Approved: April 1, 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 10, 2004 in Room 241-N of the Capitol.

All members were present.

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 McGill, Kansas Association of Insurance Agents
Bruce Moore, Administrative Law Judge
Dr. Tom Trigg, Deputy Supt., Adm Svcs, Blue Valley Schools
Janet Stubbs, Kansas Building Industry Association
Scott Anderson, Kansas Farmers Service Association, Hutchinson

Others attending:
See Attached List.

The Chairman opened the meeting stating this was an informational type agenda on workers compensation. In the interest of time the Chairman asked the conferees to not duplicate testimony given by others. Many questions are anticipated so he requested that the conferees keep there testimony short and concise but also thorough. Lengthen the testimony if needed. The first topic will be on Administrative Law Judges (ALJ's) and how they fit into workers compensation.

Larry McGill, Kansas Association of Insurance Agents, testified in support of changes in the way workers compensation administrative law judges are appointed, reviewed and compensated. One area of the workers compensation act that was not reformed in 1993 was the process for selecting and reviewing ALJ's. That was not because there weren't concerns expressed by management and members of the insurance industry that the judges tended to always side with the injured workers, but because no one could come up with a better system to replace the current one. Under the present arrangement, ALJ's are in the classified service.

Everyone agreed in the past that it made no sense to replace the current process with one that had the ALJ's serving at the pleasure of the Governor for fear that decisions would swing like a pendulum with every changing of the guard in the Governor's office. However, in the 1993 reforms the legislature created an Appeals Panel composed of judges nominated by labor and business. Each nominee has to be approved by both sides, guaranteeing in theory, that they would be impartial. The Appeals Judges serve a term of four years and then must be re-nominated. That gives both sides an opportunity to evaluate performance and weigh the known, the incumbent, against the unknown, any possible successor. The Appeals Panel judges are compensated the same as District Court judges. This process seems to be working quite well.

The ALJ's appealed to the Workers Compensation Council this fall to recommend a substantial raise in pay. The current salary is approximately $56,000 and the proposal was to raise that to $80,000 or 80% of a District Court judge's pay. The salaries are paid with an assessment on business through their workers compensation claims expense. It is part of the budget of the Division of Workers Compensation which is funded by an assessment (2%) on all paid workers compensation claims each year. Business would be footing the bill for the salary increase.

There must be greater accountability and an option to review performance and not reappoint those that are not balanced in their approach to the system. A balloon has been drafted that would replace all the existing ALJ's through a process identical to the one that has worked successfully for Appeals Panel

Judges for ten years. The current ALJ's would be automatically qualified to re-apply for the new positions. They would serve four year terms and then be subject to reappointment. The balloon does not specify how the performance of the ALJ's would be measured but that is presumed. In addition, the balloon would pay the new ALJ's at 80% of the District Court Judge level. It is believed this is a way to bring balance and accountability to the ALJ process and attract highly talented people in the bargain (Attachment 1).

Bruce E. Moore, Administrative Law Judge, Salina, addressed the committee regarding contemplated workers compensation legislation. There are 10 ALJ's in Kansas and they are charged with the responsibility of applying whatever changes the legislature enacts. This is in the area of to what extent the 1993 amendments to the worker's compensation act have been implemented or diluted by recent court decisions.

Workers compensation legislation had its roots in the Industrial Revolution of the late 18th and 19th centuries, when the focus of production moved from small family farms and shops to more centralized factories with complex machinery. Previously, if someone was injured in the context of their employment, they could rely on extended family and neighbors for support and sustenance as they worked through their disability. With factory work, families were often geographically separated from their extended families. If a factory worker was injured, he was without income, unable to pay for his housing or food for his family, and unable to pay for medical care.

The tort remedy was available for these injured urban factory workers and the potential for a large recovery existed, but that potential was undermined and diluted by the lengthy delays and costs of litigation. In addition an injured worker had to prove that his injury resulted from his employer's negligence and was not contributed to by his own negligence. Add into the mix the employer defenses of assumption of risk and fellow-servant doctrine and making a viable claim for work-related injuries became daunting. Nonetheless, there was the potential for substantial recovery, for lost wages, past and future, for medical expenses, past and future, and for pain and suffering.

Too many significant jury verdicts in favor of injured workers had the potential for slowing or stopping entirely the move toward industrialization and mechanization. The first workers compensation acts were described as "social" or "remedial" legislation to both bring some prompt relief to injured workers but also to protect business and industry. From the very beginning there has been the attempt to balance the worker's right to some measure of compensation with a limitation on the employer's liability. Some of the first trade-offs included paying the injured worker only a portion of lost wages; i.e., not paying for the first week off work, and thereafter, only paying two-thirds of the pre-injury gross average weekly wage, and capping the lost wage claim at an arbitrary maximum. In exchange, however, the injured worker received relatively prompt medical care, at no cost, and without having to prove fault. The injured worker only had to establish that the injury was suffered while performing duties for the employer.

The employer, on the other hand, had to pay for medical care and lost wages even if the injured worker was negligent and solely responsible for the injuries suffered and the liability for medical care was unlimited in dollar amount or time. The employer enjoyed an absolute shield, however, from tort liability for injuries to his employees.

One of the major elements of the 1993 revisions was contained in K.S.A. 44-501(c) which was the employee shall not be entitled to recover for the aggravation of a pre-existing 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 pre-existing. The inferred intent of this provision was to provide that an injured worker would only receive monetary compensation for permanent partial disability if and only if a pre-existing condition was permanently aggravated and then only to the extent of the aggravation. Prior to the enactment of this provision, an injured worker could recover several times for the same impairment or disability. For example, if Hanson had previously injured his knee and suffered a 15% impairment of function to the knee, he presumably would have received an award of compensation premised upon that impairment of function. If he later re-injured the same knee and now had a 25% impairment of function to the same knee, he could recover an award of compensation

for the entire 25% impairment, even though he had already previously received compensation for the first 15% of impairment.

The term "disability" has a different meaning under the act than does the term "functional impairment". "Impairment" is determined by reference to the AMA Guides to the evaluation of permanent impairment, while the term "disability" refers to "work disability" or "permanent partial disability in excess of functional impairment."

After the 1993 revisions came into play it became routine for some doctors, when rating patients in workers compensation cases, to deduct for "pre-existing impairment" based upon degenerative conditions discovered in the course of treating a work-related injury.

In the Hanson case Mr. Hanson was a track coach for Logan U.S.D. 326. On May 19, 1995, he "tweaked" his right knee alighting from a school bus at a track meet. Some thirty years before Hanson had been injured and had his right medial meniscus surgically removed. He was later diagnosed with degenerative joint disease in his right knee and had been told he needed a knee replacement. He did not have the knee replacement surgery at the time but was told to put it off as long as he could. He also officiated at basketball games and was treated occasionally for knee pain particularly after officiating a game. He had arthroscopic surgery in 1989 for on-going complaints and was told he had "bone on bone" contact in his knee; that the cartilage was completely worn away. After "tweaking" his knee on May 19, 1995, he was treated and a knee replacement was again recommended. The medical evidence was to the effect that the "tweaking" incident contributed very little overall to the need for surgery but essentially represented the "straw that broke the camel's back".

