Approved: March 12, 2004
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 a.m. on February 6, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Bob Grant- excused
Representative Broderick Henderson- excused
Representative Don Hill- excused
Representative Kevin Yoder- excused

Committee staff present:
Jerry Ann Donaldson, Legislative Research Department
Norm Furse, Revisor of Statutes
Renae Jefferies, Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee: Larry Karns, Attorney
Beth Foerster, Adjunct Professor, Washburn Law School and Attorney at Law

Others attending:
See Attached List.

The Chairman stated this meeting was designed to help all of the committee members get up to speed on workers compensation. This is an information session and two attorneys that may have different views of workers compensation have been invited to speak. The two conferees will speak approximately 20 to 25 minutes each and then they will have the opportunity to make additional comments or rebuttals. Questions will follow.

Larry Karns, presented his views on reform regarding the definition of "work disability." For many decades, Kansas Workers' Compensation Law has provided two statutory methods in regard to compensating injured workers. The first approach provides compensation based on an injury to a "scheduled" member of the worker's body. Thus, for example, an injury to the arm is allocated so many weeks of permanent partial disability compensation, and a different number of weeks is allocated for a leg injury. "Scheduled" injury compensation awards are determined by applying the percent of physical impairment of function to the appropriate statutory number of weeks allowed.

In 1987,the Kansas legislature made significant revisions to "work disability." K.S.A. 44-510e(a) was modified to read as follows: "The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation..."

Because of the high expenses involved in the vocational rehabilitation that was also attempted under the 1987 legislation, the Kansas legislature again revamped the Workers Compensation Act in 1993. For accidents occurring on July 1, 1993 and thereafter, the definition of "work disability" was changed pursuant to K.SA. 44-510e(a) to provide as follows: " The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

Unfortunately, the current work-disability scheme is such that the burden of proof is unfairly weighted in favor of the claimant. Anytime legislation to resolve conflict results in the burden of proof not being fairly apportioned, abuse can and in fact will result.

The second aspect of work disability under the current law is also tilted to an extreme in favor of the

claimant. The claimant is rewarded for not returning to work (whether it is with the same or a different employer). This is because the amount of permanent partial disability compensation the claimant can receive is increased if he or she is not working.

With the current system, there is a partial backward-looking scheme to determine work disability, where vocational experts and physicians have to testify, and a present-time test of whether or not the claimant is currently working. The future is ignored as we look at what the claimant is actually earning at the particular time the award is rendered by the administrative law judge. This very light burden of proof on the claimant under the current workers' compensation system makes recovery of significant work disability much easier than would otherwise be the case (Attachments 1, 2, 3 & 4).

Beth Regier Foerster, Adjunct Professor, Washburn University Law School and Attorney at Law, stated she attempted to give "neutral testimony" regarding Kansas workers compensation during the legislative interim committee. This broad overview is more from the perspective of the injured worker.

The interim committee heard, and this committee will hear testimony, that there is no "crisis" in workers compensation. As such, there is simply no need for "reform". It seems overwhelmingly correct that all statistical data from the NCCI and other sources indicates Kansas premiums are very low both nationally and within the geographic area. Indemnity payments to injured workers were approximately equal in 2003 to those paid in 1993. The Insurance Department has approved a decrease of 35.2% for combined premiums between June 1, 1994 and January 1, 2003.

The Insurance Commissioner has approved a 1.9% rate increase for the upcoming year. It is clear that the upturn is due to the ever accelerated rising costs of medical care, the cyclical nature of the insurance industry and general inflationary pressures.

From the injured workers perspective the picture changes from "stable" or "as anticipated" to "bleak." In all five categories of monetary benefits paid to injured workers (i.e. indemnities), there is a huge deficiency. There are two very favorable components of the current workers compensation system, i.e., preliminary hearings and return to work incentive.

When a worker is completely unable to return to substantial and gainful employment following injury, they are entitled to permanent total disability not to exceed $125,000. Kansas is only one of four states in the Union which caps permanent total disability rather than providing lifetime benefits. Not only does Kansas institute this cap, but it also pays the lowest amount of the four capped states. The nearest state pays double what Kansas pays or $250,000.

In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent total disability was raised from $100,000 to $125,000. Since 1987, this cap has never been raised.

Regardless of what a worker makes while working, they are only allowed to currently receive $440 per week when off work and unable to work because they are healing/recovering from injury.

In July 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent partial disability was raised from $75,000 to $100,000. Since 1987, this cap has never been raised.

In July of 1987, death benefits were increased to $200,000. That cap remained in effect until July of 2000, when benefits were increased by $50,000. The increase was brought about by the tragedy from DeBruce Grain. Again, it is easily shown that Kansas' death benefits are meager compared to other states and what it would take to allow for an adjustment period following the death of a breadwinner (Attachment 5).

The meeting adjourned at 10:30 a.m. and the next meeting will be February 10, 2004.

COMMERCE AND LABOR COMMITTEE

Date February 6, 2004

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Scott Heidner	KS Self Insurers Assoc

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PROPOSED KANSAS WORKERS' COMPENSATION REFORM

When the Kansas legislature convenes for the 2004 legislative session, workers' compensation reform will be an important topic for consideration. Kansas employers have serious and viable concerns regarding the structure and judicial application of the Workers' Compensation Act. These concerns including the following topics of interest.

I. REFORM REGARDING THE DEFINITION OF "WORK DISABILITY."

A. Background Information Of Scheduled Versus Whole Body Injuries And Whole Body Injuries Being Compensated As Physical Functional Impairment Or "Work Disability."

For many decades, Kansas Workers' Compensation Law has provided two statutory methods in regard to compensating injured workers. The first approach provides compensation based on an injury to a "scheduled" member of the worker's body. Thus, for example, an injury to the arm is allocated so many weeks of permanent partial disability compensation, and a different number of weeks is allocated for a leg injury. "Scheduled" injury compensation awards are determined by applying the percent of physical impairment of function to the appropriate statutory number of weeks allowed.

