Approved: March 12, 2003
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE.

The meeting was called to order by Chairperson Karin Brownlee at 8:30 a.m. on February 12, 2003 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: April Holman, Legislative Research
Mitch Rice, Revisor of Statutes
Norman Furse, Revisor of Statutes
Jodie Anspaugh, Secretary

Conferees appearing before the committee: Terry Leatherman, KCCI
Pat Bush, Kansas Self-Insurers Association
John Ostrowski, Kansas AFL-CIO
Mike Helbert, Kansas Trial Lawyers Association
Phil Harness, Director of Workers Compensation

Others attending: See attached list.

April Holman from Legislative Research briefed the committee on SB 181, regarding workers compensation. She read the parts of the bill that changed current law.

Terry Leatherman, Vice President of Legislative Affairs from Kansas Chamber of Commerce and Industry, testified in support of SB 181. (Attachment 1) He believes this bill proposes important changes to current work disability law. In the bill, the work disability definition is deleted. Instead, to measure the degree of injury to the body, functional impairment will be used in work disability cases, just like it is used in other parts of current law. He also supports the pre-existing condition reform and clarification of the date of injury.

Pat Bush testified as a proponent to SB 181 on behalf of the Kansas Self-Insurers Association. (Attachment 2) He supports the change that would allow the employer to subtract from the total functional impairment the amount of impairment medically deemed to be preexisting. He also supports the language in the bill that allows for an offset of workers compensation benefits when an individual is also eligible for benefits from an employer funded disability retirement program.

Philip Harness, Acting Director of Workers Compensation, testified as neutral on SB 181. (Attachment 3) He listed five changes that the bill would make to the current Workers Compensation Act. First, it would require administrative law judges to consider all testimony on the subject of pre-existing conditions. Second, it reduces workers compensation benefits by the weekly amount of disability retirement benefits that the employee is receiving. Third, it would provide a definition of the date of accident for repetitive use injuries. Fourth, it would eliminate the present general disability mechanism (commonly called work disability) and replace it with a concept of supplemental functional disability. SB 181 would determine the employee's disability only by looking at the percentage loss of earnings, as compared to the employee's pre-injury wage. Finally, SB 181 repeals K.S.A. 44-510a, which is a section that allows for a credit where weekly benefits being paid from one injury overlap with benefits being paid on a subsequent injury.

John Ostrowski from Kansas AFL-CIO testified in opposition to SB 181. (Attachment 4) He believes that this bill is an attempt to cut benefits to injured workers and their families. Mr. Ostrowski said that Kansas has lower benefits to workers and higher premiums than the national average. The state has a problem with safety, with a high rate of injury. The 1993 bill gave workers a financial incentive to get back to work, and employers had a motivation to get workers back to work.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on February 12, 2003 in Room 123-S of the Capitol.

Michael Helbert from the Kansas Trial Lawyers Association testified in opposition to SB 181. (Attachment 5) Mr. Helbert said that Kansas is in the bottom 10 in payments to injured workers and is in the top 10 in workplace injuries. SB 181 would end the rights of injured workers and would eliminate work disability. He believes that the current system offers only minimal protection to Kansans who are injured on the job.

Mike Payne, Risk Manager for the City of Wichita, offered written testimony in support of SB 181. (Attachment 6)

The meeting was adjourned at 9:30 a.m.

The next meeting is scheduled for February 13, 2003 at 8:30 a.m. in Room 123-S.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

SENATE COMMERCE COMMITTEE
GUEST LIST
DATE: Wednesday, Feb. 12, 2003

NAME	REPRESENTING
Megan Chalfant	Burgess and Associates
PAT BUSH	Kansas Self-Insurers Assoc.
Julie Clark	Hallmark Cards Inc
Scott Heidner	KS Self Insurers Assoc
Terry Leatherman	KCCI
John. OSTROWSKI	AFL-CIO
Jim Wilson Huff	KS AFL-CIO
Phil Harness	KDHR-Div. of Work. Comp.
Ken Hvesh	KDHR - Work Comp
Kevin Barlow	Hein Law Firm
Martin Hawver	Hawver's Capital Report
Natalie Burgis	WIBA
[illegible]	KS Dept of Admin
John Frederick	Boeing
Denise Richards	Goodyear
Barb Caudt	KTLA
[illegible]	KTLA
[illegible]	KTLA
J.P. Small	KOCH INDUSTRIES
Steve Johnson	Kansas Gas Service
GARY DAVENPORT	KS MOTOR CARRIERS ASSN
Don Greenwell	Builders' Assoc / KC-AGC
Michael White	Kearney & Assoc.
Larry Magill	KAIA

LEGISLATIVE TESTIMONY

the Kansas Chamber of Commerce and Industry
The Unified Voice of Business

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SB 181

February 12, 2003

KANSAS CHAMBER OF COMMERCE AND INDUSTRY

Testimony before the Senate Committee on Commerce
By Terry Leatherman, Vice President – Legislative Affairs

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 present testimony this morning in support of SB 181. The bill contains a number of reforms to the workers compensation system which Kansas employers support. I plan to touch on several of the reform topics in SB 181, but spend the majority of my time reviewing the change to calculating work disability compensation proposed on pages 4 to 6 the bill.

There are essentially three stages in which to view a workers compensation case. Stage one is after a worker is injured and they receive medical care. It is everyone's hope the medical care makes the worker whole, leaving the employee with no lasting effects of their injury, back on the job, and their workers compensation claim resolved.

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

Stage three involves cases where an employee's injury keeps them from returning to work. This is called a "work disability" case. It has also been an area of contention for years. Today's work disability definition, developed in the workers compensation reform package of 1993, places a two-prong test to determine the compensation award in a work disability case. Here are the two work disability tests. First, you determine the percentage loss of job skills that the injured worker has used over their prior 15 years of employment. Second, you determine the percentage difference between the

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employee's pre-injury and post-injury wages. These two percentages are then averaged to determine how long an injured worker will be paid work disability compensation.