Ultimately the amount of permanent partial disability compensation to which Hanson was entitled had to be decided. While all of the doctors who examined Hanson and testified agreed there was a pre-existing impairment, they could not agree on the amount of pre-existing impairment. The previous injuries and condition had not been "rated" as to impairment because ratings are generally only given in workers compensation cases, not for injuries or conditions suffered away from the workplace. The evidence was evaluated and found that the claimant had a pre-existing impairment of function in the right knee but awarded compensation for the aggravation above and beyond that pre-existing impairment.

The Workers Compensation Appeals Board (WCAB) reversed the finding concluding the evidence presented was insufficient to establish the amount of pre-existing impairment.

It must be recognized that not every current injury results in a permanent impairment of function. Similarly, just because there has been a previous injury and treatment, there was not necessarily a resulting permanent impairment. Each case must be considered on its own facts to determine the nature of the prior injury or condition and whether, with reference to the AMA Guides, a pre-existing impairment may be established. It is the responsibility of the ALF to ensure that there is an adequate evidentiary record to support his or her decision. Appeals from decisions of the ALJ's are made to the WCAB and ultimately to the Kansas Court of Appeals. While proceedings before the WCAB are *de novo*, meaning the WCAB can make its own findings of fact and are not bound by the findings of the ALJ, the WCAB is limited to the same record that was developed before the ALJ.

The present workers compensation system is not perfect but no system yet developed has attained that perfection. Significant substantive changes to the act based upon the Hanson decision are arguably unwarranted. Existing WCAB decisions require rateable pre-existing conditions to be deducted from later injuries and ratings. The most problematic area of litigating "pre-existing impairments" is identifying pre-existing conditions and obtaining medical records relating to those conditions (Attachment 2).

Tom Trigg, Deputy Superintendent, Blue Valley Unified School District #229, stated school district are concerned about the increasing premiums for worker's compensation insurance. Specifically, Blue Valley Schools experienced an increase from 2002-03 to 2003-04 of 51%. The district's premium in 2002-03 was $422,768 and in 2003-04 it increased to $637,968.

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE at 9:00 a.m. on February 10, 2004 in Room 241-N of the Capitol.

Blue Valley Schools bids worker's compensation on the open market each year. Blue Valley has also explored self-insurance as an option for workers compensation. The rates quoted above were the least expensive option each year (Attachment 3).

Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund (KBIWCF), a homogeneous fund formed under Chapter 44 of the Kansas Statutes to provide workers compensation coverage for companies in the residential and light commercial construction industry, stated that Kansas law requires that any person/company having an annual payroll of $20,000 or more carry workers compensation insurance. Health insurance will not pay for treatment if the injury happened on the job. The problem arises when the injured party does not have health insurance and is injured on activities away from work. Often this is seen in the smaller construction companies that do not furnish health insurance for their employees. Often "Monday" injuries are reported. Workers compensation insurance was established to ensure that the injured employee would be able to provide for his family without having to file a lawsuit against his employer and await a decision sometime in the future. Education of all Kansas companies as to how to provide a safe workplace for their employees is much preferred to the way Kansas is operating now (Attachment 4).

Scott Anderson, Kansas Farmers Service Association (KFSA), Hutchinson, Kansas, stated their top priority was to provide the best available insurance protection, risk management and safety services for all customers. Based on a $28,600 salary, grain elevator employees have had a 105% increase in premiums; farm machinery operators a 32% increase; feed mill employees a 43% increase; and retail petroleum and propane employees a 17% increase (Attachment 5).

The meeting adjourned at 11:00 a.m. The next meeting will be February 11, 2004

COMMERCE AND LABOR COMMITTEE

Date February 10, 2004

NAME	AGENCY
Christy Caldwell	Topeka Chamber of Commerce
Marilyn Seeley Smith	KMHA
Janet Stubbs	KBIWCF
Cindy Shaw	Goodyear Tire & Rubber Co.
RICHARD THOMAS	KDHR WC
Richard W Barratt	KDHR W.C.
Jan Boullet	KDHR WC
Lana Nicol	KDHR WC
Phillip Hayes	The Arnold Group
Lenore Balden	Society for Human Res. Mgmt Topeka Chapter
LORI MACDONALD	Adecco / Society for Human Resource Mgmt - Lawrence Chapter
Wil Leiker	KS AFL-CIO
John M. Ostrowski	KS AFL-CIO
Ron Seeber	Hin Law Firm
Jesse Torres	SILCK
Tom Tunnell	KS GRAIN & FEED ASSN / KARA
Scott Anderson	Kansas Farmers Service Assn.
Tom Irvin	Blue Valley Schools
Dick Cook	KS Ins. Dept.
Jo Ann Bearden	K.I.D.
John Friedrich	Boeing
Bernie Koch	Wichita Area Chamber
LARRY MAGILL	KS. ASSN OF INS. AGENTS
Roy T. Ortman	KBIWCF
Bill Curtis	Ks Assoc of School Bds
Brad Smoot	NCCI
SCOTT SCHNEIDER	KCCI
GARY DAVENPORT	KS MOTOR CARRIERS ASSN

Testimony
Before the House Commerce & Labor Committee
By Larry Magill
Kansas Association of Insurance Agents
February 10, 2004

Thank you mister Chairman and members of the Committee for the opportunity to appear today in support of changes in the way workers compensation administrative law judges are appointed, the way they are reviewed and compensated. My name is Larry Magill and I'm representing the Kansas Association of Insurance Agents. We have approximately 550 member agencies and branches throughout the state and our members write approximately 70% of the commercial insurance in Kansas including workers compensation. Our members are free to represent many different insurance companies.

One area of the workers compensation act that we did not try to reform in 1993 was the process for selecting and reviewing administrative law judges. Not because there weren't concerns expressed by management and members of the insurance industry that the judges tended to always side with the injured workers, but because no one could come up with a better system to replace the current one. Under the present arrangement, ALJ's are in the classified service.

Everyone had agreed in the past that it made no sense to replace the current process with one that had the ALJ's serving at the pleasure of the Governor for fear that decisions would swing like a pendulum with every changing of the guard in the Governor's office. However, in 1993's reforms, the legislature created an Appeals Panel composed of judges nominated by labor and business. Each nominee has to be approved by both sides, guaranteeing in theory, that they will be impartial. And the Appeals Judges serve a term of four years and then must be re-nominated. That gives both sides an opportunity to evaluate performance and weigh the known, the incumbent, against the unknown, any possible successor. The Appeals Panel judges are compensated the same as District Court judges.

Now, ten years later, we have an opportunity to step back and see how the Appeals Panel system of selecting judges is working. And from what I can tell, it appears to be working quite well.