If a work-related injury is suffered to the trunk of the human body (such as to the neck or back), or injuries occur to more than one extremity, a whole-body injury can be claimed. The claimant can then be compensated based upon the higher amount of

Comm. Labor
2-6-04
Atch #1

recovery of either the physical functional impairment as given by a physician, or for what is called "work disability." A brief history of what "work disability" involves is worth understanding in order to see some of the current problems with the Kansas Workers' Compensation system.

B. **"Work Disability" Before July 1, 1987.**

Prior to legislative changes in 1987, "work disability" was determined pursuant to K.S.A. 44-510e(a), which provided that:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the workman to engage in work of the same type and character that he was performing at the time of this injury, has been reduced . . . .

The above definition was created by the Kansas legislature in 1974. Under this approach it was the administrative law judge's function to determine the following question of fact: By what percentage has the claimant's ability to perform his job been impaired because of the work-related injury?

Pursuant to *Ploufz v. Ell-Kan Co.*, 234 Kan. 153 (1984), the test for work disability was the effect an accident had on the claimant's ability to perform the same or similar employment. This test did not involve looking at the claimant's ability to obtain or retain employment in the open labor market. It also did not involve looking at whether the claimant was able to return to the job he or she was performing at the time of the accident. Instead, the fact question was what portion of the claimant's job requirements he or she is unable to perform because of the work-related injury and resulting permanent restrictions.

Under the above approach, the physicians would provide permanent impairment of function ratings along with any permanent restrictions. The claimant attorney would then have the injured worker testify as to what his or her job duties were in the position the claimant held at the time of the work-related injury. The claimant would testify as to what percentage of these job tasks he or she was no longer able to perform. Counsel for the employer could cross-examine the claimant on this issue, as well as obtain testimony from co-workers or supervisors of the claimant. Again, the fact question was: Based upon the permanent restrictions given, to what percentage has the claimant's ability to perform his or her job been impaired by the work-related injury due to the resulting permanent restrictions?

In essence, both claimants and respondents sought testimony from those individuals most knowledgeable about the claimant's employment duties. The function of the administrative law judge was to exercise his or her judicial expertise and judgment to determine the percent of "work disability." Thus, the pre-July 1, 1987 law looked to the recent past concerning the claimant's employment at the time of the work injury to ascertain "work disability."

C. Post-July 1, 1987 Defined "Work Disability."

In 1987, the Kansas legislature made significant revisions to "work disability." K.S.A. 44-510e(a) was modified to read as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation . . . .

The above statute provided that "work disability" was to be based upon a labor-market-loss theory and a wage-loss theory. Pursuant to the Kansas Supreme Court decision of *Hughes v. Inland Container Corp.*, 247 Kan. 407 (1990), the Supreme Court stated:

> . . . We conclude that both the reduction of a claimant's ability to perform work in the open labor market and the ability to earn comparable wages must be considered in determining the extent of permanent partial general disability.
>
> In order to arrive at a percentage, a mathematical equation or formula must necessarily be utilized. The district court determined to give each element equal weight and averaged the two to arrive at a percentage. The statute is silent as to how this percentage is to be arrived at, and, absent any indication as to how this is to be accomplished, we cannot say that the district court erred in the method adopted and applied in the instant case.

Thereafter, vocational experts were utilized by both claimant counsel and respondent counsel to determine each prong of "work disability," that is, the percent of ability the claimant had lost to perform work in the open labor market AND the percent of the ability the claimant had lost to earn a comparable wage because of the work-related injury (again based upon any permanent restrictions). These percentages were then averaged to determine the percentage figure of "work disability" applicable.

The *Ploutz* approach to work disability under the pre-1987 workers' compensation law looked back to the time of the claimant's injury to determine the percentage of work loss the claimant had suffered. Under the 1987 legislation, the administrative law judges interpreted the vocational experts' hypothetical opinions, which looked to the claimants' <u>future</u> loss of ability to perform work in the open labor market and <u>future</u> loss of ability to earn comparable wages. The 1987 law resulted in

the use of vocational expert witness testimony in any litigated work-disability case. The cases became the battle of the experts, and the administrative law judge basically adopted one expert's position or split the difference between experts to arrive at a work-disability opinion.

D. **Post-July 1, 1993 Defined "Work Disability."**

Because of the high expenses involved in the vocational rehabilitation that was also attempted under the 1987 legislation, the Kansas legislature again revamped the Workers Compensation Act in 1993. For accidents occurring on July 1, 1993 and thereafter, the definition of "work disability" was changed pursuant to K.S.A. 44-510e(a) to provide as follows:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the 15-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

The Kansas legislature attempted to respond to concerns about the heavy reliance on vocational experts as well as the costs associated with attempting to return workers to the work force through reeducation or training. It was found that such attempts at re-education or re-training, while well-intentioned, were not very successful. The individuals who profited the most from the system under the 1987 legislation were people employed in the vocational rehabilitation field who were supposed to help injured workers return to gainful employment.

This new definition of "work disability" under the 1993 law creates a backward-looking test and a present-moment test. There was still a two-prong approach in which the percentages lost by the injured worker were averaged to arrive at a "work disability" percent. Doctors were now to provide the medical opinion as to what percentage of the work tasks which the claimant had performed in the previous 15 years of employment could no longer be performed because of the work-related injury and subsequent permanent restrictions placed upon claimant. In addition, the claimant's current post-injury employment status was examined to determine his or her actual wage loss and then compute such loss on a percentage basis.

What the above did was to place the physician front and center in determining a claimant's work disability. Physicians were not thrilled with this role, and, as a practical matter, claimant counsel and respondent counsel continued to utilize vocational experts to determine the claimant's loss of ability to perform essential job tasks compared with the 15-years of work prior to the work-related injury. This saved the physicians a lot of time, as they were then able to adopt the vocational experts' findings concerning the essential job tasks a claimant had performed and what had been lost by the doctor's permanent restrictions resulting from the work-related injury. In addition, the physicians' permanent restrictions also had an impact upon the claimant's likelihood of finding employment post-injury.