There are problems with both prongs of the work disability test. The loss of job tasks over a 15-year period is a poor barometer of the physical effects of an injury. The wage test is an objective measure, which is good, but it also encourages an employee to avoid work to maximize an award. Overall, the major problem with our work disability definition is it throws out the best test we have, and the test that is routinely used today in workers compensation, functional impairment, when determining work disability compensation.

SB 181 proposes a different approach. The work disability definition is deleted. Instead, to measure the degree of injury to the body, functional impairment will be used in work disability cases, just like it is used in other parts of current law. In addition, an employee will receive "supplemental compensation" to compensate them for their wage loss. A simple wage comparison will be used to determine the amount of supplemental compensation. The percentage difference between pre-injury and post-injury wages will become the number of weeks of supplemental compensation awarded. For instance, an employee who was earning $500 a week, but after their injury can only earn $400 a week, has suffered a 20% wage loss. In this scenario, the employee's 20% wage loss would lead to 20 additional weeks of supplemental compensation, in addition to their compensation for functional impairment.

There is one additional provision to note, and one omission from the bill to consider. The additional provision addresses the problem involving an employee avoiding work to maximize compensation. SB 181 requires a workers compensation judge to impute a wage, based on evidence presented, in cases where a worker is unemployed. The omission concerns a problem that is mounting today involving work disability cases following an economic layoff. Today's challenging economy has led employers to lay off individuals, who then receive unemployment compensation. However, there are cases today where the worker dismissed during an economic downturn has claimed work disability. It would be KCCI's contention that, when a person loses their job for economic reasons and not because of their work place injury, they should not qualify for additional workers compensation benefits. SB 181 might provide an opportunity to address this situation.

There are two other provisions in SB 181 that KCCI supports. The first is on the first page of the bill, and addresses compensation for employees with pre-existing conditions. Pre-existing condition reform was a key element in the 1993 reform bill that has not nearly resembled the legislative intention of 10 years ago. The concept behind pre-existing condition provision is an employer should be responsible for the degree which work caused their employee's injury, but not responsible for conditions that pre-existed the work place accident. The change in SB 181 attempts to make

this decade old reform a reality. On page 9, the bill also clarifies the date of injury in cases involving cumulative trauma cases, to legislatively address confusion the courts have brought to this area of the law.

Thank you for the opportunity to comment on SB 181. I would be happy to answer any questions.

About the Kansas Chamber of Commerce and Industry
The Kansas Chamber of Commerce and Industry (KCCI) is the leading broad-based business organization in Kansas. KCCI is dedicated to the promotion of economic growth and job creation and to the protection and support of the private competitive enterprise system.

KCCI is comprised of nearly 2,000 businesses, which includes 200 local and regional chambers of commerce and trade organizations that represent more than 161,000 business men and women. The organization represents both large and small employers in Kansas. 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.

Senate Bill 181
KSIA Testimony
February 12, 2003

Members of the Committee, my name is Pat Bush and I appear before you today representing the Kansas Self-Insurers Association (KSIA) and to offer testimony in favor of Senate Bill 181.

The workers compensation reform of 1993 offered changes intended to improve the workers compensation system in Kansas. After nearly ten years, the intent of some of the 1993 changes have been misconstrued through case law, thus serving only to burden their practical application and cause additional expense to businesses operating in this state. Senate Bill 181 offers language to help get our workers compensation system back on track and to hopefully help develop case law to support the intent of the legislative changes made some ten years earlier.

There are two proposed changes in Section 1, K.S.A. 44-501. The first change is to paragraph (c). This proposed change offers language to assist employers in receiving a "credit", if you will, for an injured workers preexisting condition. Currently, a worker sustains a work related injury; let's say to the knee. All parties involved know, through medical evidence or the workers own testimony, this individual already had a "bad knee" from a previous injury. In addition to the employer paying all medical costs associated with the treatment, the employer will also compensate the worker for the total functional impairment the worker is determined to have sustained, regardless of how much of the functional impairment was preexisting. There is case law that makes it clear that without a documented impairment rating from any previous injury, the employer must compensate the worker for the total functional impairment regardless of the medical evidence to support a preexisting condition. The proposed change would allow the employer to subtract from the total functional impairment the amount of impairment medically deemed to be preexisting.

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The second proposed change in Section 1 is found in paragraph (h). This proposed change is to clarify the original intent of this paragraph. That is to allow for an offset of workers compensation benefits when an individual is also eligible for benefits from an employer funded disability retirement program. While the statute is clear that an offset can be taken from other retirement funds, case law has established that a worker drawing from an employer funded disability retirement fund is also eligible for total compensation paid through workers compensation benefits, thus receiving full benefits from both programs.

Proposed changes found in Section 2, K.S.A. 44-510e would essentially eliminate the current "work disability" provision and replace it with "supplemental compensation". The current application has demonstrated its costliness and inappropriateness, as case law has applied and upheld this process in unthinkable circumstances. The current process uses a two-prong approach consisting of a task loss percentage and a wage loss percentage to arrive at the percentage of work disability. The problem encountered with the current application is that workers who have returned to work following a work related injury, and who were later laid-off due to economic reasons, have been able to come back to the courts and be compensated for their 100% wage loss, even though the loss in wages was due to the lay-off and not a result of the injury. The proposed approach would simply base compensation on the percent of functional impairment plus additional weeks of compensation, up to 100, based on the percentage of wage loss, if any, sustained by the worker as a result of the injury (i.e., a 30% wage loss as a result of the injury would net an additional 30 weeks of compensation).