This fall and winter, the ALJ's appealed to the Workers Compensation Council to recommend a substantial raise in pay. Currently they are making approximately $56,000 and the proposal in December was to raise that to $80,000 or 80% of a District Court judge's pay. Judge Moore, the ALJ from Salina, pointed out that a student just out of law school who graduated near the top of the class could expect to start at close to that figure. Yet our ALJ's have years of legal experience and usually years of experience as Administrative Law Judges.

Comm. Labor
2-10-04
Atch #1

The ALJs' salaries are paid with an assessment on business through their workers compensation claims expense. It is part of the budget of the Division of Workers Compensation, which is funded by an assessment on all paid workers compensation claims each year. That assessment is currently about 2%. In essence, it would be business that would be footing the bill for a salary increase for ALJ's of approximately 43%. That is substantial by any measure.

But for that kind of increase, there must be greater accountability and an option to review performance and not reappoint those that are not balanced in their approach to the system. That seems to be a fair bargain.

We have drafted a balloon amendment that we think gets the job done. It would replace all the existing Administrative Law Judges through a process identical to the one that has worked successfully for Appeals Panel Judges for ten years. The current ALJ's would be automatically qualified to re-apply for the new positions. They would serve four-year terms and then be subject to reappointment. The balloon does not specify how the performance of the ALJ's would be measured, but that is presumed. In addition, the balloon calls for paying the new ALJ's at 80% of the District Court Judge level.

The Workers Compensation system must be viewed as fair to all the parties. Any attempt to tilt the scales one way or the other is not likely to succeed. We think this is a way to bring balance and accountability to the ALJ process and attract highly talented people in the bargain. We urge the committee to take this opportunity to improve a critical aspect of the workers compensation system.

44-551. Assistant directors, administrative law judges and special local administrative law judges; powers and duties, compensation, fees and expenses; review of findings and awards by board; delayed order on board review, effect; payment of medical compensation pending review. (a) The duties of the assistant directors of workers compensation shall include but not be limited to acting in the capacity of an administrative law judge.

see attached (b) (1) – (7)

(c) ~~(b)~~ (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(2) (A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

(B) If an order on review is not issued by the board within the applicable time period prescribed by subsection (b) (1), medical compensation and any disability compensation as provided in the award of the administrative law judge shall be paid commencing with the first day after such time period and shall continue to be paid until the order of the board is issued, except that no payments shall be made under this provision for any period before the first day after such time period. Nothing in this section shall be construed to limit or restrict any other remedies available to any party to a claim under any other statute.

Administrative Law Judges

(b) (1) , shall be appointed by the secretary in accordance with this section and who shall each serve for a term of four years, except as provided for the first members appointed to the board under subsection (f).

(2) (b) Each board member shall be an attorney regularly admitted to practice law in Kansas ~~for a period of at least seven years and shall have engaged in the active practice of law during such period as a lawyer, judge of a court of record or any court in Kansas or a full-time teacher of law in an accredited law school, or any combination of such types of practice.~~

Administrative Law Judges

(3) (c) Each ~~board member~~ shall receive an annual salary in an amount equal to 80% of the salary prescribed by law for a district judge, ~~except that the member who is the chairperson of the workers compensation board shall receive an annual salary in an amount equal to the salary prescribed for a district judge designated as chief judge of a district court of Kansas~~. The ~~board members~~ shall devote full time to the duties of such office and shall not engage in the private practice of law during their term of office. No ~~board member~~ may receive additional compensation for official services performed by the ~~board member~~. Each ~~board member~~ shall be reimbursed for expenses incurred in the performance of such official duties under the same circumstances and to the same extent as judges of the district court are reimbursed for such expenses.

Administrative Law Judges

Administrative Law Judge

Administrative Law Judges

Administrative Law Judge

(4) (d) Applications for ~~membership on the board~~ shall be submitted to the director of workers compensation. The director shall determine if an applicant meets the qualifications for ~~membership on the board~~ prescribed in subsection (b). Qualified applicants for the board will be submitted by the director to the workers compensation board nominating committee for consideration.

Administrative Law Judge

an Administrative Law Judge

(5) (e) There is hereby established the ~~workers compensation board~~ nominating committee which shall be composed of two members appointed as follows: The Kansas AFL-CIO and the Kansas chamber of commerce and industry shall each select one representative to serve on the workers compensation board nominating committee and shall give written notice of the selection to the secretary who shall appoint such ~~representatives to the committee~~. In the event of a vacancy occurring for any reason on the nominating committee, the respective member shall be replaced by the appointing organization with written notice of the appointment to the secretary of human resources within 30 days of such vacancy.

Administrative Law Judge

Administrative Law Judges

(6) (a) (f) (1) Upon being notified of any vacancy ~~on the board or of the need to appoint a member pro tem under subsection (i)~~, the nominating committee shall consider all qualified applicants submitted by the director for the vacant position on the board ~~or the member pro tem position~~ and nominate a person qualified therefor. The nominating committee shall be required to reach unan-

of an Administrative Law Judge

s agreement on any nomination to the board. With respect to each person nominated, the secretary either shall accept and appoint the person nominated by the nominating committee to the position on the board for which the nomination was made or shall reject the nomination and request the nominating committee to nominate another person for that position. Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for that position in the same manner.

~~(2) The first members of the board established by this section are hereby appointed as follows: Each person who was a member of the workers compensation board which was in existence on January 12, 1995, is hereby appointed, effective January 13, 1995, as a member of the board established by this section. The term of office of each person so appointed as a member of the board established by this section is for the period equal to the remainder of the term of office such person had as of January 12, 1995, as a member of the workers compensation board which was in existence on January 12, 1995.~~

(b) 1 Each member of the board shall hold office for the term of the appointment and until the successor shall have been appointed. Successors to such members shall be appointed for terms of four years.

(c) If a vacancy should occur on ~~the board~~ an Administrative Law Judge during the term of ~~a member~~ an Administrative Law Judge, the nominating committee shall nominate an individual from the qualified applicants submitted by the director to complete the remainder of the unexpired portion of the term. With respect to each person so nominated, the secretary either shall accept and appoint the person nominated to the board or shall reject the nomination and request the nominating committee to nominate another person for the position. Upon receipt of any such request for the nomination of another person, the nominating committee shall nominate another person for the position in the same manner.

(7) Following the completion of a term, board members who wish to be considered for reappointment to the board shall be deemed to have met the qualification requirements for selection to the board and shall be considered for renomination by the workers compensation board nominating committee.

~~(h) The members of the board shall annually elect one member to serve as chairperson.~~

(1)(b) 1-5

) In any case in which the final award of an ministrative law judge is appealed to the board for review under this section and in which the compensability is not an issue to be decided on review by the board, medical compensation shall be payable in accordance with the award of the administrative law judge and shall not be stayed pending such review. The employee may proceed under K.S.A. 44-534a and amendments thereto and may have a hearing in accordance with that statute to enforce the provisions of this subsection.

(d) Each assistant director and each administrative law judge or special administrative law judge shall be allowed all reasonable and necessary expenses actually incurred while in the actual discharge of official duties in administering the workers compensation act, but such expenses shall be sworn to by the person incurring the same and be approved by the secretary.

