urged action to correct the situation where a

Senate Commerce Committee

Date 2-17-98

Attachment # 5-1 thru 5-2

Minor workplace injury could lead to a major workers compensation award. The often repeated phrase in the early 90's was that "employers should be only responsible for how much a work place injury aggravated a preexisting condition."

Prior to legislative action concerning preexisting conditions, workers compensation assumed an employee was in pristine condition. The clearest example from 1993 was the lifting of a briefcase from the trunk of a car, which resulted in a debilitating back injury. The purpose of the preexisting condition law was to make employers responsible only for the portion the lifting of a briefcase caused to the injured back, not the totality of the injury.

In the five years that have passed since the landmark reform of workers compensation in 1993, several legal questions have arisen regarding preexisting conditions. One question involves the subject matter of SB 522. The question is when do you begin to offset for preexisting conditions? In KCCI's opinion, SB 522 appropriately would reduce conditions which preexist the date of the accident.

This is not the only question which has been raised in court regarding the legislative meaning of preexisting conditions. The courts have also reviewed whether the legislature felt the preexisting condition must have surfaced prior to the workers compensation injury before an award can be reduced. This court ruling on whether the preexisting condition was "symptomatic" seems opposed to the Legislature's intent. Other legal questions concern how preexisting conditions should reduce a "work disability" award, and what medical opinion is needed to establish a preexisting condition reduction.

SB 522 would answer one of the legal questions that has arisen since the introduction of the preexisting condition limitation into the workers compensation act. The Kansas Chamber would urge Committee approval of the measure. I would be happy to attempt to answer any questions.

Senate Commerce Committee  
The Honorable Alicia Salisbury, Chair  
February 16, 1998

Testimony of James E. Martin, Chairman  
KTLA Workers Compensation Committee

Senate Bill 522 - Repetitive Use Injuries

Thank you Madame Chair, Senator Barone and members of the Committee. Good morning. My name is James E. Martin and I appear before you this morning on behalf of the Kansas Trial Lawyers Association. Straight out of law school I began my career as an Assistant Director for the Division of Workers Compensation. For the next fifteen years I represented employers and insurance companies in workers compensation cases. Now my practice is representing injured workers, and I serve as Chairman of the Workers Compensation Practitioners or the Kansas Trial Lawyers. I hope you will agree that I have experienced the workers compensation system from all perspectives.

Senate Bill 522 makes a seemingly small change in the Workers Compensation statute which will have an enormous and adverse impact on workers. Page 1, lines 35 and 36 deletes the phrase, "be preexisting" and replaces it with "preexist the date of accident". While this may seem to be a minor rewording, in fact, it will effectively deny repetitive overuse claims [such as carpal tunnel syndrome] on behalf of injured workers.

The proposed language appears to attempt to "fix" a specific date when an injury occurs, even when the injury is known to have occurred over a period of time. The Workers Compensation Appeals Board rejects that notion in their order in the *Dumbauld* case,<sup>1</sup>

*"As pointed out by the Court of Appeals in Berry v. Boeing Military Airplanes<sup>2</sup>, carpal tunnel syndrome is a condition that defies any attempt to affix the precise date the accident occurred."*

The nature of repetitive use injuries, gradual development over time, is such that it is difficult to fix the precise "date of accident." The workers compensation law uses a legal fiction which more often than not is the date the person last worked. The "date of accident" is important because it establishes what law applies, what the TTD maximum rate is, when compensation begins, etc. It is an important procedural milestone in the case. The courts have used the last day of work, generally speaking, as an easy milestone by which to fix the precise date on which compensation accrues.

However, repetitive use injuries develop over time and it is neither an easy nor a routine matter to fix the date of accident in such cases. In these gradual types of injuries, we do not have a situation where one day the worker is fine and the next day the worker is disabled. In fact, in most repetitive use injuries the claimant has about 99.9% of the same condition the day before their last day of work as they have on the actual day of work.

By making the change proposed in SB 522, any disability which pre-exists the date of the accident or the last day worked will be non-compensible. Obviously, if a condition has gradually worsened over five years while in the employer's service, it would be grossly unfair for them to avoid liability for everything except the final day of work. However, that is exactly what SB 522 does.

<sup>1</sup> *Dumbauld v. Beech*, Docket No. 187, 935 July 1996 Workers Compensation Appeals Board Order, page three.

