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 12, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Kevin Yoder- excused
Representative Rob Boyer- excused

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

Conferees appearing before the committee: Carol Cast, Division of Workers Compensation
Tom Caby, Stormont Vail Hospital
Terri Roberts, Kansas Coalition for Workplace Safety
Jeff Cooper, Kansas Coalition for Workplace Safety

Others attending:
See Attached List.

The Chairman stated the Floor was open to see if anyone was interested in working **HB 2359 - Requiring continuing education for certain contractors licensed by cities and counties.**

Representative Novascone moved and Representative Ruff seconded to move **HB 2359** out favorably.

After discussion Representative Sharp moved and Representative Novascone seconded a Substitute Motion to amend on Page 1, line 25 and on Page 2, line 18, to add "not less than" between "obtain" and "six". The motion carried.

Representative Novascone moved and Representative Ruff seconded a Substitute Motion to move **HB 2359** out as amended. The motion carried.

The Chairman asked if the Committee wished to take action on **HB 2479 - Employment of illegal aliens, penalties**?

Representative Pauls moved and Representative Ruff seconded to move **HB 2479** out favorably.

After discussion Representative Pauls withdrew her motion and Representative Ruff withdrew her second to move **HB 2479** out favorably.

The Chairman announced Workplace Disability would be the topic for discussion today.

Carol Cast, Coordinator, Employer Services, Division of Workers Compensation, gave a summary of how the process works for workplace disability under workers compensation (Attachment 1)

Workers Compensation Information for Kansas Employers & Employees brochure is filed in the Chairman's office.

Tom Caby, Stormont Vail Hospital, gave an example of an employee being injured and claiming work disability. Once the money ran out, the employee applied and got a job where her salary was $2.00 per hour more than the previous job. Most workers eventually return to work doing same/similar work. There is a timing issue as the future is not considered. Going back 15 years is subjective, it may or may not be pertinent. A nurse could be injured and possibly 15 years earlier had worked at a minimum wage job. Work disability should be similar to unemployment and should be capped. Economic conditions should not be grounds for work disability (Attachment 2).

Jeff Cooper, Kansas Coalition for Workplace Safety, practicing attorney, and Adjunct Professor of Law at Washburn University School of Law, has been teaching workers compensation for approximately 12 years reviewed workplace disability under workers compensation. Mr. Cooper is also a Pro Tem Appeals Board Judge, filling in when one of the Board Members has a conflict or is unavailable. The Legislature changed the law in 1993 to set up a two-prong test, and for the past 10 years, we have been looking at wage loss and task loss as the two prongs for the test. Under the current law, these two prongs are averaged together.

Under the current law the wage loss prong is looking at actual wage loss. The statute, as written in 1993, states wages are to be compared with what the employee was earning at the time of the injury with the wages the employee is earning after the injury. As written, theoretically, the employee, if not brought back to work and paid 90%, could sit at home, make no efforts to find a job, and would have a 100% wage loss. The "liberal" Judges, the Appeals Board, and the Court of Appeals have judicially imposed a "good faith" test.

The task loss prong is the second prong of the equation. Under current law, the "tasks" are looked at that were performed by the employee in jobs they have worked for the 15 years before the injury (Attachment 3).

Terri Roberts, R.N., chairperson, Kansas Coalition for Workplace Safety, stated under current law injured workers in Kansas receive workers compensation benefits according to the severity and type of disability sustained on the job. Work disability cases are those in which an employee sustains severe, permanent injuries on the job that are not covered by the schedule of injuries in the Kansas statute, such as injuries to the back, hip or the neck. These are career-ending injuries; injuries that rob employees of their ability to perform the tasks they used to perform to earn their paycheck. A laborer who used to make a good wage on the strength of his back and through an injury can no longer lift more than 25 pounds; that injury could be career ending. A grocery store checker who used to stand behind a cash register all day who can no longer work on her feet after her hip was shattered; that injury could be career ending. These are real people with real bills to pay and real mouths to feed who must now compete in the real world for a real job. Under current law, the amount of disability an injured worker receives in based, in part, on how much the worker actually earned both before and after the injury. However, under the proposed amendment, disability benefits would no longer be based on what the injured worker actually earned post-injury but instead on what a vocational expert thinks an injured worker has the "capacity to earn" after the injury (Attachment 4).

The Chairman stated that yesterday time expired on the topic of Pre-Existing Condition and so testimony on that topic will be completed at this time.

Terri Roberts, R.N., chairperson, Kansas Coalition for Workplace Safety, stated she wanted to call attention to some of the word games being played by those who advocate changing the definition of "pre-existing condition." As with most areas of law, workers compensation has many parts, and it is difficult to reform singular sections of the law without affecting the statute as a whole. Be assured that changing the language used to define "pre-existing condition" is much more than a "surgical strike." If the Legislature adopts the definition of "pre-existing condition" being proposed, it would ultimately affect every worker in Kansas who sustains a permanent injury on the job. The new definition of "preexisting condition being proposed is so broad that virtually any worker over a certain age who sustains a permanent injury on the job would have a preexisting condition. In this new proposal, "preexisting condition" could mean any condition that has never been symptomatic, has never been diagnosed or has never interfered with the ability to work or carry out daily activities of living (Attachment 5).