(e) In case of emergency the director may appoint special local administrative law judges and assign to them the examination and hearing of any designated case or cases. Such special local administrative law judges shall be attorneys and admitted to practice law in the state of Kansas and shall, as to all cases assigned to them, exercise the same powers as provided by this section for the regular administrative law judges. Special local administrative law judges shall receive a fee commensurate with the services rendered as fixed by rules and regulations adopted by the director. The fees prescribed by this section prior to the effective date of this act shall be effective until different fees are fixed by such rules and regulations.

(f) All special local administrative law judge's fees and expenses, with the exception of settlement hearings, shall be paid from the workers compensation administration fee fund, as provided in K.S.A. 74-712 and amendments thereto. Where there are no available funds or where the special local administrative law judge conducted a settlement hearing, the fees shall be taxed as costs in each case heard by such special local administrative law judge and when collected shall be paid directly to such special local administrative law judge by the party charged with the payment of the same.

(g) Except as provided for judicial review under K.S.A. 44-556 and amendments thereto, the decisions and awards of the board shall be final.

History: L. 1927, ch. 232, § 36; L. 1953, ch. 245, § 1; L. 1955, ch. 250, § 9; L. 1957, ch. 293, § 6; L. 1961, ch. 243, § 3; L. 1967, ch. 280; § 11; L. 1969, ch. 246, § 3; L. 1971, ch. 179, § 1; L. 1976, ch. 225, § 1; L. 1976, ch. 370, § 21; L. 1980, ch. 146, § 11; L. 1983, ch. 168, § 2; L. 1986, ch. 318, § 55; L. 1990, ch. 183, § 8; Revived and amend., L. 1995, ch. 1, § 2; L. 1996, ch. 79, § 12 L. 1997, ch. 125, § 12; July 1.

75-5708. Division of workers compensation, establishment and administration; director of workers compensation, assistant directors, administrative law judges; appointment, compensation, qualifications. (a) There is hereby established within and as a part of the department of human resources a division of workers compensation. The division shall be administered, under the supervision of the secretary of human resources, by the director of workers compensation, who shall be the chief administrative officer of the division. The director of workers compensation shall be appointed by the secretary of human resources and shall serve at the pleasure of the secretary. The director shall be in the unclassified service under the Kansas civil service act and shall receive an annual salary fixed by the secretary of human resources, with the approval of the governor. The director of workers compensation shall be an attorney admitted to practice law in the state of Kansas. The director shall devote full time to the duties of such office and shall not engage in the private practice of law during the director's term of office.

(b) The director of workers compensation may appoint two assistant directors of workers compensation ~~and also may appoint not to exceed 10 administrative law judges~~. Such assistant directors ~~and administrative law judges~~ shall be in the classified service. The assistant directors shall act for and exercise the powers of the director of workers compensation to the extent authority to do so is delegated by the director. The assistant directors ~~and administrative law judges~~ shall be attorneys admitted to practice law in the state of Kansas, and shall have such powers, duties and functions as are assigned to them by the director or are prescribed by law. The assistant directors ~~and administrative law judges~~ shall devote full time to the duties of their offices and shall not engage in the private practice of law during their terms of office.

(c) Assistant directors ~~and administrative law judges~~ shall be selected by the director of workers compensation, with the approval of the secretary of human resources. Each appointee shall be subject to either dismissal or suspension of up to 30 days for any of the following:

(1) Failure to conduct oneself in a manner appropriate to the appointee's professional capacity;

(2) failure to perform duties as required by the workers compensation act; or

(3) any reason set out for dismissal or suspension in the Kansas civil service act or rules and regulations adopted pursuant thereto.

No appointee shall be appointed, dismissed or suspended for political, religious or racial reasons or by reason of the appointee's sex.

History: L. 1976, ch. 354, § 8; L. 1976, ch. 364, § 1; L. 1979, ch. 156, § 17; L. 1980, ch. 146, § 15; L. 1988, ch. 353, § 1; L. 1993, ch. 286, § 76; July 1.

(3) 1-7

Testimony before the
House Commerce and Labor Committee
Hon. Bruce E. Moore, Administrative Law Judge

Kansas Department of Human Resources (Labor?)
Division of Workers Compensation
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February 10, 2004

Chairman Dahl and Members of the Committee:

Thank you for inviting me to appear today and address you regarding contemplated workers compensation legislation. Unlike many of your witnesses, I have no particular position on most of the issues before you. I am an administrative law judge, one of ten in the State of Kansas, charged with the responsibility of applying whatever changes you enact. I am here, as I understand it, to share my insights as to whether and to what extent the 1993 amendments to the Workers Compensation Act have been implemented or diluted by recent court decisions. I am also here to answer any questions that you may have, to the extent I am capable, regarding current workers compensation issues.

A Historical Perspective

Before we discuss current issues in workers compensation, where we are going, if you will, it might be helpful to understand from whence we came. Workers compensation legislation had its roots in the Industrial Revolution of the late 18th and 19th centuries, when the focus of production moved from small family farms and shops to more centralized factories with complex machinery. Previously, if someone was injured in the context of their employment, they could rely on extended family and neighbors for support and sustenance as they worked through their disability. With factory work, families were often geographically separated from their extended families. If a factory worker was injured, he was without income, unable to pay for his housing or food for his family, and unable to pay for medical care.

The tort remedy was available for these injured urban factory workers, and the potential for a large recovery existed, but that potential was undermined and diluted by the lengthy delays and costs of litigation. In addition, an injured worker had to prove that his injury resulted from his employer's negligence, and was not contributed to by his own negligence. Add into the mix the employer defenses of assumption of risk and fellow-servant doctrine, and making a viable claim for work-related injuries became daunting. Nonetheless, there was the potential for substantial recovery, for lost wages, past and future, for medical expenses, past and future, and for pain and suffering.

Too many significant jury verdicts in favor of injured workers had the potential for slowing or stopping entirely the move toward industrialization and mechanization. The first workers compensation acts were described as "social" or "remedial" legislation to both bring some prompt

Comm. Labor
2-10-04
Atch #2

relief to injured workers, but also to protect business and industry. From the very beginning, there has been the attempt to balance the worker's right to some measure of compensation with a limitation on the employer's liability. Some of the first trade-offs included paying the injured worker only a portion of lost wages: not paying for the first week off work, and thereafter, only paying two-thirds of the pre-injury gross average weekly wage, and capping the lost wage claim at an arbitrary maximum. In exchange, however, the injured worker received relatively prompt medical care, at no cost, and without having to prove fault. The injured worker only had to establish that the injury was suffered while performing duties for the employer.

The employer, on the other hand, had to pay for medical care and lost wages even if the injured worker was negligent and solely responsible for the injuries suffered., and the liability for medical care was unlimited in dollar amount or time. The employer enjoyed an absolute shield, however, from tort liability for injuries to his employees.

This "tension" between the interests of injured workers and industry has thus existed since the beginning, and continues with periodic swings of legislation in favor of one group or the other, and the inevitable return swing of the pendulum when previous legislation fails to provide the panacea everyone seeks.