<sup>2</sup> *Berry v. Boeing Military Airplanes*, 20 Kan App. 2<sup>nd</sup> 220,885 P.2d 1261, (1994)

Senate Commerce Committee

Date 2-17-98

Attachment # 6-1 thru 6-2

Even under current law, some employers and insurance companies are attempting to convince ALJ's and the Appeals Board to interpret KSA 44-501 ( c ) in a manner that will allow them to completely offset a disability award.

The way this argument works, is that the employer's attorney will ask the medical witness how much of the permanent impairment rating was already existing on the day before the last day at work. The testifying doctors will then testify that virtually all of the permanent impairment of function was already there on the day before the last day at work. The insurance company's attorney then argues to the Administrative Law Judge and Appeals Board that there is no entitlement to a permanent functional disability award, since the rating given for the "injury" that "occurred" on the last day of accident is virtually the same as the rating given for the condition existing on the day before the last day at work. Whatever impairment existed on the day before the last day of work then becomes a pre-existing condition.

This interpretation of "pre-existing conditions" has been raised unsuccessfully by employers both at the Administrative Law Judge level and before the Workers Compensation Appeals Board. The issue has already been ruled upon and rejected by an Administrative Law Judge and the Workers Compensation Appeals Board. It has also been rejected in an unpublished decision of the Court of Appeals in the *Dumbauld v. Beech Aircraft Corporation* case. You may also want to consider that the Kansas Supreme Court has a pending petition for review on the *Dumbauld* case.

Since the courts that have ruled upon this issue do not appear to be sympathetic to the arguments for establishing a specific date of accident in most repetitive use injury cases, business interests now appear to be attempting to convince the legislature to change the statute in a manner that will dovetail with these arguments.

At stake is the fair compensation of permanent disability claims for every victim of a repetitive overuse injury. KTLA strongly opposes this legislation and requests that the committee reject the bill.

*Shultz, Lonker & Raymond, Chartered*

*Attorneys at Law*

*Craig Shultz  
Brenton G. Lonker  
Bill H. Raymond*

*205 East Central  
Wichita, Kansas 67202  
(316)269-2284*

*Fax No. (316)267-6997*

Testimony of Bill Raymond, Attorney at Law  
Shultz, Lonker & Raymond  
Re: Senate Bill 522

Madame Chair, members of the Committee, thank you for the opportunity to testify before you here this morning. My name is Bill Raymond. I am Wichita attorney with the firm of Shultz, Lonker & Raymond. After reading SB 522, the bill before you today, I am, frankly, a bit perplexed.

As the attorney for Mr. Mike Dumbauld in his workers compensation case with Beech Aircraft in 1996, I have litigated the definition of preexisting condition in repetitive use injury cases before three tribunals: a workers compensation administrative law judge, the Workers Compensation Appeals Board and the Kansas Court of Appeals. My opposing counsel in the case at all levels, Mr. Terry Torline, has also filed a petition for review in the case before the Kansas Supreme Court. A decision on that petition is expected soon. Now, once again, I see the same issue. This time in the form of legislation.

This is a well settled area of law. It certainly is not an area of law that requires legislative attention. Numerous cases have held that a claimant with a repetitive motion injury is entitled to be compensated for that injury to the extent that it arose from his or her work tasks or was related to his or her employment. In fact, passage of this bill would turn Kansas case law on its head. In essence, it would extinguish the rights of Kansas workers to be compensated for repetitive motion injuries except for the degree of injury generated on their very last day of employment.

SB 522 limits the compensation workers who develop repetitive motion injuries could receive under the law. How? By establishing a specific date when the injury occurred, even in repetitive motion injuries, and redefining non-compensable preexisting conditions as all conditions existing prior to that date. While this may work in the case of industrial accidents, it is a decidedly unfair standard to impose on repetitive motion injuries which by their very nature develop over time.

As pointed out by the Court of Appeals in *Berry v. Boeing Military Airplanes*, 20 Kan App. 2d 220, (1994) "carpal tunnel syndrome is a condition that defies any attempt to affix the precise date the accident occurred."

Current law requires employers to compensate their injured workers for the amount of impairment or aggravation that is work related. However, current law also allows "any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting." I agree, that is fair. I do not agree that the proposed language "preexist the date of accident." coupled with existing statutory and case law on how the "date of accident" is determined, will result in fairness for injured workers. This debate over Senate Bill 522 is a debate about how we define "preexisting conditions."