Jeff Cooper, Attorney at Law and Adjunct Professor of Law at Washburn University School of Law gave information on what is work disability. 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. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

The law was changed in 1993 to set up a two-prong test, and for the last 10 years, have been looking at wage loss and task loss as the two prongs for the test. Under the current law, these two prongs are averaged together.

The following testimony was distributed by Dennis L. Horner on preexisting impairments (Attachment 6).

The meeting adjourned at 11:00 a.m. The next meeting will be February 13, 2004.

COMMERCE AND LABOR COMMITTEE

Date February 12, 2004

NAME	AGENCY
Kerrie Bacon	KCDC/KDHR
Cheryl Patrick	KCDC/KDHR
Martha Gabehart	KCDC/KDHR
Josie Torrez	S/LCK
Wil Leiker	Ks. AFL-CIO
RICHARD THOMAS	KDHR-UC
CAROL CAST	KDHR-WC
James Stubbs	KBIA/CF
Roy Artman	"
Scott Heidner	KS Self Insurers Assoc.
Bill Curtis	Ks Assoc of School Bds
[illegible]	KTLA
Mike Brunk	Ironworkers Local 10 B.A.
Ed Redmon	Fin Fight

Kansas Legislature

COMMITTEE ON COMMERCE AND LABOR

WORKPLACE DISABILITY

February 12, 2004

Presented by: Carol S. Cast, Coordinator
Employer Services
Division of Workers Compensation

SUMMARY OF HOW THE PROCESS WORKS

- Injury Occurs
- Worker Notifies employer within 10 days; 75 days just cause – **K.S.A. 44-520**
- Employer mails or delivers KWC-27 to employee or legal beneficiary - **K.S.A. 44-5,102(a)**
- Employer notifies insurance carrier or group funded plan
- Employer/insurance carrier provides medical treatment
- Accident report filed with Division within 28 days

SUMMARY OF HOW THE PROCESS WORKS

- Division mails written claim form (KWC-15) to employee along with (KWC-136) informational explaining injured workers rights.
- Employee files written claim form with employer
- Insurance provider pays benefits

Comm & Labor
2-12-04
Atch #1

After Employee sustains injury, the employee shall, upon request of employer, submit to exam at reasonable time and place by reputable health care provider, selected by employer. (K.S.A. 44-515)

BENEFITS

- MEDICAL TREATMENT TO CURE AND RELIEVE THE EFFECTS OF THE INJURY - NO $$ MAXIMUM
- EMPLOYER CHOICE OF DOCTOR
- MEDICAL MILEAGE (More than 5 miles round trip) (Current $.36/mile)

UNAUTHORIZED MEDICAL TREATMENT

- Without application or approval, employee may consult a health care provider of the employee's choice for purpose of examination, diagnosis or treatment up to $500.

(May not be used to obtain a functional impairment rating.)

The authorized Treating Doctor determines when the injured employee can return to work:

- **Restricted**
- **Full Duty**
- **MMI (Maximum Medical Improvement)**

MEDICAL TREATMENT

UNSATISFACTORY MEDICAL TREATMENT

SUBMIT NAMES OF THREE HEALTH CARE PROVIDERS WHO , IF POSSIBLE GIVEN THE AVAILABILITY OF LOCAL HEALTH CARE PROVIDERS, ARE NOT ASSOCIATED IN THE SAME PRACTICE.

INJURIED WORKER SELECTS ONE AS AUTHORIZED TREATING HEALTHCARE PROVIDER.

FOR INDEPENDENT MEDICAL EXAM (IME), ONLY THE ADMINISTRATIVE LAW JUDGE CAN ORDER.

WHO PAYS

- The insurance carrier, group funded pool, or self-insured employer.
  - Medical Treatment (Includes prescriptions)
  - Medical Mileage – More than 5 miles roundtrip
  - Travel & living expenses (KSA 44-515)
  - Disability benefits

AGGRAVATION OF A PRE-EXISTING CONDITION

- EMPLOYER IS RESPONSIBLE FOR THE INCREASED FUNCTIONAL DISABILITY CAUSED BY THE AGGRAVATION OF A PREEXISTING CONDITION
- RATING OF 10% INCREASES TO 20% THE EMPLOYER IS RESPONSIBLE FOR 10% PLUS MEDICAL

TEMPORARY TOTAL BENEFITS

- **TEMPORARY TOTAL DISABILITY 2/3 AWW NOT TO EXCEED THE STATE MAXIMUM IN EFFECT AT TIME OF INJURY (Current Max is $440)**
- **SEVEN DAY WAITING PERIOD**

TEMPORARY PARTIAL GENERAL DISABILITY

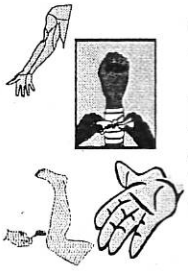
KSA 44-510e

- **Exist when worker returns at wage less than wage at time of injury**
- **Statute provides for General body injury.**

FAILURE TO RETAIN AN INJURED WORKER MAY RESULT IN LARGER DISABILITY PAYMENTS TO SOME INJURED WORKERS BUT IT IS NOT ILLEGAL (UNDER W C LAW) TO NOT BRING THEM BACK.