Section 3, K.S.A. 44-508 paragraph (d), proposes a clarification to the definition of "Accident". This change is needed as our system has come to see an increased amount of claims related to cumulative trauma disorders. Current case law has defined the date of accident for these types of injuries to be the last day the worker worked. This is simply not practical when trying to administer a workers compensation program. Using this logic, if a worker continues working while receiving medical treatment for carpal tunnel

syndrome, one could argue the accumulated medical bills would be the responsibility of the worker as there has yet to be a date of accident reported to the employer for this injury. It simply makes sense to better define an accident date for these types of cumulative trauma injuries.

In summary, while the changes made in 1993 have made some improvement in the workers compensation system, there are clearly areas that need to be fine tuned to ensure the application of this statute meets the intent of the legislative body. The members of KSIA are asking you to make these needed changes a reality. We ask your support for Senate Bill 181.

Thank you.

Patrick E. Bush
Past President
Kansas Self-Insurers Association

TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE
ON SENATE BILL 181
by Philip S. Harness, Acting Director of Workers Compensation
February 12, 2003 – 8:30 a.m. – Room 123-S

Senate Bill 181, if passed, would change the mechanics of the Workers Compensation Act in five ways:

1. This bill would change K.S.A. 44-501 to require administrative law judges to consider all testimony on the subject of pre-existing impairment before determining the amount of an award of benefits. Generally, administrative law judges look for a prior, contemporaneous impairment rating, based on a doctor's examination of the employee at the time of that rating, before they will find a pre-existing impairment. The Workers Compensation Board has held that pre-existing impairment ratings can be made after the subsequent work injury, but the rating should be based on the employee's contemporaneous medical records. S.B. 181 would require administrative law judges, and the Workers Compensation Board to consider certain types of evidence that they already consider and sometimes find unreliable.

2. This bill further changes K.S.A. 44-501 to reduce workers compensation benefits by the weekly amount of disability retirement benefits that the employee is receiving. Currently, the statute only requires a reduction when the employee is receiving retirement benefits. In the scheme of social security disability retirement benefits, those benefits are reduced by the amount of workers compensation the employee is receiving. This bill would reverse that process and offset the workers compensation benefits to begin with. Disability retirement systems other than Social Security may have different offset provisions with respect to workers compensation, so in some situations this could create an offset to workers compensation benefits for which there would not have been a corresponding offset in the employee's disability retirement.

3. K.S.A. 44-508 would be changed to provide a definition of the date of accident for repetitive use injuries. The courts have grappled with the question of when a repetitive use injury begins for purposes of determining workers compensation benefits. The current interpretation is that the date of accident is the day the employee is taken off of work due to the injury, but even that does not cover every situation. This provision in S.B.181 provides three alternative events, the earliest of which would constitute the date of accident, and appears to provide a date for any kind of case.

4. The most profound change is to K.S.A. 44-510e. This bill would eliminate the present general disability mechanism (commonly called work disability) and replace it with a concept of supplemental functional disability. Work disability is a method for determining the employee's percentage of disability when the injury has caused the employee to lose more than 10% of the employee's pre-injury earnings. Bear in mind that this is different from functional disability, which is a percentage determined by a doctor by use of the AMA Guides. Work disability comes into play when the law deems that functional disability is insufficient. Supplemental functional disability under S.B. 181 would serve the same purpose as work disability, but does it in a different way. S.B. 181 would determine the employee's disability only by looking at the percentage loss of

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earnings, as compared to the employee's pre-injury wage. Under the current system of work disability, the employee's percentage loss of earnings is averaged together with the employee's percentage loss of task performing abilities as determined by the doctor. So, supplemental functional disability removes the percentage loss of task performing abilities from the equation. It also treats the earnings loss percentage as a whole number representing the number of weeks of benefits the employee is to receive in addition to the employee's functional disability.

The S.B. 181 mechanism would change the process of determining general disability by removing one half of the disability equation. It would also reduce the amount of permanent partial benefits in many cases. The maximum number of weeks for which general disability benefits could be paid under the present statute is 415. Under S.B. 181, it would be 100 weeks. The S.B. 181 supplemental functional disability system would result in lower amounts of permanent partial disability benefits than the present work disability system in the vast majority of cases. The only exceptions would be cases where the functional disability percentage is very high (like at least 75%), or where temporary total benefits were paid for a very long time (on the order of more than 6 years), and those situations are extremely rare.

5. Finally, S.B. 181 repeals K.S.A. 44-510a, which is a section that allows for a credit where weekly benefits being paid from one injury overlap with benefits being paid on a subsequent injury. 1993 changes to the act accelerated the rate at which permanent partial benefits are paid out, so we rarely see a case where the 44-510a credit applies. Benefits simply aren't paid out long enough for there to be overlapping claims. S.B. 181 would shorten even more the length of time for which permanent partial benefits are paid, making it even more unlikely that a 44-510a credit would ever apply.

The Workers Compensation Advisory Council has discussed many of the proposals incorporated into S.B. 181, and the Council has not yet reached a consensus on them.

TESTIMONY BY KANSAS AFL-CIO
IN OPPOSITION TO SB 181
PRESENTED TO SENATE COMMERCE COMMITTEE
by
JOHN M. OSTROWSKI
FEBRUARY 12, 2003

1. Background & Introduction

In 1987 and 1993, in response to rising premiums the Kansas Legislature "reformed" workers compensation. It is clear to even the casual observer that the thrust of both so-called reforms was to decrease benefits to injured workers. In hindsight, it is apparent that the reforms were both unnecessary, and failed to produce the intended result of lowering premiums. The reforms were unnecessary because there are always "peaks and valleys" with regard to premiums. Without legislative action, premiums would have decreased in subsequent years. Furthermore, evidence clearly exists that the massive reduction in benefits to workers did not lead to a reduction in premiums for Kansas employers. Rather, medical charges increased, profits for insurance companies increased, administrative costs increased, etc. Premiums are currently rising only at an expected rate.