Please reject this bill rather than rejecting the legitimate rights of injured workers across Kansas.

I have attached the Workers Compensation Appeals Board decision and the Kansas Court of Appeals unpublished decision in the Dumbauld case. I will be happy to answer any questions you might have about these documents or my testimony. Thank you for your time and attention.

Senate Commerce Committee

Date 2-17-98

Attachment # 7-1 thru 7-11



**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**EDWARD M. DUMBAULD**

**SSN: 510-42-3884**

**Claimant**

**VS.**

**BEECH AIRCRAFT CORPORATION**

**Respondent**

**Self-Insured**

**AND**

**KANSAS WORKERS COMPENSATION FUND**

**Docket No. 187,935**

**ORDER**

On the 2nd day of July 1996, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark dated January 5, 1996 came on before the Appeals Board for oral argument.

**APPEARANCES**

Claimant appeared by and through his attorney, Bill H. Raymond of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney, Terry J. Tortine of Wichita, Kansas. The Workers Compensation Fund appeared by its attorney, Edward D. Heath, Jr., of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board is the same as that enumerated in the Award of the Administrative Law Judge. The stipulations of the parties are, likewise, set forth in the Award and are hereby adopted by the Appeals Board for purposes of this review.

### ISSUES

On appeal, respondent raised the following issues:

- (1) The nature and extent of claimant's disability, specifically, the amount of any preexisting impairment of function.
- (2) Whether all or any portion of the Award should be assessed against the Workers Compensation Fund.

During oral argument, counsel for the Workers Compensation Fund (hereinafter Fund) also raised an issue as to the claimant's date of accident.

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record, the Appeals Board finds that the Award of the Administrative Law Judge should be modified to find an accident date of August 21, 1994, but should otherwise be affirmed.

Our finding of claimant's date of accident is dispositive of all issues raised in this appeal. That is because the Fund is only liable for payment of awards to handicapped workers for injuries occurring prior to July 1, 1994. See K.S.A. 44-566a; K.S.A. 44-567; Farrall v. Unified School District #229, Docket No. 196,840 (January 26, 1996); Jones v. The Boeing Company-Wichita, Docket No. 196,447 (January 24, 1996). It is also because in finding claimant's date of accident to be the last day he worked prior to his August 22, 1994 surgery, the Appeals Board finds claimant's bilateral carpal tunnel syndrome condition to have been caused by a series of mini-traumas occurring each and every day worked. In so finding, there is no preexisting impairment upon which Fund liability can be based nor for which respondent can claim a credit or offset. Since we find no preexisting impairment of function, the claimant's permanent partial disability award is not reduced by the mandate of K.S.A. 44-501(c) which reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes

increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

The Administrative Law Judge found an accident date of March 20, 1994, the date claimant first sought medical treatment for and was initially diagnosed with bilateral carpal tunnel syndrome. In so holding, the Administrative Law Judge correctly cited the controlling authority of Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 585 P.2d 1261 (1994), for the proposition that the date of injury in a carpal tunnel syndrome case will ordinarily be the last date claimant worked for respondent. The Kansas Court of Appeals in Berry specifically rejected using the date an injury first manifested itself or the date on which an injury is first diagnosed as the date from which disability is computed. This rule was later clarified in Condon v. Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), which stands for the proposition that in cases where a worker injured by micro-traumas does not leave work due to his injury, the date of accident is not always the last day the claimant worked. In this case, claimant continued to work and, thereby, continued to suffer the same micro-traumas, up until the date he left work for surgery. Accordingly, the Appeals Board finds under the facts and circumstances of this case that the appropriate date for fixing the date from whence compensation is to be computed for claimant's bilateral carpal tunnel syndrome is August 21, 1994, the last date claimant worked prior to surgery.

As pointed out by the Court of Appeals in Berry, carpal tunnel syndrome is a condition that defies any attempt to affix the precise date the accident occurred. The bright line rule established in Berry set the date of injury in carpal tunnel syndrome cases at the last day worked where the employment came to an end due to the employee no longer being capable of continuing his job because of the condition. This bright line rule was established because of the complexities of locating the date of injury in a carpal tunnel syndrome case. Noting that injuries caused by continuing repetitive activity over a period of time are not subject to being defined as occurring on a specific date, the Court of Appeals in Condon determined for cases where, unlike Berry, a claimant is not forced to quit work because of his or her injury, the date of injury will not always be the last day the worker worked.