FUNCTIONAL VS WORK DISABILITY

SCHEDULED INJURY



Injury affects extremities of body:
EX: Arm, hand, fingers, leg, toes, shoulder

GENERAL BODY INJURY

INJURY THAT AFFECTS THE TRUNK OF BODY, HEAD, or NECK

WORK DISABILITY

A + B
2 = RATING

A= TASK PERFORMING SKILLS OF LAST 15 YEARS

B= ACTUAL EARNING LOSS: DATE OF INJURY COMPARED TO TODAYS EARNINGS

WORK DISABILITY

20 – 10 = 50% of skills lost

$300÷$640 =46.88% of earnings retained

53.12% Loss of earnings

17

WORK DISABILITY

$$\frac{50\% + 53.12\%}{2} \quad \frac{103.12}{2}$$

51.56% rating for work disability

18

DEATH BENEFITS
(KSA 44-510b)

- $250,000 MAXIMUM TO SPOUSE AND DEPENDENT CHILDREN
- MINIMUM BENEFIT IS 50% OF THE STATE'S AVERAGE WEEKLY WAGE
  (Current minimum is $293/week)
- $40,000 LUMP SUM IMMEDIATELY-NOT SUBJECT TO 8% DISCOUNT
- NO PENALTY FOR REMARRIAGE

DEATH BENEFITS

- $25,000 to heirs if no spouse or dependents
- No dependents or heirs the insurance company pays $18,500 to the Workers Compensation Fund
- Burial allowance is $5000

ALCOHOL AND DRUGS
(KSA 44-501(d)(2) (A-E)

- PROBABLE CAUSE TO CHECK FOR ALCOHOL/DRUGS
- IMPAIRMENT
- CONTRIBUTION
- TEST SAMPLE MUST BE CONTEMPORANEOUS
- TESTING BY APPROVED LAB

ALCOHOL AND DRUGS

•COLLECTION/LABELING OF SAMPLE PERFORMED BY OR UNDER SUPERVISION OF LICENSED HEALTH CARE PROFESSIONAL
•MUST ESTABLISH BEYOND A REASONABLE DOUBT SAMPLE TAKEN FROM EMPLOYEE.

LEGAL FLOW

- If employer and employee disagree on entitlement of benefits, the employee requests a preliminary hearing
- Case is assigned to an Administrative Law Judge to make a ruling based on the evidence presented
- At any time during the legal process, any party may request a mediation conference. All parties have to agree to mediate.

REFER TO LEGAL FLOW CHART FOR LEGAL PROCESS

8/16/00

KANSAS WORKERS COMPENSATION LEGAL FLOW

EMPLOYER NOTIFIED OF AN INJURY

K.S.A. 44-520	-Ten (10) day notice of injury, (75) days after accident for just cause
K.S.A. 44-557	-Report filed with Director within (28) days after receipt of such knowledge
K.S.A. 44-520a	-Written claim for compensation within 200 days of accident or last paid compensation
K.S.A. 44-5,101	-Informational material
K.S.A. 44-5,102	-Distribution of informational K-WC 27/270

EMPLOYEE CONTACTS OMBUDSMAN

K.S.A. 44-5,111	-Ombudsman Program

{IF DISPUTE EXISTS...}

MEDIATION

K.S.A. 44-5,117	-Mediation is available at anytime during a workers compensation claim

{IF DISPUTE EXISTS...}

PRELIMINARY HEARING FILING PROCEDURE

K.S.A. 44-534	-Application for Hearing filed (E-1)
K.S.A. 44-534(b)	-No proceeding for compensation unless application on file within (3) years of date of accident or within (2) years of date of last payment of compensation---whichever is later
K.S.A. 44-534a(a)(1)	-Application for Preliminary Hearing (E-3) -Seven (7) day written notice

{IF DISPUTE EXISTS...}

PRELIMINARY HEARING HELD

K.S.A. 44-534a	-ALJ shall give (7) days notice by mail to the parties of the date set for such hearing
K..A.R. 51-3-5a	-TTD and Medical decided -Award of ALJ rendered within (5) days
K.S.A. 44-512a	-File for motion hearing if service of written demand not made within (20) days from date of service of such demand -Entitled to civil penalties and all past due compensation shall become immediately due and payable
K.S.A. 44-551	-Appeal to WC Board -Any Party has within (10) days to make written request to the WC Board. (Intermediate Saturdays, Sundays, and Holidays shall be excluded in the time computation) -Board's findings or awards shall be issued within (30) days from date arguments were presented by the parties
K.S.A. 44-534a(a)(2)	-Board will only consider limited issues defined as jurisdictional on review of preliminary findings