Unfortunately, the current work-disability scheme is such that the burden of proof is unfairly weighted in favor of the claimant. Anytime legislation to resolve conflict results in the burden of proof not being fairly apportioned, abuse can and in fact will result. The claimant in most cases is the only person available to determine the

essential job tasks he or she performed during the 15-years prior to the work-related injury. Individuals in our society are now much more likely to move from job to job than to stay with the same employer for years at a time as an earlier generation may have done. Thus, knowledge of the claimant's actual employment history, as well as of the specific essential job tasks the claimant performed, is usually exclusively known only by the claimant. Only when the claimant has worked for the same employer for the prior 15 years is the knowledge level equal on both sides. The requirement of a 15-year essential job-task history derived from all of the claimant's prior jobs tempts a claimant to exaggerate and emphasize the physical difficulties of the essential job tasks in his or her 15-year work history. While most claimants are honest, there is great difficulty in ascertaining the veracity of the claimants' representations regarding their 15-year work history. In fact, for most of us, our memories are not very accurate anyway when we are asked to recall detailed events of a decade or more ago.

The second aspect of work disability under the current law is also tilted to an extreme in favor of the claimant. The claimant is rewarded for not returning to work (whether it is with the same or a different employer). This is because the amount of permanent partial disability compensation the claimant can receive is increased if he or she is not working. A non-working claimant has a 100% wage loss when compared with the wages he or she was earning at the time of the work-related injury. This results in an automatic 50% work disability! Thus, under the current statutory scheme, it is in the claimant's best financial interest to "wait out" the workers' compensation litigation process in an attempt to get a higher work-disability award. However, it is truly not in the best interest of the injured worker or the employer for the worker to remain off work

for a substantial period of time. Nor is it in the best interest of our society to provide greater compensation to a worker who chooses to remain out of the work force.

It should be noted that workers' compensation case law has developed that, if the respondent can prove that the claimant has failed to exercise good faith in attempting to find reemployment, the claimant will be imputed a hypothetical wage income. However, this burden of proof on the respondent is difficult to bear, as the claimant can easily exaggerate the extent to which he or she has sought employment. Also, this heavy burden of proof on employers encourages the use of private investigators by respondents, thereby increasing the cost of litigation and creating more distrust among the parties involved (employee and employer alike).

With the current system, we have a partial backward-looking scheme to determine work disability, where vocational experts and physicians have to testify, and a present-time test of whether or not the claimant is currently working. The future is ignored, as we look at what the claimant is actually earning at the particular time the award is rendered by the administrative law judge. This very light burden of proof on the claimant under the current workers' compensation system makes recovery of significant work disability much easier than would otherwise be the case.

No. 84,746

KENNETH HANSON, *Appellee,* v. LOGAN U.S.D. 326 and EMC INSURANCE COMPANIES, *Appellants.*

SYLLABUS BY THE COURT

1. WORKERS COMPENSATION—*Appellate Review of Worker's Compensation Board's Decision—Substantial Competent Evidence Standard of Review.* We review a workers compensation award in the light most favorable to the prevailing party to determine whether the Board's findings are supported by substantial competent evidence. Substantial competent evidence possesses something of substance and relevant consequence or furnishes a substantial basis in fact from which issues can reasonably be resolved. We will not reweigh evidence or evaluate the credibility of witnesses.

2. SAME—*Claimant's Testimony Is Sufficient Evidence of Claimant's Physical Condition.* A workers compensation claimant's testimony alone is sufficient evidence of the claimant's physical condition.

3. SAME—*Preexisting Condition—Aggravation of Condition by Work-related Event— Compensation for Increase in Financial Impairment.* When a work-related event causes aggravation of a preexisting condition, the employee is entitled to compensation for any increase in the amount of functional impairment. The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition.

4. SAME—*Preexisting Condition—Distinguished from Preexisting Disability—Employer's Liability for Total Impairment.* A preexisting condition is distinct from a preexisting disability. When there is no evidence of the amount of preexisting disability or impairment due to a preexisting condition, there is nothing to deduct from the total impairment to ensure that the employer and/or its carrier are excused from covering the preexisting portion.

5. SAME—*Preexisting Condition—Employer's Burden of Proof to Prove Amount of Preexisting Disability to Deduct from Total Impairment.* The burden of proving a workers compensation claimant's amount of preexisting impairment as a deduction from total impairment belongs to the employer and/or its carrier once the claimant has come forward with evidence of aggravation or acceleration of a preexisting condition.

Appeal from Workers Compensation Board. Opinion filed October 20, 2000. Affirmed.

James M. McVay, of Watkins, Calcara, Rondeau, Friedeman, Bleeker, Glendenning & McVay, Chtd., of Great Bend, for appellants.

Russell B. Cranmer, of affiliated attorneys of Pistotnik Law Office, of Wichita, for appellee.

Before BEIER, P.J., ELLIOTT, J., and FRED S. JACKSON, S.J.

BEIER, J.: This appeal by the respondent-appellant school district and its insurance carrier seeks reversal of a workers compensation award to claimant-appellee Kenneth Hanson for permanent impairment of the function of his right knee. We affirm.

Hanson, who coached track for respondent Logan U.S.D. 326, claimed he injured his knee on May 19, 1995, while unloading supplies at a track meet. Hanson said that his knee popped when he stepped down from a school bus, that he immediately had trouble walking, and that he had swelling and other problems thereafter.

Hanson did not seek treatment for his knee until July 19, 1995. Dr. Gary Harbin, who had performed arthroscopic surgery on the knee in 1989, performed another surgery in August 1995. He removed a bone spur and observed moderately advanced arthritis and bone-on-bone contact consistent with his 1989 observations. Harbin testified that Hanson would have ultimately needed a knee replacement but that the work-related injury could have accelerated the need. Hanson experienced less pain and improved mobility after the bone spur surgery.

Hanson returned to work in the fall of 1995 and continued to coach. He saw Dr. Gregory Woods in February 1996, complaining of stiffness and difficulty straightening his knee and an achy, nonspecific pain. X-rays showed severe degenerative arthritis with bone rubbing on bone. Woods considered the complaints consistent with the degenerative condition, possibly exacerbated by the May 19, 1995, injury. He said Hanson would have had "a fair degree of impairment" before the work-related injury, but he could not judge how much because he had not seen him at that time. Woods recommended a knee replacement to relieve Hanson's pain. Hanson underwent knee replacement surgery in June 1996.