The Administrative Law Judge adopted the date when claimant first sought medical treatment for the condition. However, the record indicates claimant sought medical treatment on March 20, 1994 at the Hertzler Clinic for a variety of symptoms and complaints. In addition, he had been treated by respondent's on-site clinic on numerous occasions for upper extremity complaints including, on some of those occasions, for symptoms akin to those which were ultimately diagnosed as being caused by the bilateral carpal tunnel syndrome condition. Therefore it is difficult to pinpoint which of these

instances would be "the onset of pain which necessitates medical attention". 20 Kan. App. 2d at 224. In addition, claimant continued to perform his work for respondent after each of these medical visits. Therefore, he presumably continued to sustain the micro-traumas which had ultimately led to his carpal tunnel syndrome condition. Applying the logic of the Court of Appeals as announced in Berry would lead to a finding of claimant's date of accident to be his last date worked prior to his carpal tunnel release surgeries. When he returned to work with respondent following these two surgeries, it was with permanent restrictions. Accordingly, we find an accident date of August 21, 1994.

Bruce G. Ferris, M.D., was the only medical expert to testify in this case. Dr. Ferris was asked how much of claimant's present impairment of function preexisted March 25, 1994. He opined that 90 percent of claimant's permanent impairment of function preexisted March 25, 1994. Of course, it is not argued by any of the parties that claimant's injury was the result of a sudden onset or single traumatic event occurring on March 25, 1994 or on any other single date. Dr. Ferris agrees that claimant's bilateral carpal tunnel syndrome was the result of repetitive gripping, extension and flexion of the wrists constituting a series of accidents or minor traumas which were suffered over a period of time, primarily from his work with respondent. The selection of a single date is for purposes of finding "accident" or "occurrence" and for computation of benefits. It does not presuppose that all repetitive mini-traumas and the resulting impairment which preceded the accident date are to be considered to be preexisting conditions either for purposes of Fund liability or a reduction in benefits under K.S.A. 44-501(c). Instead, they are all treated as part of one injury. There are circumstances where preexisting repetitive use injuries can be established within sufficiently defined perimeters of time and with sufficient medical evidence of separate impairment to establish Fund liability or a percentage of preexisting impairment. However, the circumstances in this case do not fit within either of those categories. Under the facts of this case we do not find claimant's bilateral carpal tunnel syndrome to constitute an aggravation of a preexisting condition.

#### AWARD

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 5, 1996 is modified to find an accident date of August 21, 1994, but is otherwise affirmed as follows:

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN FAVOR OF** the claimant, Edward M. Dumbauld, and against the respondent, Beech Aircraft Corp., for an accidental injury sustained on August 21, 1994.

The claimant is entitled to 9 weeks temporary total disability at the rate of \$319.00 per week or \$2,871.00 followed by 95.45 weeks at \$319.00 per week or \$30,448.55 for a 23% permanent partial general bodily disability making a total award of \$33,319.55. As of July 12, 1996, there would be due and owing to claimant 9 weeks temporary total compensation at \$319.00 per week in the sum of \$2,871.00 plus 89.71 weeks permanent partial compensation at \$319.00 per week in the sum of \$28,617.49 for a total due and owing of \$31,488.49 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$1,831.06 shall be paid at \$319.00 per week for 5.74 weeks or until further order of the Director.

All other orders of the Administrative Law Judge are adopted herein as if specifically set forth in this order.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1996.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

- c: Bill Raymond, Wichita, KS  
 Terry J. Torline, Wichita, KS  
 Edward D. Heath, Jr., Wichita, KS  
 John D. Clark, Administrative Law Judge  
 Phillip S. Hamess, Director

NOT DESIGNATED FOR PUBLICATION

No. 77,240

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

EDWARD M. DUMBAULD,  
*Appellee,*

v.

BEECH AIRCRAFT CORPORATION,  
SELF-INSURED,  
*Appellant,*

and

KANSAS WORKERS COMPENSATION FUND.

MEMORANDUM OPINION

Appeal from the Workers Compensation Board. Opinion filed December 19,  
1997. Affirmed.

*Terry J. Terline*, of Martin, Pringle, Oliver, Wallace & Swartz, L.L.P., of  
Wichita, for appellant.

*Bill H. Raymond*, of Shultz & Lonker, Chartered, of Wichita, for appellee.