{IF DISPUTE EXISTS...}

REGULAR HEARING STAGE
PRE-HEARING SETTLEMENT CONFERENCES

K.S.A. 44-534	-Application for Hearing filed (E-1) -ALJ shall proceed with notice to all parties within (20) days
K.S.A. 44-523	-Each party is allowed (30) days after hearing to complete their case -Award not entered within (30) days, Director may assign matter to Assistant Director or to a special ALJ, or party may request assignment -Not less than (10) days prior to full hearing an ALJ shall conduct a prehearing settlement conference to explore the possibility that the parties may resolve issues and reach a settlement prior to the first full hearing
K.S.A. 51-3-8	-Pre-trial stipulations

{IF DISPUTE EXISTS...}

REGULAR HEARING HELD

K.S.A. 44-523	-See above Statute
K.S.A. 44-551	-Appeal to WC Board -Any party has within (10) days to make written request to the WC Board (Intermediate Saturdays, Sundays, and Holidays shall be excluded in the time computation) -Board's findings or awards shall be issued within 30 days from date arguments were presented by the parties
K.S.A. 44-512a	-Service of demand within (20) days from date of service of such demand -Entitled to civil penalties and all past due compensation shall become immediately due and payable

{IF RULING IS DISPUTED...}

POST AWARD MEDICAL

New Section	-Application for hearing filed (E-4) -Hearing heard by the assigned ALJ -Application must be given priority setting by the ALJ---only superseded by preliminary hearings -Parties shall meet and confer prior to the setting of the hearing -Prehearing settlement conference shall not be necessary -Parties must be given opportunity to present evidence (including testimony) -ALJ may award treatment back to entry of underlying award, but treatment cannot relate back more than six (6) months following the application for post award treatment -ALJ may award attorney fees and cost on claimants behalf per K.S.A. 44-536(g) -ALJ findings subjected to full review by the Board -Board review shall receive priority setting (superseded only by preliminary hearings) -Board must make a decision within thirty (30) days from the time the review is submitted

REVIEW & MODIFICATION OF AWARDS

K.S.A. 44-528	-Application for hearing filed (E-5) -ALJ may appoint one or two health care providers to examine the employee and report to the ALJ -ALJ shall hear all competent evidence offered

-ALJ may modify award or reinstate a prior award by increasing or diminishing the compensation subject to the limitations provided by the Workers Compensation Act

K.A.R. 51-19-1(c) -The number of reviews shall be limited to not more than once during any six month interval, except in highly unusual circumstances

K.A.R. 44-528(d) -The effective date for the increase or decrease in the functional impairment or work disability shall be the effective date that the actual increase or decrease occurred, except no modification awards more than (6) months prior to the application.

WORKERS COMPENSATION BOARD

K.S.A. 44-551 -Appeal to WC Board
-Any party has within (10) days to make written request to Board

K.S.A. 44-534a(a)(2) -Review of preliminary hearing should set forth disputed issues

K.S.A. 44-556(a) -Board's findings or awards shall be issued within (30) days from date arguments were presented by the parties

K.S.A. 44-551(b)(2)(B) -Board does not rule in (30) days----party can request ALJ start award

{IF LEGAL DISPUTE EXISTS...}

KS COURT OF APPEALS

K.S.A. 44-551 -Review by the Board shall be a pre-requisite to judicial review

K.S.A. 44-556 -Any party may appeal from a final order of the Board by filing an appeal with the court of appeals within 30 days of the date of the final order
-Such review shall be upon question of law

K.S.A. 44-534a(a)(2) -Decision of Board on review of preliminary order is not subject to further judicial review

{IF LEGAL DISPUTE EXISTS...}

KS SUPREME COURT

KA 20-3018	-Petition for review of Court of Appeals decision within (30) days after Court of Appeals decision -Review of any such decision discretionary with the Supreme Court
KA 20-3016 KA 20-3017	-Cases pending in Court of Appeals may be transferred to -Supreme Court upon motion of Court of Appeals or a party. However, Supreme Court may accept case for review or may decline.

DIVISION OF WORKERS COMPENSATION
KS DEPT OF HUMAN RESOURCES
800 SW JACKSON STE 600
TOPEKA KS 66612-1227

EMPLOYER'S REPORT OF ACCIDENT

Submit original report only

OSHA Case or File Number _____

There is a $250 penalty for repeated failure to file Accident Reports within 28 days of the employer's receipt of knowledge of the accident.

READ INSTRUCTIONS BEFORE FILLING IT OUT.