The administrative law judge (ALJ) ordered an independent medical examination by Dr. Kenneth Jansson. In Jansson's opinion, Hanson's waxing and waning of symptoms after the work-related

injury were more consistent with a chronic condition than with an acute injury. Jansson assigned an impairment rating of 10 percent because of Hanson's pain. He attributed 95 percent of the impairment to the preexisting condition.

Based upon an examination of Hanson, his medical history, and his records, Dr. Daniel Zimmerman testified that, in his opinion, the May 1995 incident permanently aggravated the preexisting degenerative change in Hanson's knee. He rated Hanson's impairment of function at 41 percent after Hanson underwent a knee replacement. He believed Hanson would have had some impairment of function prior to the work-related injury but could not quantify it.

The ALJ found that Hanson suffered a personal injury by accident arising out of and in the course of his employment that accelerated his need for knee replacement surgery. The ALJ also found that Hanson suffered a 33.67 percent permanent partial disability of the right lower extremity. The Board modified the award to a 41 percent loss of use.

We review a workers compensation award in the light most favorable to the prevailing party to determine whether the Board's findings are supported by substantial competent evidence. *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, 513, 949 P.2d 1149 (1997). Substantial competent evidence possesses something of substance and relevant consequence or furnishes a substantial basis in fact from which issues can reasonably be resolved. *Depew v. NCR Engineering & Manufacturing*, 263 Kan. 15, 26, 947 P.2d 1 (1997). We will not reweigh evidence or evaluate the credibility of witnesses. *Bradford v. Boeing Military Airplanes*, 22 Kan. App. 2d 868, 871, 924 P.2d 1263, *rev. denied* 261 Kan. 1084 (1996).

The parties do not dispute that, before his alleged work-related injury, Hanson had had several knee surgeries and suffered from a degenerative condition that would ultimately necessitate a total knee replacement. Respondent questions whether Hanson actually experienced injury on the date and under the circumstances alleged, and whether the amount of impairment attributed to the injury's aggravation of his preexisting disability is correct.

The finding that Hanson suffered an accidental injury in the course of his employment on May 19, 1995, is supported by substantial competent evidence. Hanson testified that he felt his knee pop and that he had immediate pain and swelling. A claimant's testimony alone is sufficient evidence of his own physical condition. See *Graff v. Trans World Airlines*, 267 Kan. 854, 863-64, 983 P.2d 258 (1999). Although respondent makes a compelling argument regarding Hanson's delay in seeking medical treatment, Dr. Harbin's testimony supports his patient's position. Harbin testified that Hanson's history subsequent to the alleged injury was consistent with an aggravation of his condition. We are not free to substitute our judgment of the credibility of the witnesses.

With regard to the amount of impairment attributed to the work-related injury's aggravation of Hanson's preexisting disability, we turn first to *Woodward*. In that case, the employee experienced aggravation of preexisting severe degenerative changes in his right knee as a result of an on-the-job injury to his left knee. Considering evidence that the knee would degenerate regardless of subsequent injury and that the injury could only hasten the process, the Board found that the aggravation of the right knee was compensable as a direct and natural result of the work-related injury to the left knee. 24 Kan. App. 2d at 512-13. This court affirmed the Board's functional disability award for a bilateral injury, noting that the test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or accelerated the condition. 24 Kan. App. 2d at 514.

When a work-related event causes aggravation of a preexisting condition, the employee is entitled to compensation for an increase in the amount of functional impairment. The controlling statute 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." K.S.A. 1999 Supp. 44-501(c).

The statute clearly distinguishes between a preexisting condition and a preexisting disability. There is no evidence of the amount of

Hanson's preexisting disability, and there is some evidence that Hanson had no impairment prior to the May 19, 1995, injury. Hanson had not sought treatment for his knee from Dr. Harbin since the 1989 surgery, and Hanson testified his activities were not restricted because of his knee until after the May 1995 injury. There was no amount of impairment for the Board to deduct from the total impairment to ensure that respondent was excused from covering the preexisting portion.

We agree with Hanson that the burden of proving his preexisting impairment as a deduction from total impairment belonged to respondent once Hanson had come forward with evidence of aggravation. We think this type of burden shifting pattern is implicit in *Woodward's* holding that, where a work-related injury causes aggravation or acceleration of a preexisting condition, compensation is allowed for the entire disability without apportionment of causation. 24 Kan. App. 2d at 514. Hence, the claimant need only show aggravation or acceleration of the condition and a causal relationship between the work-related injury and the disability. Once the claimant shows increased disability, compensation is for the full amount of disability less any amount of preexisting impairment established by the respondent. This is also pragmatic. Only the respondent has an interest in establishing the amount of preexisting impairment, and the respondent would be as foolish to rely on the claimant to prove it as the claimant would be to do so.

Because the record lacked any evidence of the amount of preexisting disability or impairment, the Board had no choice but to deduct zero from the total.

Affirmed.

2-5

PRE-EXISTING CONDITION

Kansas law currently says that employers are not supposed to pay for conditions that are already in place at the time of a workplace injury. The problem is the interpretation of K.S.A. 44-501(c) by the courts that has taken place in the ten years since the act was written in 1993. Court decisions have continued to place taller hurdles in the path of employers seeking a credit for a pre-existing condition, with the current requirement so ominous that it's virtually impossible to receive such a credit. **The current suggested changes to the work comp act are only intended to bring work comp practices back in to line with what the legislature intended in the 1993 reforms.**

Some points to remember:

- Changing the language for presenting conditions in the vast majority of cases would not be a major impact. It only involves cases where a pre-existing condition exists.

- If this work comp reform passes, employers will still pay for ***all medical*** costs, regardless of whether or not they stem from a pre-existing condition. The reform is a surgical strike, not a broad and excessive reform, and applies only to indemnity payments for pre-existing conditions.

- The proposed reform ***does not do away with use of the AMA guidelines***. It allows apportionment of pre-existing conditions, a practice which took place for years with the second injury fund.

Comm a labor
2-6-04
Atch # 3

44-501.

(c) 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.