Preexisting Conditions and the *Hanson* Decision

One of the major elements of the 1993 revisions was contained in **K.S.A. 44-501(c)**:

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed. **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.** (Emphases added)

The inferred intent of this provision was to provide that an injured worker would only receive monetary compensation for permanent partial disability if and only if a pre-existing condition was permanently aggravated, and then only to the extent of the aggravation. Prior to the enactment of this provision, an injured worker could recover several times for the same impairment or disability: For example, if he had previously injured his knee, and suffered a 15% impairment of function to the knee, he presumably would have received an award of compensation premised upon that impairment of function. If he later re-injured the same knee, and now had a 25% impairment of function to the same knee, he could recover an award of compensation for the entire 25% impairment, even though he had already previously received compensation for the first 15% of impairment.

In drafting the provisions of **K.S.A. 44-501(c)**, the legislature used two different terms, in adjacent sentences. There was to be no compensation for an aggravation of a pre-existing condition unless there was "increased disability". The next sentence provides for a reduction in an award by the amount of "functional impairment determined to be pre-existing". The term "disability" has a different meaning under the act than does the term "functional impairment". "Impairment" is determined by reference to the AMA ***Guides to the Evaluation of Permanent Impairment***, while the term "disability" refers to "work disability" or "permanent partial disability in excess of functional impairment."

After the 1993 revisions came into play, it became routine for some doctors, when rating patients in workers compensation cases, to deduct for "pre-existing impairment" based upon degenerative conditions discovered in the course of treating a work-related injury. Virtually everyone in this room, if examined by MRI, would exhibit some signs of degenerative disc disease in the spine. It is an inevitable consequence of aging. Even if you have no active symptoms, you have radiological evidence of degenerative disc disease. Without symptoms, can it be said that you are "impaired" or "disabled" by this previously undiagnosed and asymptomatic condition?

In the case of **Hanson v. Logan U.S.D. 326, 28 Kan.App.2d 92, 11 P.3d 1184 (2000)**, I, as the assigned Administrative Law Judge (ALJ) had to confront that very issue and attempt to implement the legislative intent expressed in the 1993 revisions to **K.S.A. 44-501.** Kenneth Hanson was a track coach for Logan U.S.D. 326. On May 19, 1995, he "tweaked" his right knee alighting from a school bus at a track meet. Some thirty years before, Hanson had been injured and had his right medial meniscus surgically removed. He was later diagnosed with degenerative joint disease in his right knee, and had been told he needed a knee replacement. He did not have the knee replacement surgery at the time, but was told to put it off as long as he could. He also officiated at basketball games and treated occasionally for knee pain, particularly after officiating a game. He had arthroscopic surgery in 1989 for on-going complaints, and was told he had "bone-on-bone" contact in his knee, that the cartilage was completely worn away. After "tweaking" his knee on May 19, 1995, he was treated and a knee replacement was again recommended. The medical evidence was to the effect that the "tweaking" incident contributed very little overall to the need for surgery, but essentially represented the "straw that broke the camel's back".

Ultimately, I had to decide the amount of permanent partial disability compensation to which Hanson was to be entitled. While all of the doctors who examined Hanson and testified agreed there was a pre-existing impairment, they could not agree on the amount of pre-existing impairment. The previous injuries and condition had not been "rated" as to impairment, because ratings a generally only given in workers compensation cases, not for injuries or conditions suffered away from the workplace. I evaluated the evidence and found that Claimant had, indeed, had a pre-existing impairment of function in the right knee, but awarded compensation for the aggravation above and beyond that pre-existing impairment.

The Workers Compensation Appeals Board (WCAB) reversed my finding, concluding that the evidence presented was insufficient to establish ***the amount of*** preexisting impairment. The

Board granted Hanson the full measure of his post-surgical impairment rating, without deduction. An appeal was taken to the Kansas Court of Appeals, which held that there is, indeed, a difference between a preexisting condition and a preexisting disability. Noting that distinction, the Court of Appeals held that, "where 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." ***Hanson*, supra, Syl. ¶ 4, (emphasis added).**

Unfortunately, the language of the Court of Appeals decision suggested, erroneously, that "no evidence of the amount of preexisting disability or impairment" had been presented in the trial of the cause. The Court's language was widely interpreted to mean that, notwithstanding a preexisting condition, if there was no prior rating, there was nothing to deduct as preexisting. That interpretation, however, was far too broad.

Subsequent to ***Hanson***, the WCAB has decided a number of cases holding, in essence, that a preexisting impairment does not have to be *rated* as long as it is *ratable*:

> The Board interprets [K.S.A. 44-501©)] to require that a ratable functional impairment must preexist the work-related accident. The statute does not require that the functional impairment was actually rated or that the individual was given formal medical restrictions. But it is critical that the preexisting condition actually constituted an impairment in that it somehow limited the individual's abilities or activities. An unknown, asymptomatic condition that is neither disabling nor ratable under the AMA Guides cannot serve as a basis to reduce an award under the above statute.

Terry L. West v. Sedgwick County, Dkt. No. 231,498, p.4, (WCAB, 8/21/01); Stephen C. Wright v. Lawrence Paper Company, Dkt. NO. 241,804, p.6, (WCAB, 10/31/01). In **Robert D. Leroy v. Ash Grove Cement Company, Dkt. No. 204,000 (WCAB, 3/2002)**, the claimant had previously been rated by Dr. Prostic in 1989 at a 30% impairment of function to the body as a whole for bilateral shoulder injuries. Under the version of the AMA Guides then statutorily applied, the functional impairment was substantially less. The Board adopted the opinion of Dr. Edward Prostic and reduced the claimant's award by the amount of impairment that would have been established by reference to the 4th Edition of the AMA ***Guides to the Evaluation of Permanent Impairment***.

It must be recognized that not every current injury results in a permanent impairment of function. Similarly, just because there has been a previous injury and treatment, there was not necessarily a resulting permanent impairment. Each case must be considered on its own facts to determine the nature of the prior injury or condition, and whether, with reference to the AMA ***Guides***, a preexisting impairment may be established. The ***Guides*** require, for example, that before a back condition may be assigned an impairment rating, there must be a "clinical history and examination findings . . . compatible with a specific injury." Back to the scenario I presented above: Assume that everyone of us would demonstrate radiologic evidence of degenerative disc disease, whether we knew we had

2-4

it or not, and regardless of whether there were any known symptoms. Under the ***Guides***, a finding of preexisting degenerative disc disease would not be "ratable" unless there was a previous injury and clinical evidence of resulting symptoms. A previously undiagnosed and asymptomatic condition of degenerative disc disease would thus not be ratable under the ***Guides***, and would not support a reduction for preexisting impairment.