1. Federal Employers Identification Number _____
2. Name of Employer _____ Telephone Number (_____) _____
3. Mailing Address _____
   Street *City* *State* *Zip Code*
4. Location, if different from mailing address _____
   Street *City* *State* *Zip Code*
5. Nature of Business _____ S.I.C. Code _____ Dept. or Division _____
6. Name of Employee _____ Age _____ Sex _____
   First *Middle* *Last*
7. Home Address _____
   Street *City* *State* *Zip Code*
8. Soc. Sec. # _____ Birth Date _____ Employee's Occupation _____ Home Phone Number (_____) _____
9. Date of Injury or Occupational Disease _____ Time of Injury _____ A.M./P.M.
   Date Disability Began _____ Gross Average Weekly Wage $ _____
10. Place of Accident or last exposure _____
    City *County* *State*
11. Was accident or last exposure on employer's premises? ☐ YES ☐ NO
12. How did accident occur? _____
13. What was employee doing when injured? _____
14. Name substance or object that directly caused injury _____
15. Describe in detail nature and extent of injury, indicate part of body involved _____
16. Was worker admitted to hospital? ☐ YES ☐ NO Date _____ Treated by emergency room only? ☐ YES ☐ NO
    Hospital name & address _____
17. Name and address of attending physician or clinic _____
18. Has employee returned to regular duty? ☐ YES ☐ NO Light duty? ☐ YES ☐ NO Date _____
19. Is compensation now being paid? ☐ YES ☐ NO Date first/initial payment _____
20. Weekly compensation rate $ _____ Is further medical aid needed? ☐ YES ☐ NO ☐ UNKNOWN
21. Did employee die? ☐ YES ☐ NO If so, give date of death _____ (File amended report within 28 days if death subsequently occurs.)
22. Name and address of dependents (death cases only) _____
23. Insurance Carrier and Third Party Administrator _____
    Address _____
    Street *City* *State* *ZIP* *Phone*
    Policy Number _____ Name of Agent _____
    Claim Number _____ Name of Claim Representative _____
24. Date of Report _____ Completed by _____ Title _____

DO NOT WRITE IN THIS SPACE

AGE

OD

Y N

CAUSE

NATURE

SEVERITY

O - NO TIME LOST

1 - TIME LOST

2 - MEDICAL

3 - FATAL

SOURCE

MEMBER

DO NOT WRITE IN THIS SPACE

Questions or comments can be directed to the Kansas Division of Workers Compensation, Topeka, KS – Phone: 1-800-332-0353

K-WC 1101-A (Rev. 1-02) **- SUBMISSION DOES NOT CONSTITUTE ADMISSION OF LIABILITY -**

1-14

General Instructions

1. Please answer every question on the accident report. Incomplete and/or illegible accident reports will be returned for corrections. Returned accident reports may cause delays in benefits being paid to your injured employees.

2. **Submit the original report only**. Reports must be **typewritten, computer generated** (if an exact duplicate of K-WC 1101-A), or neatly **printed** in **black** ink. Please avoid submitting faxed or photostat copies of accident reports, they are difficult for the Division to microfilm.

3. It is the employer's responsibility to insure that an accident report is filed when necessary. This may be done by sending it directly to the Division within **28 days** of the date of **the employer's receipt of knowledge** of the accident. It is also permissible to send a report to your insurance carrier, third party administrator or pool association as long as the report is submitted to the Division within the required time limit. Whichever method is used, **please avoid filing duplicate reports of the same accident. Only accidents which cause an incapacitating injury to the employee are required to be reported to the Division.**

4. Submission of this Employer's Report of Accident **does not** constitute a **written claim**.

Definition of an Incapacitating Injury

The Workers' Compensation Act sets forth a strict time frame for filing of accident reports with the Division. The controlling statute is K.S.A. 44-557(a), which reads as follows:

> **(a)** ***it is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt of such knowledge, if the personal injuries which are sustained by such accidents are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.***

Accident reports are not necessary for every work related injury. The statute requires a report to be filed when the worker's whole or partial incapacity continues beyond the "day, turn, or shift which such injuries are sustained" as the result of accident. "Incapacity" is not specifically defined within the law, but the Division believes that the Legislature's intent was to reference a worker's whole or partial loss of the ability to perform his or her ordinary job tasks. Under that criterium, the decision of whether to file a report is relative to the particular job and demands a judgment regarding how, if at all, the accident limited the worker. When in doubt, keep in mind the law contains no penalty for filing a report that ultimately proves to be unnecessary. There are penalties, however, for failing to file a report when one was required. Those penalties are fines and limitations on the defenses the employer may assert should a claim be filed. The Division will of course, accept those reports the employer wishes to file.

Instructions for Specific Items

Item 14: Name the object or substance which directly injured the employee. Example: machine or thing he/she struck or struck him/her; vapor or poison he/she inhaled or swallowed; chemicals or radiation which irritated his/her skin; if hernias, the thing he/she was lifting or pulling; etc.