Comm. Labor
2-6-04
Att. #4

TESTIMONY BEFORE HOUSE COMMERCE & LABOR COMMITTEE
February 6, 2004

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Mr. Chairman, Members of the Committee:

I initially testified before the legislative interim committee, and at that time, attempted to present "neutral testimony" regarding Kansas workers compensation in my position as an adjunct professor at Washburn Law School. I have taught workers compensation at Washburn for over ten years. It is my understanding that my role today is more from the perspective of the injured worker. This is acceptable to me since I represent, and have represented, injured workers for many years. It is also my understanding that I am to generally speak in broad overview relative to Kansas workers compensation. That is, "how the heck are things?".

A. THE STATE OF THINGS FROM THE EMPLOYER/INSURANCE CARRIER PERSPECTIVE

The interim committee heard, and in the upcoming weeks this Committee will hear testimony that there is no "crisis" in workers compensation. As such, there is simply no need for "reform." I do not pretend to be a source of independent research, but it seems overwhelmingly correct that all statistical data from the NCCI, and other sources, indicates:

* Kansas premiums are very low both nationally and within the geographic area. (Exhibit 1)

* Indemnity payments to injured workers were approximately equal in 2003 to those paid in 1993. (KDHR, Annual Report, 2003)

* The Insurance Department has approved a decrease of 35.2% for combined premiums between 6/1/94 and 1/1/03. (Exhibit 2)

While others will present more information on all of these statistics, again, as a broad overview, these statistics seem uncontroverted, and

Comm & Labor
2-6-04
Atch # 5

totally incompatible with a drive for reform legislation.

While there has just been approval for a modest rate increase by the Insurance Commissioner (my understanding is 1.9%) for the upcoming year, it is clear that the upturn is due to:

* the ever accelerated rising costs of medical care

* the cyclical nature of the insurance industry

* general inflationary pressures

It is also of note that the NCCI has publicly stated that SB 181, and spinoff similar legislation, will not lead to a reduction in premiums. Perhaps more interesting is the recent price quotation from the NCCI that indicates passage of Substitute for SB 181 will lead to a premium increase.

B. THE STATE OF THINGS FROM THE INJURED WORKERS PERSPECTIVE

Now turning to how things are on a broad scale from the injured worker's perspective. Quite frankly, the picture changes from "stable" or "as anticipated" to "bleak." In short, in all five categories of monetary benefits paid to injured workers (i.e. indemnities), there is a huge deficiency. Prior to discussing these deficiencies, I would emphasize that there are two very favorable components of the current workers compensation system:

* Preliminary Hearings. So far as I am aware, the Kansas preliminary hearing structure, or so-called "emergency hearing," is a useful tool that is unique to Kansas. It allows an administrative law judge to quickly institute benefits in certain cases without penalty to individual insurance companies if an error is made. This tool has become more and more utilized because insurance carriers have become less and less responsive to on-the-job injuries. For example, Liberty Mutual Insurance Company writes, by far, the greatest number of policies for Kansas employers. Liberty Mutual has consolidated their claims to Schaumburg, Illinois and elsewhere. They have no offices or claims representatives within the State of Kansas and are extremely difficult to communicate with if you are an injured worker. This causes an ever increasing delay in instituting benefits of medical care and temporary total. Without the unique preliminary hearing process of Kansas, there would not be a remedy.

* Return to Work Incentive. In 1993, the Kansas Legislature made substantial modifications to the Kansas Workers Compensation Act. Virtually every change in 1993 represented a reduction in benefits to injured workers. One of the few benefits to injured workers was a strong incentive for employers to return them to work following injury at 90% or more of their preinjury wage. By returning them to work, in a real job, paying real wages, employers were able to avoid "work disability." This "reward program" to employers has proven successful. Indeed, since 1993, many injured workers have been retained by their employers who otherwise would have been terminated due to physical inabilities caused by industrial accident.

As I indicated before, every indemnity category within Kansas is woefully deficient. There are five types of money paid to injured workers.

Permanent Total Disability

When a worker is completely unable to return to substantial and gainful employment following injury, they are entitled to permanent total disability not to exceed $125,000 paid out weekly. Kansas is only one of four states in the Union which caps permanent total disability rather than providing lifetime benefits. Not only does Kansas institute this cap, but it also pays the lowest amount of the four capped states. The nearest state pays double what Kansas pays or $250,000.

In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent total disability was raised from $100,000 to $125,000. Since 1987, this cap has never been raised!

The Legislature should think about that statement. Therefore, I will repeat it.

In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent total disability was raised from $100,000 to $125,000. Since 1987, this cap has never been raised!

Temporary Total Disability

Regardless of what a worker makes while working, they are only allowed to currently receive $440 per week when off work and unable to work because they are healing/recovering from injury. At the current time, there are only five states in the nation that provide less than Kansas (we are tied with Arkansas at $440). We are the lowest state in the entire midwest region. Kansas legislators often seem to be interested in what Missouri does, and Missouri provides $662, more than a one-third increase. Iowa provides over $1100 per week! (See Exhibit 3) Benefits are low!

Permanent Partial Disability

Because Kansas is so inadequate in its temporary total rate (i.e. 75% of the State's average weekly wage representing the "cap"), they are also a low benefit state in terms of scheduled and unscheduled injuries. Scheduled injuries are, generally speaking, paid for individual body parts (an arm, a leg, a foot, etc.) General bodily disabilities are the type of injury where so-called "work disability" is *possible.*

> **In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent partial disability was raised from $75,000 to $100,000. Since 1987, this cap has never been raised!**

The Legislature should think about that statement. Therefore, I will repeat it.

> **In July of 1987, the amount that an injured worker in Kansas could receive as a maximum for permanent partial disability was raised from $75,000 to $100,000. Since 1987, this cap has never been raised!**

In 1987, Ninja Turtles were introduced and made popular. In 1987, Mike Hayden had just assumed office. In 1987, a loaf of white bread was less than 50 cents. Since 1987, COLAs under Social Security have risen in excess of 3% per year (see attached Exhibit 4) for a total increase of over 50%.

It is troublesome that the KCCI and others would be complaining about the amount paid for work disability claims in Kansas when the Kansas

Legislature has kept the cap on these working families for almost 17 years. Is this the way we want to treat our most precious resource? Again, what an embarrassment.