In summary, the ***Hanson*** decision has been frequently misread and misinterpreted. The 1993 amendments to **K.S.A. 44-501(c)**, requiring a deduction for preexisting impairment, are being observed and applied. **The difficulty encountered is one of proof**. The burden is on the employer to establish the nature and extent of pre-existing impairment. ***Hanson***, supra. It is sometimes difficult to find evidence of preexisting impairment, because a previous treating physician may have died, retired or moved away, and his records may no longer exist. The claimant may come from another country, from which medical records are unavailable. The employer is dependent upon the claimant to honestly identify prior treating physicians, previous treatment or prior complaints. Without adequate contemporaneous treatment records, it becomes very difficulty for a current treating or evaluating physician to rate a preexisting condition.

Before criticizing judges for their decisions, based upon anecdotal reports, one must assess the quality and quantity of evidence presented to the judge on the nature and extent of alleged preexisting impairment. The judge may only consider the evidence presented, and may not presume a preexisting impairment without competent medical evidence.

Administrative Law Judges

There are ten Administrative Law Judges employed by the Division of Workers Compensation, three in the Kansas City area, two in Topeka, three in Wichita, and one each in Salina and Garden City. To become a workers compensation ALJ, one must have a law degree from an accredited law school and five years of practice experience–the same qualifications required for a District Court Judge. I currently have 876 active files assigned to me, of a current total of 9,551 across the state. Each file has a potential value of up to $125,000.00, exclusive of the value of medical care. Medical expenses may easily exceed $20,000 in any given case, more if surgery is involved.

ALJ's represent the "Trial Court" for workers compensation claims. They hear preliminary hearings on the issues of compensability and the availability of medical and temporary total disability compensation, they hear the ultimate trial of the case and render awards of compensation, and they hear post-award applications for review and modification and post-award medical care. They hear and determine disputes regarding the scope of the act, pre-trial discovery and whether penalties should be assessed for failure to comply with orders of the court. As with any administrative proceeding, it is ultimately the responsibility of the ALJ to ensure that there is an adequate evidentiary record to support his or her decision. Appeals from decisions of the ALJ's are made to the Workers Compensation Appeals Board and, ultimately to the Kansas Court of Appeals. While proceedings before the WCAB are ***de novo***, meaning the WCAB can make its own findings of fact and are not bound by the findings of the ALJ, the WCAB is limited to the same record that was

developed before the ALJ.

While the vast majority of claims are resolved without the need for a hearing, in that there is no dispute as to an accidental injury, and the claim is accepted as compensable, those that do require litigation may be complex and time consuming. One of the original purposes behind the establishment of an administrative procedure for addressing workers compensation claims was to avoid the complexities and delays of litigation, providing prompt treatment and compensation to injured workers. As a practical matter, however, the litigation of claims before the ALJ's is very similar to litigation before a District Court. The Respondent has the right to present its own witnesses and evidence before a claim can be deemed compensable or benefits awarded. **K.S.A. 44-534a** requires:

> [i]f the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues.

Given the busy calendars of lawyers who practice in this area of law, and the geographic areas encompassed by each ALJ, there are frequent delays in scheduling hearings and depositions. Rather than having a quick, informal hearing on the issue of the availability of medical care and temporary total disability, a full-blown preliminary hearing with multiple issues and witnesses may cause a several month delay in getting to a preliminary hearing and a decision on the issues. This delay is not attributable to the courts, as they frequently have cases settle and hearing slots go unutilized, but on the nature of the process: It would not be unusual for a claim to involve a claimant's lawyer from Wichita, with a claimant and witnesses in Concordia, a defense attorney from Kansas City, and a treating physician from Topeka. Bringing necessary parties together for a deposition or court hearing causes scheduling nightmares. Cases can last years, rather than months, and may involve multiple proceedings and depositions.

As a practical matter, I spend more time litigating preliminary hearings than I do Regular Hearings and writing formal Awards. While there are a small minority of claims involving false or fraudulent claims, there are probably an equal number of false or fraudulent defenses. The vast bulk of the litigation at Regular Hearings is simply over the amount of money due. The amount of money due frequently depends less on the functional impairment ratings and more often on the appropriate permanent work restrictions, as those restrictions impact "task loss" under **K.S.A. 44-510e**. There is a broad spectrum of physicians willing to weigh in on those topics. Claimants have their "pet" doctors who regularly and routinely give high impairment ratings and severe permanent restrictions, and respondents have their own "pet" doctors who wouldn't find a quadriplegic to be functionally impaired or in need of work restrictions. Unfortunately, the physicians who could be relied upon to provide objective, unbiased opinions, avoid involvement in litigation in general and workers compensation proceedings in particular. Their time is too valuable to spend it in depositions with lawyers who quibble over "task loss" and who second guess the doctors' medical opinions.

Conclusion

The present workers compensation system is not perfect, but no system yet developed has attained that perfection. Significant substantive changes to the act based upon the ***Hanson*** decision are arguably unwarranted. Existing WCAB decisions require ratable preexisting conditions to be deducted from later injuries and ratings. The most problematic area of litigating "preexisting impairments" is identifying preexisting conditions and obtaining medical records relating to those conditions.

If changes are implemented, we who hear and determine the issues ask that you make clear the intended purposes of the changes. Note that the 1993 act established work disability premised upon "task loss" but failed to define the term "task" or provide any frame of reference for defining it. We in the judiciary are not "activist judges" hellbent on defeating legislative purpose. On the contrary, we recognize that our function is to implement your intent. Tell us what you want us to do, and we will do it.

The import of changes made now will be litigated for years to come. Note that the ***Hanson*** decision involved a 1995 injury, was decided by the ALJ in 1999 and the Court of Appeals in 2000, and this was the ***first*** reported decision interpreting the 1993 amendments to **K.S.A. 44-501(c).** Changes made this legislative session may not be interpreted for several years. The clearer you are with your stated intentions, the more likely that court interpretations will approach and achieve the goals you intend.

Thank you for the opportunity to address this committee.

HOUSE COMMERCE AND LABOR COMMITTEE
FEBRUARY 10, 2004 – 9:00 A.M.

TESTIMONY CONCERNING SB 181

Presentation by:
Dr. Tom Trigg, Deputy Superintendent

Blue Valley Unified School District #229
PO Box 23902
Overland Park, KS 66283-0901

The Honorable Chairman Dahl and Distinguished Committee Members.

School districts are concerned about the increasing premiums for Worker's Compensation Insurance. Specifically, Blue Valley Schools experienced an increase from 2002-03 to 2003-04 of 51%. The district's premium in 2002-03 was $422,768 and in 2003-04 it increased to $637,968. I hope you would agree that this increase, while due to a number of factors, including modification rate, gross payroll, and manual rates determined by the State of Kansas and the Insurance Commissioner's Office, is not acceptable.

Blue Valley Schools bids Worker's Compensation on the open market each year. Blue Valley has also explored self-insurance as an option for Worker's Compensation. The rates quoted above were the least expensive option each year. In addition, we have hired a person with a previous track record of handling Worker's Compensation claims to help control our costs and to increase safety on the job.

We feel we have made major strides at the district level and would appreciate any legislative remedy that assists us in controlling costs.

Thank you for your consideration and for the opportunity to testify before you today. I would be happy to answer any questions you might have.