Item 15: Please be as specific as possible indicating all that is known about the injury. Name part of body injured.

KANSAS

DEPARTMENT OF HUMAN RESOURCES
Jim Garner, Secretary

KATHLEEN SEBELIUS, Governor

If you were hurt in a job related injury and have questions about workers compensation, contact the Ombudsman/Claims Advisory Section of the Workers Compensation Division at 1-800-332-0353 or 785-296-2996.

Se requiere que el empleador le proporcione tratamiento médico y compensación al trabajador mientras se restablece de cualquier accidente ocasionado por o a causa de su trabajo. Para más información, llame al teléfono 1-800-332-0353 o al 785-296-2996, o escriba a la oficina.

WRITTEN CLAIM: Even if your employer knows about the injury, you could lose all rights to further compensation if you do not tell your employer **in writing** that you expect workers compensation benefits for your injury. **An accident report filed with the Division of Workers Compensation is not a written claim. Written claim** must be filed **with the employer** within 200 days of the date of accident or date of last payment of compensation for disability or date of last authorized medical care. You may take the written claim to the employer and obtain a receipt for it or you can mail it to the employer by certified mail, return receipt requested. You can not obtain a hearing before an administrative law judge unless you meet the following deadlines: filing an application for hearing within three (3) years of the date of accident or within two (2) years of the last payment of compensation, whichever is later.

AVERAGE WEEKLY WAGE: A worker's "average weekly wage" is calculated by adding together the **base wage, the average weekly overtime** and the **weekly value of fringe benefits** that have been discontinued.

WEEKLY DISABILITY BENEFITS: While you are unable to work because of the injury, you are entitled to weekly disability benefits for the duration of the disability. The **first seven (7) calendar days** of disability is a **waiting period** and compensation is not payable for the first seven (7) days unless you are unable to work for (21) consecutive calendar days. Your weekly disability benefit rate is 2/3 of your average weekly wage, but not more than the maximum rate in effect on the date of your accident.

MEDICAL BENEFITS: An injured worker is entitled to all medical services reasonably necessary to cure and relieve the worker from the effects of the injury. The employer has the right to select the doctor who will treat the injury. A worker may seek the services of an unauthorized doctor up to a limit of $500. A worker may apply for a hearing to change the authorized health care provider. Reimbursement for travel to obtain medical treatment is payable for round-trips that are more than five miles. Necessary hired transportation may be reimbursed.

DIVISION OF WORKERS COMPENSATION
800 SW Jackson Street, Suite 600, Topeka, KS 66612-1227
Phone: 785-296-3441 • Fax: 785-296-0839 • Toll Free: 1-800-332-0353 • workerscomp@hr.state.ks.us • www.hr.state.ks.us

WORKERS COMPENSATION RECORDS: General access to accident reports and medical records filed with the Division of Workers Compensation is restricted to approved parties. Once an application for hearing is filed, records are open for inspection. Questions about the accessibility of records can be addressed to the Ombudsman/Claims Advisory Section.

MEDIATION CONFERENCE: The mediation conference offers both parties a reasonable opportunity to resolve disputes without litigation. All disputed issues can be addressed at this informal session, presided over by a mediator. A claimant may be represented by an attorney at a mediation conference, but need not be. If you don't have an attorney during the process, you may request assistance from the Ombudsman/Claims Advisory Section. The absence of an attorney during the process does not mean legal representation cannot be obtained later, if the dispute is not settled in this informal setting. If you have questions about the mediation conference procedures, you may write or call the toll-free number 1-800-332-0353 or (785) 296-0848. Mediation must be agreed to by **all** parties.

VOCATIONAL REHABILITATION: Vocational rehabilitation services may be voluntarily offered to assist you in returning to work. If you believe you will need such services, **contact the insurance carrier administering your claim** to request referral to a qualified vocational rehabilitation provider. If you have questions about vocational rehabilitation, you may write or call our toll-free number 1-800-332-0353 or (785) 296-2996.

SCHEDULED INJURIES: Injuries to the body members listed below are called "scheduled injuries."

The schedule below shows the maximum number of weeks for which compensation can be received. Actual compensation is based on the percentage of permanent disability.

Shoulder	225	Thumb	60
Arm	210	1st (index) finger	37
Forearm	200	2nd (middle) finger	30
Hand	150	3rd (ring) finger	20
Leg	200	4th (little) finger	15
Lower leg	190	Great toe	30
Foot	125	Great toe, end joint	15
Eye	120	Each other toe	10
Hearing, both ears	110	Each other toe, end joint only	5
Hearing, one ear	30		

Injuries that are not "scheduled injuries" are called **general body injuries** for which compensation is payable for a maximum of 415 weeks.