While this failure to increase permanent partial disability may be complex in terms of cost of living, mathematical formulas, work disability and other factors, I can give other examples of what Kansas families are dealing with. A Kansas injured worker must submit, virtually without limitation, to every medical examination set by an insurance carrier. If the claimant must travel out of town for this appointment, the insurance carrier must pay mileage and per diem. In 1978, yes, 1978, the Kansas Legislature raised the per diem rate from $7 per trip to $15. There has never been another increase which is more than a quarter of a century ago. You can, therefore, send an injured worker from Garden City to Kansas City, pay their mileage, and reimburse them $15 for motels and meals.

Or consider the huge increases that have taken place in medical expenses over the years. Kansas allows for an injured worker to seek medical care on his own up to $500 (since the insurance carrier gets to pick the doctor). That $500 limitation, despite the rising costs of medical, has not been changed in over ten years.

These are just a few examples of what I consider to be the woeful state of benefits for workers and their families in the State of Kansas.

Temporary Partial Disability

Temporary partial occurs when an injured worker is basically still in the recovery period but can return to work part time. We are again dealing with the "caps" that I have already discussed (that is 75% of the State's average weekly wage). Injured workers should be encouraged to return to work as quickly as possible. The payment of some wage replacement, that is "temporary partial," is supposed to supplement the wages they earn. And yet, for some types of injuries, (scheduled injuries to an arm or a leg), the law does not compel the replacement of these wages. It is grossly unjust to force an injured worker who is recovering to live on half of his/her paycheck during the recovery period. In fact, it encourages workers not to go back to work so that they can collect temporary total disability. Yet, when a change was suggested in the Advisory Council to remedy this unfortunate situation, the business community would not agree.

Death Benefits

In July of 1987, death benefits were increased to $200,000. That cap remained in effect until July of 2000, when benefits were increased by $50,000. The increase was brought about by the tragedy from DeBruce Grain. Again, it is easily shown that Kansas' death benefits are meager compared to other states and what it would take to allow for an adjustment period following the death of a breadwinner.

C. A WORD ABOUT PROPOSED AMENDMENTS TO SB 181

1) Preexisting conditions

Proponents of SB 181 indicate that they did not get what they bargained for in 1993 "due to liberal judges," particularly in the area of preexisting conditions. I was involved in the 1993 process, and can advise you that this is patently incorrect. There were several components that went hand in hand with the change in preexisting conditions. This included, among other things, the abolishment of the Kansas Workers Compensation Fund and the institution of mandatory use of the AMA Guidelines. The entire topic of "preexisting conditions" was part of a package. It was never even considered that asymptomatic, undiagnosed conditions not rising to the level of disability or impairment and causing no limitation in function would constitute an offset from compensation. It was further never the intent of the 1993 Legislature that there be an offset for a claimant who could fully perform his job and now could not fully perform his job when the injury caused that "disability."

What the proponents of the proposed amendment to preexisting conditions are asking for is a dramatic and material change in the law, and its *sole purpose* is to further reduce the already meager benefits we have been discussing.

It also includes the following scenario. A 35-year-old male has never had an injury to his arm or shoulder. He has never had any treatment, and has no limitations of function of any kind whatsoever. His arm is cut off by machinery just below the shoulder. The insurance carrier will be able to take the amputated limb, haul it to the emergency room, have it x-rayed, and prove that there is a degree of arthritis in the amputated, severed limb. They will then argue that the claimant is not entitled to his 100% loss of the arm because his arm was imperfect due to preexisting arthritis prior to injury.

Not only can I assure you that there will be a reduction in the existing paltry benefits for injured workers, I can also assure you that there will be a massive explosion in litigation. There is not a defense attorney worth his/her salt who will not argue for a preexisting condition in any case where the worker is older than 30 years at the time of injury.

2) Work Disability

Proponents have argued that we should change the definition of "work disability." Any time there is a change to this section of the law, there *has to be* an increase in litigation. This is because there are several legal words of art being utilized and the courts will have to sort these out. Proponents tell you, again, that the attempted change is not an attempt to decrease benefits. Well, if we are not going to decrease benefits, then logically, benefits will either stay the same or be increased by the change. It is difficult to believe that proponents of SB 181 want to either a) increase litigation to have benefits remain the same, or b) increase benefits. Therefore, the original assertion that these amendments are not intended to decrease benefits is false.

There are two additional problems. First of all, I already mentioned that the best part of the 1993 amendments was that injured workers were returned to work by their employers. The trigger is that the injured worker is actually earning 90% of their old wage. In the amendments, the worker only has to, in theory, have an ability to return to work. We have already had an "abilities test," and it did not result in workers returning to work, it only resulted in employers arguing that they *could return to work*. It would truly be unfortunate to again have workers kicked out of the workplace following their injuries.

At this point, I must digress. The idea that an injured worker can simply sit at home and collect benefits because of liberal judges is fabricated. It is the injured workers burden to show he/she cannot find work or the administrative law judge will simply assign or "impute" a wage to the worker. The administrative law judges are harsh in their judgment of a "good faith" effort to find work and very demanding.

The second major problem is that we will again involve vocational experts to guess as to what jobs workers could find and compete for in the open labor market. Again, "we have been there, done that." It did not work. The law was changed in 1993 at the urging of employers! There is a vast difference between truly being able to find and compete for a job in the open labor market with a disability, and what it says "on paper"

you can do. Many workers have the theoretical ability to be a successful artist on paper. In other words, there is no minimum IQ level, and there is no heavy lifting. In reality, they cannot make a living working as an artist or a real estate agent, but that will not prevent testimony from a vocational rehabilitation expert that the claimant can do such work.

D) SUGGESTED MODIFICATIONS

In conclusion, it is my opinion overall that employers/insurance carriers should be satisfied with the states of workers compensation in Kansas. The low premiums then allow to successfully compete against all neighboring states. Conversely, and as I hope I have demonstrated, employees "need an increase in benefits" since they have not had one for almost 20 years! In addition, there need to be systemic reforms. While there are many possible, the following seem to be the most serious to me:

* A limited return of vocational rehabilitation for the most physically and/or economically injured. In 1993, when dealing with vocational rehabilitation, the Kansas Legislature killed the fly with a sledgehammer. I know of no claimant who has been voluntarily provided vocational rehabilitation since 1993. What occurs currently is that the insurance carrier simply weighs the costs of paying out the claim versus rehabilitating the worker. As we have seen, the cost of paying the claim in Kansas has not increased since 1987. There should be a system to rehabilitate workers, particularly younger workers, so that they can be returned to preinjury wages.