Senate Bill 181 is, in its simplest form, another attempt to slash benefits to injured workers and their families. Supposedly, Kansas workers are a great resource to the state. Bills such as S.B. 181 clearly jeopardize the State's commitment to this "great resource."

2. The Kansas AFL- CIO's opposition to S. B. 181

a) As with most areas of law, workers compensation has many parts that make up the whole. It is difficult to reform singular sections of the law without a study of the entire statute. In 1993, the Legislature created the Advisory Council to study legislative matters. The Legislature mandated that five members be chosen to represent the working-class, and five members be chosen to represent business interests.

The Advisory Council (KSA 44-596) is chaired by the Director of Workers Compensation. The Advisory Council meets regularly, and often calls expert witnesses to discuss pending legislation, as well as drafting legislation to recommend to the Legislature. Because it takes four votes from each side of the table to make recommendations to the Legislature, there is a tremendous amount of "negotiation". The "wish lists" of all participants are quite lengthy--including labor, business, the Division, the medical fee personnel, the fraud and abuse section, insurance carriers, etc. Oftentimes compromises are reached, and oftentimes a significant amount of "horse-trading" takes place with each party giving up pieces of the pie.

It is first of all the position of the Kansas AFL-CIO that SB 181 should be presented to the Advisory Council for study. There is no particular reason to presume that the parties who have an interest in this matter cannot reach compromise with each side bargaining for their

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respective positions. It is respectfully suggested that such an approach produces a more workable statute for those who are affected by any changes. This would also be consistent with the intent of the Legislature in creating the Advisory Council.

b) As regards Section1(c), the bill's apparent intent is to expand offset provisions, thereby further reducing benefits to injured workers. This was a very hotly contested issue in 1993, and the parties agreed, as part of a package, to the specific language found in current law. The intent was that a worker should not be able to "double dip" within the system. A worker who has a pre-existing impairment (whether or not it has been rated by a physician) will receive an offset in his/her compensation should he/she further injure that body part. The burden of proof is on the employer to show the extent of any preexisting impairment for which they seek an offset.

The bill appears to allow an offset even in those cases where the worker has a condition pre-injury, which in no way previously affected his life. For example, consider the 30-year-old worker who has never had a problem in his back or knee. Simply because the person is older then 29, there will be some arthritis present in these body parts. Litigation will now ensue relative to a "preexisting condition". Similarly, if a person has never been restricted from any work activity, a doctor can be found who will testify that this 40-year-old worker should not have been lifting boxes weighing greater than 40 pounds pre-injury. This was obviously not the intent of the statute when it was enacted and allowed offsets for preexisting impairments. It is a long, long way from "double dipping." Furthermore, this law would place the burden of proof on the claimant to disprove a negative. This is not a sound legal principle.

c) The change is set forth in Section 1 (h) continues with the overriding intent of the bill to reduce benefits for workers. In addition to taking a credit for retirement, the bill seeks to expand the credit for any disability payments the worker might receive. In reality, there should be no offset for either retirement or disability.

First of all, it is the worker (not the employer) who is paying for the disability or retirement policy. It is through his labor that he is receiving these benefits. No employer negotiates a wage without regard to fringe benefits and then gratuitously adds fringe benefits after the hourly wage is decided upon. Some workers, given a choice, will accept lower wages in exchange for fringe benefits. These are employees attempting to plan for their future, and the future of their family. Yet, it is the employee who takes "instant gratification" by accepting the higher weekly wage without fringe benefits that ends up getting more workers compensation. In short, we believe that the worker who accepts a lower weekly wage in exchange for fringe benefits should not be punished.

It is also more logical that, if there must be an offset, there should be an offset for disability, and not retirement. Retirement is earned over many years, following many years of service. It is vested after years of service. Disability policies come and go. When this provision was enacted, the fear was that employees would sit at home, and then collect both retirement and "work disability." Since its passage, the courts have interpreted the law to avoid this scenario. If an injured worker "sits at home" the law will impute a wage to him. Again, there is simply no reason for the offset of retirement benefits to exist, and is unfair to the worker who has earned his

retirement to punish him by treating him differently within the system.

d) As indicated above, in 1993 benefits were further slashed for injured workers and their families. The Kansas AFL-CIO opposed most of the provisions of the 1993 law. While the Kansas AFL-CIO believed that premiums were too high, it was labor's position that there were other methods of producing a reduction in premiums besides simply reducing benefits.

One of the things that the AFL-CIO did not oppose in 1993 was a strong incentive that the law gave for employers to return injured workers to work. It is simply a "carrot and stick" approach. If the employer will take the injured worker back to work, or aid the injured worker to return to work earning 90 percent of their preinjury wage, the claimant does not receive "work disability". This is quite logical. If a worker does not have to compete in the open labor market to earn wages with his permanent disability, he should not receive "work disability".

This aspect of the law has been more important than any other in returning injured workers to productive employment with minimal disruption in their financial life. It is indeed "a good thing" when workers are returned back to work by the employer, especially the employer at the time of injury. Insurance carriers have emphasized this return to work with their insureds. Self-insured employers have also emphasized a return to work. I do not believe that anyone would dispute that the current higher percentage of return to work cases since 1993 is due to the economic incentive given employers.

As repeatedly indicated, SB 181 is nothing more then a reduction in benefits to injured workers. In particular, Section 2 which seeks to amend KSA 44-510e, virtually eliminates work disability. It is a proven fact that by eliminating the financial incentive for returning the injured workers to work, frequent returns to work will not happen.