SETTLEMENTS: The law requires that compensation be paid for permanent disability caused by the injury. It is payable by the week until paid in full unless all parties agree to a lump sum payment (if allowed by statute) to close the claim. **The Ombudsman/Claims Advisory Section cannot act as your legal counsel, but will help you calculate the amount that would be payable for a specific percent of disability. They cannot advise you whether the percent is appropriate for your injury. You may wish to consult with an attorney to obtain a full examination of the facts and law as they pertain to your injury.**

WRITTEN CLAIM FOR COMPENSATION

In order to protect your rights for possible future workers compensation benefits, a written claim must be **filed with your employer** within 200 days after one of the following:

(1) The date of accident.
(2) The last compensation paid.
(3) The last approved medical treatment.

An accident report filed with the Division of Workers Compensation IS NOT a written claim.

Employee's Receipt

(Do not send to the Kansas Division of Workers Compensation Office)

I hereby acknowledge receipt of written claim:

Employer's Signature_____ Date Received:_____

Employee's name:_____

Date of alleged accident:_____

KEEP TOP HALF FOR YOUR RECORDS

LEAVE BOTTOM HALF WITH EMPLOYER

WRITTEN CLAIM FOR COMPENSATION

Date: (month/day/year)_____

To (employer):_____

Street:_____ City:_____ State: _____ Zip:_____

You are herewith informed that I claim compensation in accordance with the Workers Compensation laws of Kansas by reason of an accident which arose out of and in the course of my employment with you on or about (date: month/day/year)_____

Signature (worker making claim):_____ Social Security No.:_____

Street:_____ City:_____ State: _____ Zip:_____

EMPLOYER INSTRUCTION: Please forward this claim to your workers compensation insurance carrier or to your self-insurance claim processing office.

Federal Privacy Act Disclosure Section 7(a)(2)(B)

The mandatory requirement that social security number be included in forms filed with the Division of Workers Compensation is permitted by Section 7(a)(2)(B) of the Federal Privacy Act of 1974, since our regulations which require its disclosure were in existence before January 1, 1975. The number is used as a means of identifying all the various records in the Division of Workers Compensation pertaining to an individual.

The use of social security numbers is made necessary because of the large number of applicants who have similar names and birth dates, and whose identities can only be distinguished by the social security number.

ATTENTION

EMPLOYERS ARE REQUIRED TO PROVIDE THIS FORM TO EACH INJURED WORKER

OMBUDSMAN/CLAIMS ADVISORY

DIVISION OF WORKERS COMPENSATION
800 SW JACKSON STREET STE 600
TOPEKA KS 66612-1227

TOLL FREE 1-800-332-0353

If you were hurt on the job and have any questions about Workers Compensation benefits contact the **Ombudsman/Claims Advisory Section** at the Kansas Division of Workers Compensation. The Division of Workers Compensation has full-time personnel who specialize in aiding injured workers with claim information and problems. They can give information about benefits an injured worker may be entitled to receive. They can help try to solve problems with benefits not being paid on time, with medical treatment, with unpaid medical bills, with questions about how to figure settlement amounts, etc. Assistance in Spanish is available at the Division of Workers Compensation.

WHAT TO DO IF AN ACCIDENT OCCURS ON THE JOB:

1. Tell your employer that you were hurt on the job.

2. Follow your employer's instructions on getting medical aid and follow the doctor's instructions.

3. Within 200 days of the date of accident or the date of last payment of compensation for disability or authorized medical care, tell your employer **in writing** that you expect workers compensation benefits for your injury. Your employer might know you were hurt and compensation may be paid, however, you could lose all rights to future compensation if you do not tell the employer **in writing**. This is called a **"Written Claim."** Written claim may be served in person by taking it to the employer and getting a receipt for it or by mailing it to the employer by certified mail, return receipt requested. The post office receipt for the certified letter is generally sufficient proof that you sent written claim.

AVERAGE WEEKLY WAGE: A worker's "average weekly wage" is calculated by adding together the **base wage**, the **average weekly overtime** and the **weekly value of fringe benefits** that have been discontinued.

WEEKLY BENEFITS: Benefits are paid by the employer's insurance carrier or self-insurance program. Injured workers are not entitled to compensation for the first week they are off work unless they lose three consecutive weeks. The first compensation payment is normally due at the

end of the 14th day of lost time. An injured employee is entitled to a weekly amount of 66 2/3 percent of his average weekly wage up to a maximum of 75 percent of the state's average weekly wage. These benefits are subject to legislative changes. If the injury results in permanent disability, the Kansas compensation law provides for additional benefits.

MEDICAL BENEFITS: An injured worker is entitled to all medical services reasonably necessary to cure and relieve the worker from the effects of the injury. The employer has the right to select the doctor who will treat the injury. A worker may seek the services of an unauthorized doctor up to a limit of $500. A worker may apply to the Workers Compensation Director to change the authorized treating doctor. Reimbursement for travel to obtain medical treatment is payable at a rate set by law for trips that are five miles or more (round trip).