* Safety. The Kansas Legislature has never made safety in the workplace a true priority by either an incentive based program, or through investing funds into safety. Kansas again ranks poorly on a national scale for safety despite the improvements in recent years. Aggressively dealing with this issue will lead to fewer injuries, and reduce premiums.

  There are two possibilities here. Either a reward for good behavior, or punishment for bad behavior. The Legislature should pick one, but currently Kansas does neither. In other words, we should give a discount for safety programs, or an escape from the exclusive remedy for egregious situations. That is, the "carrot or the stick."

* Medical costs. Rising medical costs are obviously a national phenomenon. It is a difficult problem, but if it can be approached at all, it can be approached on a state level within a controlled system.

An example of an abuse is the in-house nurse case manager. He or she is paid at one rate as an employee of the insurance company, but then "billed out" at a much higher rate as a medical person. The billed out rate is passed along to the employer, and represents another "profit" for the carrier which is not reflected in their normal transaction costs.

* Insurance company reform. In the mid 1990s, when the stock market was very good, and insurance companies made substantial money, employers did not experience the true reduction in benefits to which they were entitled. A way should be found to level out the spikes in premiums to employers so that they can more adequately set their overhead and budgets. Furthermore, whenever there is a spike in premiums, the immediate response of some (most) is to reduce benefits for workers. This cyclical argument against injured workers should be avoided which would also, again, aid employers.

D. THE POSTSCRIPT

"If grasshoppers could use machine guns, birds wouldn't mess with 'em." Every legislator here today has business owners and workers within their jurisdiction. Both sides want something, and workers compensation is complex. As a former arbitrator, I can tell you a good arbitration is when both sides leave the table feeling wounded, but able to walk. Injured workers need to walk, and businesses need to walk, but if one side has a tank against a Chevy, someone will get unfairly hurt.

In my opinion, the Advisory Council should be strengthened not dismantled. Fairness can be achieved through "give and take." By working through the Advisory Council, this can be accomplished, with the added bonus that unintended consequences and excessive litigation will be avoided.

I will stand for questions.

Premium Rate By State

Source: Research and Analysis Section, Oregon Department of Consumer and Business Services; Kansas Division of Workers Compensation

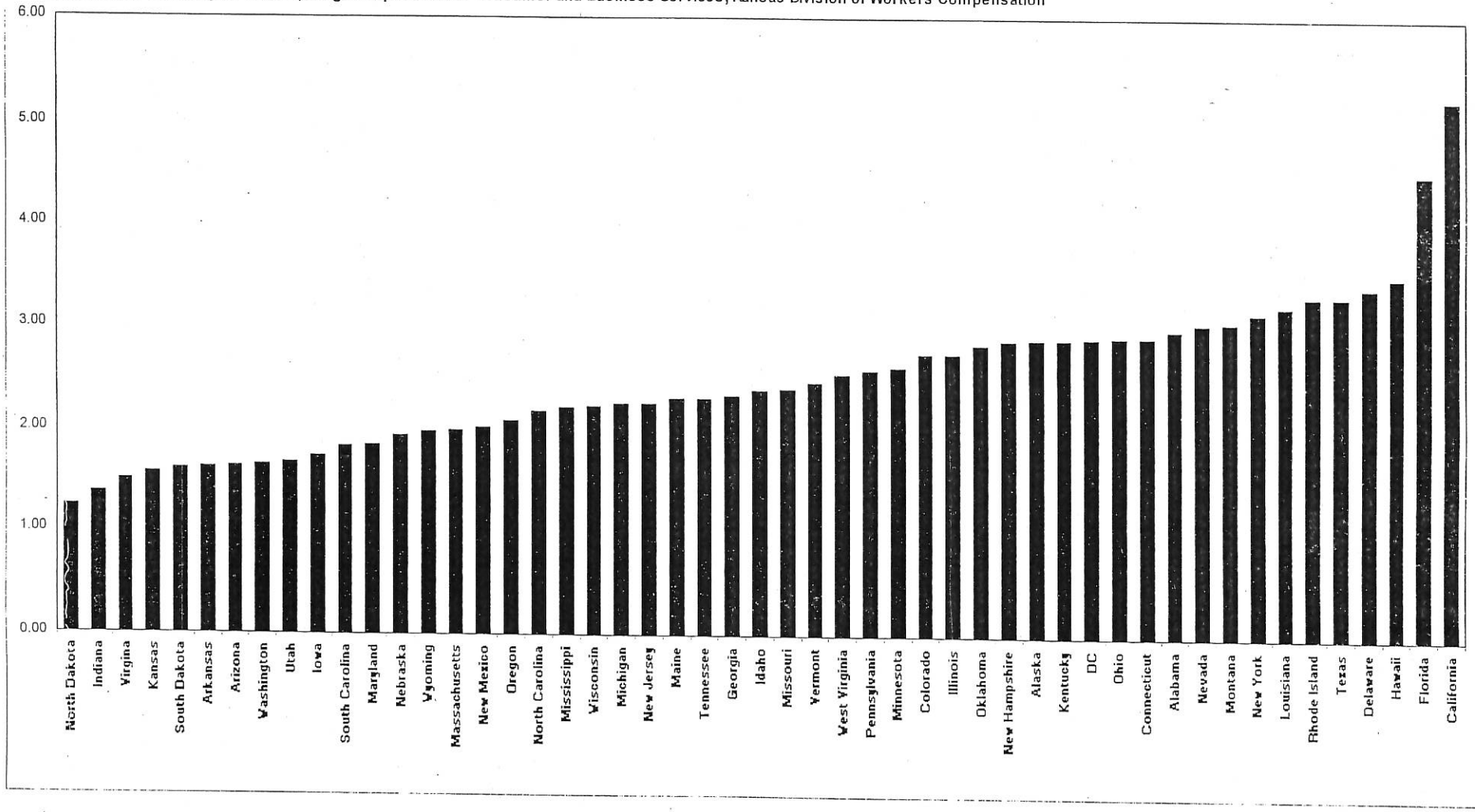

Exhibit 1

History of Kansas Workers' Compensation Rate Filings
National Council on Compensation Insurance