How do we know that employers will not take injured workers back to work without the incentive? Because it did not happen before 1993! Also, we have experienced this phenoneman in the *voluntary* vocational rehabilitation provisions of the law (another 1993 amendment). Whether or not an employer offers an injured worker vocational rehabilitation is strictly an economic decision, not a moral one. That is, the employer/insurance carrier calculates the cost of vocational rehabilitation/retraining against the cost of work disability. If vocational rehabilitation is more expensive than the work comp claim's value, the worker does not receive voc rehab.

Again, it is obvious that having injured workers go back to work is a good thing for everyone and the system itself. By virtually eliminating work disability, we will simply be casting the injured worker out the door without compensation for the injuries, and without vocational rehabilitation benefits. The injured worker simply cannot compete in the open labor market with injuries as well as the uninjured worker. Thus, the injury will cause economic loss, perhaps for a lifetime. The limited compensation currently paid in these cases should not be reduced.

e) As regards Section 3 (d), labor has spent a significant amount of time negotiating in the Advisory Council an appropriate formula for establishing a date of accident when a "series" is involved. This is a very complex area of law, and affects many respondents, insurance carriers,

and injured workers. To avoid unintended consequences, the formula must dovetail with the provisions of notice, written claim, and the filing of timely applications for hearing.

Because of the far-reaching ramifications of this particular change, we would again urge that the parties be permitted to continue negotiations in the Advisory Council.

3. Conclusion

While the AFL-CIO strongly opposes SB 181, we do not oppose changes in the system which will reduce premiums for employers. We do object that all of the proposed changes negatively impact injured workers and their families. To achieve the goal of reducing premiums, we would strongly urge that the Legislature consider remedies and proposals dealing with the following topics:

1. Why is it in Kansas that we have low benefits and higher then average premiums? This is the worst of both worlds. It is bad for workers and employers. If we had high premiums and high benefits, or low benefits and low premiums, it would at least represent a policy choice favoring either employers or workers. (Workers Compensation State Rankings Manufacturing Industry Costs and Statutory Benefit Provisions, Actuarial & Technical Solutions, Inc., 2001 Edition)[1] This should be addressed.

2. Employers' fraud needs to be controlled. Statistically, we now know that the largest percentage of fraud within the system is committed by employers, not employees. (Division of Workers Compensation "Message from the Fraud Unit", 2001 Statistics; Testimony of Director P. Harness 1/16/02, Joint House and Senate Committee Meeting) It is labor's position that the continuing fraud by employers is extremely costly (e.g. under reporting payroll, misclassifying employees, failing to secure insurance, etc.). Aggressive pursuit of these premium dollars would result in a substantial reduction of premiums for the responsible employers.

3. Why is it that Kansas continues to have such a poor safety record? Again, it is obvious that if safety were dramatically improved in Kansas, which would result in fewer injuries, the cost of workers compensation would decline. Without an injury, you would have no medical costs, hospitalization costs, temporary total paid, permanent partial paid, etc. Unfortunately, Kansas is high in both frequency of injuries and severity of injuries. (Workers Compensation in Kansas, A Report Prepared for The Kansas Coalition for Workplace Safety, Prepared by Labor Research Association, February 20, 2000) It is even respectfully suggested that if benefits were increased to injured workers, employers would be more inclined to have a safe workplace. Conversely, if it becomes "cheaper" to pay for injuries, the incentive for safety falls. Again, this is a financial issue, and not a moral one (just like vocational rehabilitation).

4. According to the NCCI, the cost driver in Kansas workers compensation is not benefits paid to workers, but the cost of medical care which outpaces, and *minimizes*, every other cost.

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[1] This study was recently endorsed by the NCCI as valid. It is copyrighted, and accordingly, exact quotations cannot be reproduced herein.

Depending upon the source, medical benefits represent between 55 percent and 67 percent of every dollar spent in the system. Stated alternatively, all the other benefits totaled together (temporary total paid, permanent partial paid, temporary partial disability paid, permanent total paid, vocational rehabilitation, the cost of running Division of Workers Compensation, defense attorneys cost, funeral and burial expenses, etc.) do not represent even half the cost of the entire system. This is the cost driver with which the Legislature should be concerned.

Although premiums in Kansas have risen slightly in the recent past, premiums are not "out of control" or beyond what is expected. Rather than again reducing benefits to injured workers, we should be dealing with the areas of concern identified above. While these "systemic problems" are more difficult to deal with and solve, fairness requires that we at least try.

Workers and their families cannot always be the source of balancing the checkbook such that employers never have an increase in premiums, doctors never take a cut in pay, and insurance companies never have a reduction in profits.

Respectfully Submitted,

Kansas AFL-CIO

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

TO: Members of the Senate Commerce Committee

FROM: Michael Helbert
Kansas Trial Lawyers Association

RE: 2003 SB 181

DATE: Feb. 12, 2003

Chairman Brownlee and members of the Senate Commerce Committee, I am Michael Helbert and I appear before you today on behalf of the Kansas Trial Lawyers Association (KTLA). KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to appear before you today in opposition to SB 181.

Most Kansas employees are covered by the Workers Compensation system. We, and our families, depend on this system to protect us from the financial consequences of workplace injuries and illnesses. Our current system offers minimal protection to Kansans who are injured on the job.

A report prepared for The Kansas Coalition for Workplace Safety in 2000 showed that Kansans have a higher risk of being injured on the job than workers in other states. The incidence of occupational injuries and illnesses in Kansas is above average for most industries, and incidence rates have remained relatively constant despite measurable improvements nationally.

The above average incidence of occupational illnesses and injuries in Kansas is compounded by substandard benefits that are well below the national average. According to the report, workers compensation benefits are substandard for all categories of injuries and survivor's benefits.

In comparison, Kansas employers' costs for workers compensation are low. Premium costs are below average and Kansas employers' workers compensation costs are almost half of the average for the nation and the region.

So the question becomes, how does SB 181 improve the workers compensation system in Kansas? The answer is simple. The passage of SB181 would further erode the already weakened rights of injured Kansas workers.