Comm & Labor
2-10-04
Atch # 3

HOUSE
COMMERCE & LABOR COMMITTEE
February 10, 2004

MR.CHAIRMAN AND MEMBERS OF THE COMMITTEE:

My name is Janet Stubbs, Administrator of the Kansas Building Industry Workers Compensation Fund. KBIWCF is a homogeneous fund formed under Chapter 44 of the Kansas Statutes to provide workers compensation coverage for companies in the residential and light commercial construction industry. (Light commercial in the world of insurance is 3 stories and under.) We began operation on February 1, 1993, thus we are now in our 12th year of operation writing workers compensation coverage for approximately 800 companies and $12,000,000 in estimated annual premium.

Group Funds or "Pools" are different from "Carriers". The best way I know to explain about pools to prospective members is to use the example of a co-op. Each participating company shares in the profits each year but there is also joint and several liability exposure. That means that if rates are not established properly and there is not strong administration of the pool's operation, there could be an assessment of the members for that specific year over and above the premium which they are charged in accordance with their filed rates, A Pool has a Board of Trustees which either contracts with a Third Party company to administer and transact the day to day business, or they operate with their own employees and an on-site Administrator, such as the KBIWCF operates. All policies of a Pool renew at the same time. Our Fund Year is January 1 to December 31.

Pools are well regulated by the Kansas Insurance Department. We must file quarterly financial reports, hire an independent audit conducted each year, submit to an audit by the KID every 2 years and, in the case of the KBIWCF, we hire 2 actuarial studies done each year to be certain our claims reserve and our rates are adequate. We must submit a copy of each new company's application to KID. We believe we are well regulated and perhaps more regulated than a carrier.

Kansas is a "Loss Cost" state. That means that workers compensation coverage providers who write in Kansas must use the loss cost rates for each class code adopted by the Commissioner of Insurance. The providers must then adopt and file a "multiplier" to determine the final cost per $100 of payroll which will provide the premium for the company to pay claims and administrative costs. To think that W.C. rates are established by the Department is only partially true. When a State does not set loss cost rates that are adequate for the claims experience, then you will see the coverage providers increase the "multipliers" which they must file with the Department.

Kansas law requires that any person/company having an annual payroll of $20,000 or more carry workers compensation insurance. How many of you have cut your finger, fallen and broken an arm, etc. and the first question usually asked of you is whether this

Comm. Labor
2-10-04
Atch # 4

happened at work or as a result of your work duties? If that should be the case, then your health insurance will not pay for treatment, IF you have health insurance!

The problem arises when the injured party does not have health insurance and is injured on activities away from work. We often see this situation with the smaller construction companies that do not furnish health insurance for their employees. Thus, we often have Monday "injuries" reported. From the injured employee's standpoint, we understand the reason. However, workers compensation insurance was established to ensure that the injured employee would be able to provide for his family without having to file a lawsuit against his employer and await a decision sometime in the future. In addition, the employer has the security of knowing that Kansas is an "exclusive remedy" state.

KSA 44-5,104 states, "(a) Each insurance company or group-funded self-insurance plan providing workers compensation insurance coverage in Kansas shall maintain and shall provide accident prevention programs upon request of the covered employer as a prerequisite for authority to provide such insurance or coverage."……KBIWCF employs 2 full time loss control staff who teach OSHA 10 and 30 hour training courses for both construction and general industry. We find that people in the type of business for which we write coverage, do not know the information necessary to abide by the OSHA regulations.

KBIWCF **requests** that companies that meet certain loss criteria send foreman to these classes which are FREE to our Fund members. We encourage **all** companies to send at least their foreman. Then owners/managers of those companies with a loss ratio of 40% or greater are requested to attend a 4 hour class to basically understand what type claims are driving their costs and how their losses affect their premium, etc. We remind employers to hire individuals who are physically capable of performing the work for which they are being hired. This avoids injuries. Attitude of the company's management toward safety and attendance at these classes is taken into consideration at renewal.

Education of all Kansas companies as to how to provide a safe workplace for their employees is much preferred to the way Kansas is operating now. Rather than the Division's consultation service soliciting companies to sign up with them so they can protect them from OSHA is objectionable to me and does not encourage management to enforce safety rules. To encourage company owners to attend educational seminars to learn not only safety procedures but also good business practices should be a win-win for everyone.

Employees, especially the construction industry type, sometimes have delusions of "Superman". They do not wear the safety glasses they are issued, don't wear gloves, remove saw guards because it is quicker, easier, etc. Many of the claims received by KBIWCF are the result of inattentiveness and deliberate improper use of equipment. Employers must TRAIN employees properly and provide safety equipment. Employees must FOLLOW INSTRUCTIONS. Not unfolding a stepladder but rather leaning it against a building only to have it slide and let them fall is inexcusable! Wiping mud from

their boots before climbing the slick metal rungs of a ladder would take so little time but results in such painful injury. A disciplinary policy by the business owner is important.

Prompt reporting of injuries is another area stressed by KBIWCF. We ask for immediate reports. According to a recent Hartford Financial Services Group study, injury claims reported within 1week cost 18% less to resolve than those filed after 2 weeks. Wait 5 weeks and this same report says it costs 45% more than if reported in the first week. Some employers are afraid to report small claims and establish a policy of paying medical bills under $250 or $500 without reporting to "protect their experience modification factor". If we know about it, we urge them to take a deductible on their policy of an agreed upon amount, then report it and let our trained staff handle the claim. This allows us to reduce the medical bills to fee schedule and save them money, it lets our staff be sure the medical treatment is appropriate, and it allows us knowledge of the type of claims the company is having. This gives us the opportunity to send our loss control staff in to see how the loss could have been avoided and assist in planning to avoid losses in the future. The theory is that "frequency breeds severity". Statistics tell us that out of every 350 claims you will have 25 that will require hospitalization of at least one day and 1 death will occur. KBIWCF has been fortunate up to this point to prove them wrong.

KBIWCF policy is to provide the best medical treatment available to the injured person, with the least amount of pain and lost time. We have a list of Preferred Providers throughout the State that is given to our member companies. We have obtained contracts with healthcare providers to save the employers money and obtain immediate care for the injured worker. We prefer Occupational Medical specialists and monitor the care and satisfaction with all physicians we use for our covered employees. Employer choice of physician is an advantage to the injured worker and a cost saver.

Concerns for the future operation:

- Cost of Excess Insurance since 9/11. Lack of market and cost has more than tripled.
- Pre-existing conditions. Serious concern.
- Accountability of ALJ's for their decisions.

KBIWCF markets through independent agents. I have agents telling me that many companies do not want to write construction industry type businesses. Some do it only for the rest of the insurance of the company.

I would be glad to attempt to respond to any questions.