Before GREEN, P.J., ROYSE, J., and WAHL, S.J.

ROYSE, J.: This is a workers compensation case. Beech Aircraft Corporation (Beech) appeals the decision of the Workers Compensation Board (Board) which ordered Beech to pay Edward M. Dumbauld compensation based upon a 23% permanent partial general disability. Beech argues the Board misconstrued K.S.A. 44-501(c) and that the Board's application of 44-501(c) results in a violation of the Equal Protection Clause. We find no error and affirm.

Dumbauld began working for Beech in 1978. He began having bilateral wrist, hand, and elbow problems in August 1978. In 1994, Dumbauld had surgeries on his wrists. After the surgeries, he returned to work. The parties stipulated that Dumbauld had a 23% impairment of function to the body as a whole.

The Board determined that Dumbauld's injury was caused by a series of mini-traumas occurring on each day he worked. The Board further determined that under *Berry v. Boeing Military Airplanes*, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), Dumbauld's date of accident should be August 21, 1994, Dumbauld's last day of work before his surgeries. The Board determined that Beech was liable to Dumbauld for compensation based upon a 23% permanent partial general disability.

On appeal, Beech argues that the Board should have reduced the award based on 44-501(c). That subsection provides: "The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the

work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

Beech points to a statement by Dr. Bruce Ferris that 90% of Dumbauld's impairment existed before August 22, 1994, and concludes that the Board misconstrued 44-501(c) when it failed to award compensation based only on a 2.3% disability (10% of 23%).

Beech's argument is somewhat confusing. While recognizing that *Berry* establishes a bright-line rule for determining the date of accident in a case where repetitive use results in carpal tunnel, Beech nonetheless urges that the Board should have treated this case as involving two accidents: one before and one after Dumbauld's surgeries. There is nothing in *Berry* which warrants such an approach.

Our cases have long treated a series of mini-traumas as *one* accidental injury. "[I]f injury occurring as the result of a single accident is compensable, surely we will not declare that injury resulting from a dozen or more of the same or similar accidents, all occurring in the course of the employment, is noncompensable." *Murphy v. IBP, Inc.*, 240 Kan. 141, 144, 727 P.2d 468 (1986); *Miller v. Board of Trustees of KPERS*, 21 Kan. App. 2d 315, 319, 898 P.2d 1188 (1995); *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 41, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985). There is nothing in *Berry* which suggests that our treatment of mini-traumas should be changed, and



we find no reason to do so. See *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, \_\_\_ P.2d \_\_\_ (1997).

The Board's analysis of Beech's argument is clear and helpful:

"The selection of a single date is for purposes of finding 'accident' or 'occurrence' and for computation of benefits. It does not presuppose that all repetitive mini-traumas and the resulting impairment which preceded the accident date are to be considered to be preexisting conditions either for purposes of Fund liability or a reduction in benefits under K.S.A. 44-501(c). Instead, they are all treated as part of one injury. There are circumstances where preexisting repetitive use injuries can be established within sufficiently defined perimeters of time and with sufficient medical evidence of separate impairment to establish Fund liability or a percentage of preexisting impairment. However, the circumstances in this case do not fit within either of those categories."

In this case, the Board made a negative finding that Beech had failed to establish that Dumbauld suffered from a preexisting impairment within the meaning of 44-501(c). Such a finding may not be disturbed in the absence of proof of an arbitrary disregard of undisputed evidence or some extrinsic circumstance such as bias, passion, or prejudice. *Guerro v. Dold Foods, Inc.*, 22 Kan. App. 2d 53, 58, 913 P.2d 612 (1995). Although Beech does not directly challenge the Board's negative finding, we are satisfied that the record contains ample evidence from Dr. Ferris that he believed Dumbauld's condition resulted from a series of mini-traumas and that

90% of Dumbauld's mini-traumas occurred before Dumbauld was diagnosed, not that Ferris knew of any prior single trauma sustained by Dumbauld before he was diagnosed.

Beech's argument that the Board's decision violated the Equal Protection Clause suffers from the same flawed assumption that a series of mini-traumas are to be divided into separate accidents. Contrary to Beech's argument, the Board clearly recognized that when there is proof of aggravation of a preexisting impairment, 44-501(c) requires a reduction of benefits, whether the claimed injury resulted from a single traumatic event or a series of mini-traumas. The problem here is that Beech failed to prove the preexisting impairment.

Affirmed.