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Terry Humphrey, Executive Director

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This legislation creates a nightmare for the system and injured workers. The issues included within SB 181 have been before the Workers Compensation Advisory Council for over a year. Without consensus and approval, these issues today remain in front of the Advisory Council. The Council has not considered nor approved SB 181.

Provisions within SB 181 would further reduce protections and benefits to injured workers. For example, under SB 181, a prior impairment rating, or permanent restrictions would not be needed to prove a pre-existing impairment or disability. This creates a situation where lay testimony and pure speculation will be used to try to establish a pre-existing impairment. At the present time, some sort of objective evidence must be admitted to establish that a person had a pre-existing disability. That objectivity will be removed by the amendment proposed in K.S.A. 44-501 (c).

SB 181 eliminates the ability of a worker to provide any meaningful evidence as to how the injury had affected his life. The same would be true for employers. An employer would not be able to present any evidence as to the work activity of the employee and how it was affected or was not affected by the injury. The entire controversy would be determined by medical evidence alone. At best, this will result in pure speculation on the part of medical doctors, and at worst, will result in the inability of the parties to find a reputable physician to render an opinion as to how much impairment or disability resulted from any one work activity.

This legislation penalizes a worker who had the foresight to purchase disability insurance. Any worker with disability benefits, regardless of the source, will be penalized under this bill. How would this happen? Subsection (h) reduces the amount of workers compensation benefits received by the amount of disability benefits received from Social Security, KPERS, or any other disability benefit. As we all know, we pay dearly for our Social Security benefits. Most of us will never have to use Social Security disability benefits, but we have earned the right to use them if such misfortune comes our way. This provision takes that right away from the individual who has paid for the insurance. The real beneficiary of this provision is then the insurance company.

SB 181 ignores the fact that Social Security already reduces its benefit if the workers compensation benefit exceeds a certain level. In addition, this would effectively eliminate the reason to have disability insurance for thousands of hard working Kansans who were smart enough to plan ahead. In other words, compensation to worker injured on the job will be reduced because that worker had a private pay disability insurance policy. This shift in policy is in not the best interests of our workforce to pass such legislation.

SB 181 eliminates the basic reason for workers compensation. Workers Compensation was designed to be a trade-off between employers and employees. Employers agree to pay injured workers compensation in a "no-fault" system and receive immunity from employee lawsuits. In exchange, employees give up the right to sue their employers. To reduce a person's compensation for a reason that has absolutely nothing to do with the

injury sustained by that person is patently unfair and against the principles of the Workers Compensation Act.

This legislation also eliminates the right to receive what is known as "work disability." Essentially, the legislation would create a "one size fits all" type of compensation. It takes individual justice out of the system and replaces it with one that dehumanizes a work injury victim. This is not the type of justice that one expects to see in a nation that prides itself on the respect for the individual.

Finally, Subsection (d) on page 9 of SB 181 is equally ill-advised. It indicates that repetitive use, cumulative traumas or micro-traumas will have three potential dates of accident. Two of those require a physician. A physician must diagnose the condition as work-related or take the employee off work due to the condition, or restrict that person from performing the work which is the cause of the condition. This language assumes the following:

- The worker is still working for the employer where the injury occurred.
- That an employee will know what his injury is when he reports the problem to the employer.
- That the company doctor will tell the injured worker that it is work-related.
- That the company doctor would take the injured worker off work or restrict the worker from performing the offending work.
- That appropriate diagnostic tests would be done quickly.

None of the above can be assumed. Many times injured workers are denied appropriate treatment or any treatment at all. Many times diagnostic test results are not explained to workers in a timely manner. During those times the worker continues to work and gets worse and worse.

In a repetitive trauma case, workers generally do not know when the injury began. In a micro-trauma case, it is the very fact that it is a micro-trauma that makes it difficult if not impossible for an injured worker to know when he or she was injured. Likewise, it is often impossible for a family practitioner to know the exact date that an injury occurred.

SB 181 proposes profound changes to our current public policy to the detriment of Kansas employees and their families who depend on workers compensation for injuries they receive on the job. It eliminates protections for Kansas employees under a system that already exposes them to a higher risk of being injured and places them at financial risk. We urge you to protect Kansas workers by opposing SB 181.

Thank you for the opportunity to express our strong opposition to SB 181.

WORKERS COMPENSATION IN KANSAS

A Report Prepared for
The Kansas Coalition
for Workplace Safety

PREPARED BY

LABOR RESEARCH ASSOCIATION

February 20, 2000

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EXECUTIVE SUMMARY

The Kansas State Legislature restructured the state's workers compensation system in 1993. A study of the system since the 1993 changes produced the following findings:

- The incidence of occupational injuries and illnesses in Kansas is above average for most industries, and incidence rates have remained relatively constant in Kansas in recent years despite measurable improvements nationally.

- Benefits paid to workers under the state's workers compensation system are substandard for all categories of injuries and for survivors' benefits.

- Employers' costs for workers compensation insurance in Kansas are low. Premium costs are below average and falling. Deep cuts in benefits have been made and the savings have been handed back to employers in the form of substantial premium reductions.

- Even after years of significant premium reductions, premiums still cover all benefit costs and administrative expenses and leave sizable profits for workers compensation insurance carriers.

- The combination of high injury rates and low benefits raises serious questions about the workers compensation system and the state's ability to maintain the work force necessary for continued economic growth.