KANSAS FARMERS SERVICE ASSOCIATION

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Testimony for the House Commerce Committee regarding Workers Compensation

Presented by
Scott Anderson
Kansas Farmers Service Association
Hutchinson, Kansas

Dedicated to Service

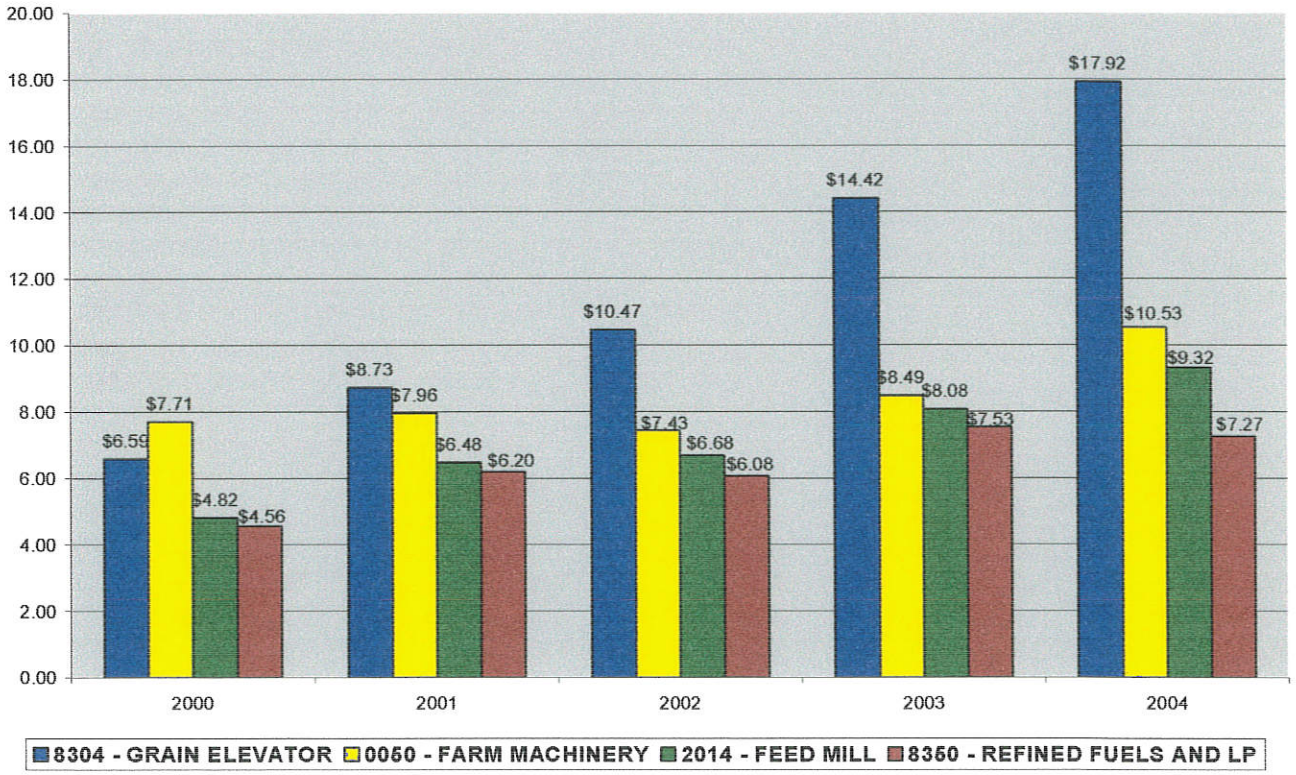
Commerce Labor
2-10-04
Atch # 5

Kansas Agribusiness Workers Compensation

The Kansas Farmers Service Association was organized as a Kansas Cooperative in 1947 and is headquartered in Hutchinson Kansas. The top priority of KFSA is to provide the best available insurance protection, risk management and safety services for all of our customers.

Scott Anderson, ARM is the Director of Risk Management Services and he oversees various safety operations our firm provides. Our property and casualty premium is in excess of $32,000,000 of that approximately $7,000,000 of workers compensation insurance.

Agribusiness WC Rates Previous 5 Years



Rates based on Farmland Mutual Insurance Company

KFSA WC Pure Loss Ratio

1998	**105.3%**
1999	**130.8%**
2000	**97.7%**
2001	**116.4%**
2002	**89.7%**
2003	**90.0%**

6 year average 105%

The calculations are based upon an employee earning $28,600.

Base Wage	$20,800
Overtime	7,800
Total Compensation	28, 600

Grain Elevator Employees
NCCI Class Code - 8304 = $17.92 current rate

- **286 x $17.92 = $5,125.12 annual premium for one employee in 2004**
- 286 x $14.42 = $4,124.12 in 2003
- 286 x 10.47 = $2,994.42 in 2002
- 286 x $8.73 = $2,496.78 in 2001

105% Increase

Farm Machinery Operators
NCCI Class Code - 0050 = $10.53 current rate

- **286 x $10.53 = $3,011.58 annual premium for one employee in 2004**
- 286 x $8.49 = $2,428.14 in 2003
- 286 x $7.43 = $2,124.98 in 2002
- 286 x $7.96 = $2,276.56 in 2001

32% Increase

Feed Mill Employees
NCCI Class Code - 2014 = $9.32 current rate

- **286 x $9.32 = $2,665.52 annual premium for one employee in 2004**
- 286 x $8.08 = $2,310.88 in 2003
- 286 x $6.68 = $1,910.48 in 2002
- 286 x $6.48 = $1,853.28 in 2001

43% Increase

Retail Petroleum & Propane Employees
NCCI Class Code - 8350 = $7.27 current rate

- **286 x $7.27 = $2,079.22 annual premium for one employee in 2004**
- 286 x $7.53 = $2,153.58 in 2003
- 286 x $6.08 = $1,738.88 in 2002
- 286 x $6.20 = $1,773.20 in 2001

17% Increase

Illustration is ment to be an example and does not include several factors such as holidays, overtime adjustments, wc modifiers, premium discounts, deductible discounts.

Another way to look at the wc rates illustrated above would be to think of the $17.92 for elevator workers as a cost = for every dollar the worker makes almost 18 cents is paid to work comp. For every dollar a retail petroleum employee makes, 7 cents is paid for WC.

Companies in our market

Farmland Mutual Insurance – 50 year History in the market
Cooperative Mutual Insurance – 8 years in the market.
Tri-States Insurance – Less than one year in market
Penn Millers Insurance – Less than one year in the market
General Fire and Casualty – No Workers Compensation
Ranger Insurance – No Workers Compensation
Triangle Insurance – Starting 2004

Note – because a carrier will write wc does not mean that a company can meet their underwriting criteria.

Companies that have left our market

Mill Mutual Insurance – left 4 years ago
Grain Dealers Mutual Insurance – left 2 years ago
National Farmers Union – left this market years ago
Zurich Insurance – left two years ago
AIG – left last year

Bold – denotes companies KFSA has contracts with.

Efforts to Keep Current Carriers

- Premium discounts have been reduced or eliminated
- Commission schedule for work comp cut in half
- Special emphasis program designed to improve losses
- Deductibles added to most policies.

Concerns of New Markets

- Achieve satisfactory WC loss ratio so they will stay in the market.
- Like any business insurance companies want to do business in states that have a favorable business climate. By adding carriers gives small businesses more options and keeps their cost down.