Effective Date of Change	Manufacturing	Contracting	All Other	Overall Approved	Overall Requested
11/21/1989 (Disapproved)	0	0	0	0	22.6%
5/1/1990	7.3%	0.7%	7.3%	5.6%	22.6%
6/1/1991	23.4%	31.4%	21.5%	24.0%	30.9%
6/1/1992	26.9%	26.6%	17.2%	21.7%	31.4%
6/1/1993	5.4%	6.7%	2.0%	3.9%	21.3%
		In voluntary market		0%	
		In assigned risk plan		12.9%	
		Law change		-11.0%	

Effective Date of Change	Manufacturing	Contracting	Office and Clerical	Goods and Service	Misc.	Overall Approved	Overall Requested
6/1/1994	-1.7%	-3.4%	-2.4%	-3.9%	4.5%	-2.0%	-0.3%
6/1/1995 Voluntary Loss Costs	-5.7%	-4.3%	-9.3%	-8.3%	-8.7% Combined	-6.9% -7.5%	-5.0%
6/1/1995 Assigned Risk Plan Rates	-7.3%	-5.9%	-10.9%	-9.9%	-10.2%	-8.5%	-8.5%
6/1/1996 Voluntary Loss Costs	-13.1%	-11.1%	-9.8%	-6.4%	-12.3% Combined	-10.4% -11.5%	5.6%
6/1/1996 Assigned Risk Plan Rates	-18.5%	-16.7%	-15.4%	-12.2%	-17.8%	-16.0%	-1.1%
1/1/1998 Voluntary Loss Costs	-14.7%	-8.8%	-12.6%	-13.8%	-12.3% Combined	-12.7% -13.2%	-12.7%
1/1/1998 Assigned Risk Plan Rates	-19.1%	-13.5%	-17.1%	-18.3%	-16.8%	-17.2%	-17.2%
1/1/1999 Voluntary Loss Costs	-6.0%	-1.4%	-2.7%	-5.2%	-3.2% Combined	-4.0% -4.2%	-4.0%
1/1/1999 Assigned Risk Plan Rates	-9.1%	-4.7%	-5.9%	-8.3%	-6.5%	-7.2%	-7.2%

Dick Cook Legislative Intern CIEE 2004

Exhibit 2

Wrkcomp2.XLS

History of Kansas Workers' Compensation Rate Filings
National Council on Compensation Insurance

Effective Date of Change	Manufacturing	Contracting	Office and Clerical	Goods and Service	Misc.	Overall Approved	Overall Requested
1/1/2000 Voluntary Loss Costs	-7.6%	2.3%	-1.8%	3.8%	0.6%	-0.5%	-0.5%
					Combined	-0.7%	
1/1/2000 Assigned Risk Plan Rates	-11.0%	-1.5%	-5.4%	-0.1%	-3.1%	-4.2%	-4.2%
1/1/2001 Voluntary Loss Costs	10.70%	-3.80%	0.20%	2.20%	8.50%	3.30%	3.50%
					Combined	4.30%	
1/1/2001 Assigned Risk Plan Rates	25.30%	8.90%	13.40%	15.70%	22.80%	17%	17.20%
1/1/2002 Voluntary Loss Costs	-2.90%	-7.10%	0.00%	-4.90%	-4.60%	-4.40%	-4.40%
					Combined	-4.00%	
1/1/2002 Assigned Risk Plan Rates	0.30%	-4.10%	3.20%	-1.80%	-1.50%	-1.30%	-1.30%
	(-1.3% is a combination of 5.2% rate decrease and 4.1% changes in AR pricing programs)						
1/1/2003 Voluntary Loss Costs	4.10%	-3.10%	12.00%	5.00%	-5.70%	1.80%	3.90%
					Combined	1.90%	
1/1/2003 Assigned Risk Plan Rates	5.30%	-2.00%	13.30%	6.20%	-4.60%	3.00%	5.20%

Maximum Weekly Benefit By State

Source: U.S. Chamber of Commerce, Statistics and Research Center

EXHIBIT 3

Social Security Online

Automatic Increases

Cost-of-Living Adjustments, 1975-2003

Updated October 16, 2003

History

Social Security benefit increases, also known as cost-of-living adjustments or COLAs, have been in effect since 1975. The 1975-82 COLAs were effective with Social Security benefits payable for June in each of those years; thereafter COLAs have been effective with benefits payable for December.

Social Security Cost-Of-Living Adjustments

Year	COLA	Year	COLA	Year	COLA
1975	8.0%	1985	3.1%	1995	2.6%
1976	6.4%	1986	1.3%	1996	2.9%
1977	5.9%	1987	4.2%	1997	2.1%
1978	6.5%	1988	4.0%	1998	1.3%
1979	9.9%	1989	4.7%	1999	[a] 2.5%
1980	14.3%	1990	5.4%		
1981	11.2%	1991	3.7%	2000	3.5%
1982	7.4%	1992	3.0%	2001	2.6%
1983	3.5%	1993	2.6%	2002	1.4%
1984	3.5%	1994	2.8%	2003	2.1%

[a] The COLA for December 1999 was originally determined as 2.4 percent based on CPIs published by the Bureau of Labor Statistics. Pursuant to Public Law 106-554, however, this COLA is effectively now 2.5 percent.

Basis for COLAs

Detailed information on [illegible] is available.

The first automatic COLA, for June 1975, was based on the increase in the Consumer Price Index for Urban Wage Earners and Clerical Workers (CPI-W) from the second quarter of 1974 to the first quarter of 1975. The 1976-82 COLAs were based on increases in the CPI-W from the first quarter of the prior year to the corresponding quarter of the current year in which the COLA became effective. After 1982, COLAs have been based on increases in the CPI-W from the third quarter of the prior year to the corresponding quarter of the current year in which the COLA became effective.

SSI COLAs

COLAs for the Supplemental Security Income (SSI) program are generally the same as those for the Social Security program. However, COLAs for SSI have generally been effective for the month following the effective month

EXHIBIT 4

5-14