INTRODUCTION

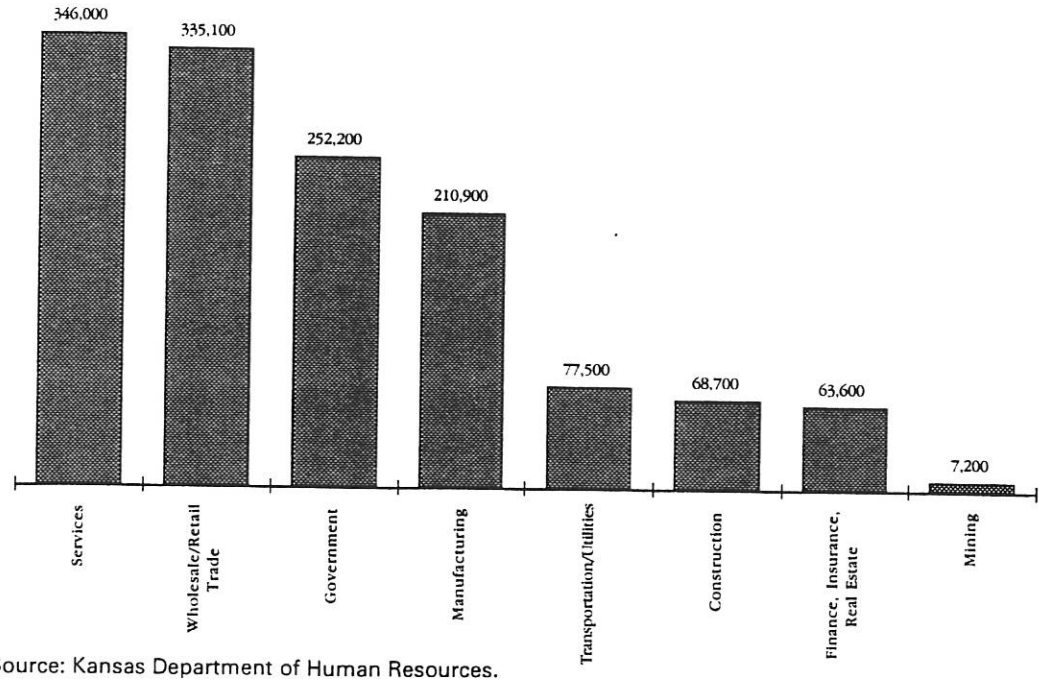
This is a report on the workers compensation system in Kansas based on a study conducted by Labor Research Association. The study included an extensive review of data and documents from the Kansas Division of Workers Compensation, the U.S. Department of Labor, and from private research and data collection agencies and publications. In the most basic terms, the study found that employers in Kansas pay low premiums for workers compensation insurance, insurance carriers pay out low benefits for injuries and illnesses, and workers lose a substantial portion of their wages if they are disabled from a workplace injury.

Most Kansas workers are covered by the state workers compensation system. These workers and their families depend on the state workers compensation system to protect them from the financial consequences of workplace injuries and illnesses. According to the Kansas Division of Workers Compensation, the workers compensation system brought in a total of $262 million in premiums for fiscal year 1998, and paid out $126 million in benefits — 48% of premiums paid. According to the National Council on Compensation Insurance, Inc., the 1997 national average loss ratio was 56% — a full four points higher than the Kansas ratio for that year, and eight points higher than the Kansas ratio for 1998.

According to the Kansas Department of Human Resources, there are a total of 69,177 employers in the state, and more than half of these, or 34,922 firms, employ fewer than five employees. Employers with payrolls of less than $20,000 a year are

Exhibit 1

Kansas Work Force November 1999



Source: Kansas Department of Human Resources.

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exempt from mandatory workers compensation coverage, as are agricultural employers. The total employed Kansas work force was 1,411,359 as of November 1999, with 346,300 in services, 210,900 in manufacturing, 335,100 in wholesale and retail trade, and 252,200 in government. (See Exhibit 1.) The work force is concentrated in Kansas City (383,681) and Wichita (284,768). The unemployment rate in November 1999 was 3.3%, one of the lowest rates in 20 years.

Statewide average weekly wages in manufacturing in November 1999 were $600.09, according to the Kansas Department of Human Resources. The average in the Topeka area was $665.73 and the average in the Wichita area was $691.39.

According to the National Council on Compensation Insurance (NCCI), a total of 8,491 workers compensation claims were filed in Kansas in 1996, the latest year for which NCCI data is available. This was down substantially from the 10,405 claims filed in 1994 and 14,006 claims filed in 1992. Overall, claims were 39.4% lower in 1996 than in 1992. The total value of all claims paid fell from $169.8 million in 1992 to $135.2 million in 1996, a decline of 20.4%. Over the same period, the size of the Kansas work force grew by more than 100,000 and the incidence of occupational injuries and illnesses remained relatively flat.

By any number of measures, Kansas has a high rate of occupational injuries. Using the Bureau of Labor Statistic's injuries and illness rate per 100 full-time workers, Kansas' rate of 8.9 in 1996 was the 8th-highest in the nation. Using the BLS's lost-workday rate, Kansas ranks 9th-highest out of the 50 states.

1993 Legislative Changes

Kansas Senate Bill 307, which was passed unanimously by both houses of the legislature in 1993, included the following provisions:

- **Temporary total disability.** SB307 limited the awarding of temporary total disability to only those cases in which the authorized treating provider provides an opinion based on the employee's actual job duties, with or without accommodation.

- **AMA Guides.** SB307 required the use of the latest edition of the AMA Guides for the Evaluation of Permanent Impairment for setting disability ratings.

- **Pre-existing injuries.** Where there is a pre-existing injury, SB307 reduces permanent partial disability by the percent impairment due to the pre-existing injury.

- **Permanent partial benefits.** Permanent partial benefits, including temporary total benefits during the healing period, are limited to $50,000 for cases based on functional impairment.

- **Social Security and pension offsets.** SB307 required offsetting indemnity benefits by Social Security and private pension benefits.

- **Medical fee schedule.** SB307 required the Workers Compensation Division to institute a medical fee schedule.

- **Accident notification.** Accident notification is required within 10 days of the injury or the claim is barred; if for just cause the employee cannot report, the period can be extended to 75 days after the accident.

- **Vocational rehabilitation.** SB307 ended mandatory vocational rehabilitation and substituted vocational rehabilitation only as agreed to by the benefit provider and the claimant.

- **Fraud.** The act established investigative resources within the Attorney General's office to pursue workers compensation fraud.

- **Safety.** SB307 authorized insurers to provide an optional program for accident prevention.

The constitutionality of 1993 legislation was challenged in a case that eventually went to the Kansas Supreme Court. The lawsuit, brought by injured workers, argued that the 1993 legislation violated due process because it restricted workers' rights and forced workers to give up too much without receiving a benefit in return. In 1997, the Court ruled in a 6-1 decision that the legislation was constitutional. In the majority opinion, Justice Bob Abbott acknowledged that the benefit for workers under the 1993 legislation "pales in comparison to what was taken away," but the majority concluded that the workers compensation law was not "emasculated to the point where it is no longer an adequate quid pro quo." In a dissenting opinion, Justice Donald Allegrucci said that the changes left workers without "a viable and sufficient substitute remedy" in seeking compensation for their injuries.

In 1997, Kansas enacted HB2011, which expanded the scope to cover self-employed subcontractors performing work for another contractor. This provision was repealed in 1998. The 1997 law also increased funeral allowances, required the medical fee schedule to be revised at least every two years instead of every year, and mandated certain types of data collection. In 1998, legislation provided for a $25,000 lump-sum payment to the legal heirs in no-dependency death cases where the employer has not procured a life insurance policy of at least $18,500. Additional legislation in 1998 increased the penalty for fraud from $1,000 to $2,000 for each act, not to exceed $20,000 in any one-year period.

Impact of the 1993 Changes

According to the National Council on Compensation Insurances' December 28, 1998 report on Kansas Post-Reform Monitoring, the number of claims per million dollars of payroll declined 13.9% in the post-reform period, compared with a 4.1% decline in a control group of non-reform states.[1] A comparison of claim frequencies for the top 25 occupational classes in Kansas indicated a 6.2% decline for the post-reform period, compared with 4.5% for the control group states.

Average total incurred claim costs declined 51.3% in Kansas in the post-reform period, with medical costs declining 61.3% and indemnity costs declining 60.9%, compared with a total decline of 13.7% for the control group. According to the NCCI, the lower claim costs in Kansas were caused by reductions in the proportion of claims with attorney involvement, surgery, hospitalization and a notable decline in the proportion of permanent partial claims.

The NCCI found that the average frequency of lost-time cases decreased 16.3% in Kansas in the post-reform period, compared with 13.4% in the control states.Average weekly benefits fell from $215.53 for accidents occurring in 1992 and 1993, to $170.31 for accidents occurring in 1994, the first year after reform.

VIA FAX 1-785-368-7119

ATTN: Jodie, Room 136 North

February 11, 2003

TESTIMONY OF MIKE PAYNE,
RISK MANAGER FOR CITY OF WICHITA,
ON SENATE BILL 181

Madam Chairperson and Members of the Committee:

I am Mike Payne, Risk Manager for the City of Wichita. Thank you for the opportunity to explain in greater detail why the City of Wichita supports SB 181 and more particularly to explain the City's support for the portion of the Bill which clarifies the offset to Workers Compensation benefits for retirement benefits and specifically includes an offset for disability retirement benefits.

The text of SB 181 includes much needed clarification for the statutory provisions involving the definition of accident dates in repetitive overuse injury cases and involving the manner in which pre-existing impairments and disabilities serve to reduce present awards. The City of Wichita supports the changes in SB 181 and believes those changes will serve to simplify the process by which the entitlement to Workers Compensation benefits is determined. I would like to specifically address the portion of SB 181 which modifies the existing statute [K.S.A. 44-501(h)] dealing with the offset of Workers Compensation benefits by retirement benefits.

The City of Wichita provides a disability retirement to commissioned police and fire employees who suffer a work-related and career-ending injury. The disability retirement benefit pays the injured employee 75% of his or her take home wages at a tax free rate that is subject to an annual cost of living increase until "time related" retirement takes effect. The funding for this benefit is paid approximately 75% by the City and 25% by the employee. This wage replacement benefit protects an injured employee who has suffered a service-connected disability and can no longer pursue a police or fire career.

At the present time, that same employee may pursue a Workers Compensation claim and receive work disability benefits up to $125,000.00 against which there is no offset for the retirement disability benefits.

This same situation was addressed by the legislature in 1993 and resulted in the passage of an amendment to the Workers Compensation statute which was intended to prevent the duplication of wage loss replacement benefits by the receipt of both the

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retirement benefit and the Workers Compensation benefit. However, in 1999, the Kansas Court of Appeals interpreted the legislative action to mean that only an "age-related or years of service" retirement benefit should be offset against the Workers Compensation benefits (Green v. City of Wichita). SB 181 includes language which clarifies the intent of the legislative action taken in 1993. SB 181 would amend the portion of the Kansas Workers Compensation Act to specifically include an offset for disability retirement benefits. This amendment is necessary to effectuate the purpose of the original legislative action.

The passage of the disability retirement benefit offset provisions would decrease the Workers Compensation expenses of the City of Wichita in excess of 10%. At the present time, awards under the Workers Compensation Act have been entered which require the City to pay a total of approximately $200,000.00 in benefits to two (2) police officers who are simultaneously drawing a disability retirement benefit which pays at least 75% of their take home earnings. That situation is in direct conflict with the intent of the legislative action in 1993. Because the Court of Appeals has indicated that the language of the statute does not clearly set forth the intent of the statute, the City of Wichita would support the changes concerning the disability retirement benefits as set out in SB 181.

Respectfully submitted,

Mike Payne