RESPONSIBILITIES OF THE EMPLOYER:

1. Employers must report all employee injuries to the Division of Workers Compensation within 28 days from the date of injury, or the date the employer learned about the injury, when the employee is wholly or partially incapacitated for more than the remainder of the day, turn, or shift.

2. Employers must provide for the payment of workers compensation claims without any charge to employees.

3. Employers must post the Workers Compensation Notice prepared by the Director.

4. Employers must pay compensation benefits regardless of insurance coverage.

5. Upon receiving notice of an injury, employers must provide the employee with written information to assist the injured worker in understanding their rights and responsibilities in obtaining compensation.

EMPLOYERS MUST COMPLETE THE FOLLOWING INFORMATION FOR INJURED WORKERS:

YOUR CLAIM WILL BE HANDLED BY:

Company _____

Address _____

_____

Contact Person _____

Telephone (_____)_____

Work Disability

- Above and beyond the impairment rating
- Is a significant cost driver
- Incentive not to return to work until after settlement
- Most workers eventually return to work doing same/similar work
- Is a timing issue (The future is not considered)
- 15 years previous employment is subjective
    - May or may not be pertinent or relevant

Issues

- What is the "Capacity" to earn a wage?
- Wage loss should never be "0" unless one is receiving Social Security Disability
- Work Disability should be similar to unemployment and should be capped
- Economic conditions should not be grounds for work disability

Example		Dates
Jane Doe 23 years old – employed by ABC		3/99
Lifting - Injured back on & term.		8/99
WC Settlement Running award	Begins	6/00
(10 functional rating 34% Work Disability)	Ends	10/02
$9028 $30,698		
Jane Doe employed by XYZ		11/02
Work Related Injury (Lifting – Injured Back)		02/03
Work Related Injury (Lifting – Injured Back)		05/03

Physical requirements at Job at XYZ was equivalent or exceeded physical requirements at Job ABC. Once the money ran out the employee applied and got a job. Note: employee wage was $2.00 an hour MORE at XYZ than at ABC where she was awarded work disability.

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TESTIMONY BEFORE
THE HOUSE COMMERCE & LABOR COMMITTEE

February 12, 2004

JEFF K. COOPER #12477
COOPER & LEE, L.L.C.
ATTORNEYS AT LAW
COMMERCE BANK BUILDING
100 S.E. 9TH STREET, 3RD FLOOR
TOPEKA, KANSAS 66612

MR. CHAIRMAN DAHL AND MEMBERS OF THE COMMITTEE:

My name is Jeff Cooper, and I practice law here in Topeka, Kansas. I am also an Adjunct Professor of Law at Washburn University School of Law and have taught workers compensation for approximately 12 years. I am also a Pro Tem Appeals Board Judge which means I fill in when one of the Board Members has a conflict or is unavailable. I represent the Kansas Workers Compensation Fund and have represented them for at least the last 15 years. I also represent injured workers, as well as defending claims for self-insured employers, such as the City of Topeka, Shawnee County, the State Self-Insurance Fund, and I also defend claims on behalf of insurance companies.

As Chairman Dahl has requested these meetings be informational in nature, my goal today is to speak to you as an Adjunct Law Professor on the topic of Work Disability.

A. What is "Work Disability?"

1. Work Disability: The statutory framework for what is commonly referred to as work disability is found in K.S.A. 44-510e. That statute is quite lengthy, and the following is an excerpt of the relevant portions when dealing with work disability.

> . . . 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. In any event, the extent of

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> permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury. . . .

2. Adjustment Period: Conceptually "work disability" is really an adjustment period that the worker and their family are allowed under the law to enable them to adapt to the injury. The worker is adapting to the loss of his job and is adapting to reduced, or perhaps, no income, as well as the physical problems occasioned by the injury. Work disability, or the adjustment period, is not lifetime benefits. The percentage referenced in the statute pertains to a percentage of 415 weeks, which is the maximum number of weeks of benefits under Kansas law. For example, a 40% work disability would entitle a worker who has had a career-ending injury to a 166 week adjustment period.

3. Return to Work: "Work Disability" or the "Adjustment Period" **only** comes into play when the employee has an injury where there are restrictions and the employer does not return them to work paying at least 90% of the wages they were earning at the time of the injury.

4. Incentive: The current law provides an incentive for employers to return injured workers to an accommodated job, or a different job, within 90% of their wages. If the employer returns the injured worker to work earning at least 90%, the employer's only responsibility is to pay compensation for permanent partial impairment, and the issue of "work disability," i.e., "adjustment period" never comes up. Under the current law, the Legislature has wisely made it a priority to keep injured workers working.

5. Control: The absolute control over work disability is in the hands of the employer. If the employee is returned to work, no work disability, i.e., adjustment period is provided for. As we all know, however, there are cases where the employer simply cannot, or elects not to, return the worker to work making 90% of their preinjury wages.

Test to Determine the Amount of "Work Disability" or the Length of the "Adjustment Period"

1. The Legislature changed the law in 1993 to set up a two-prong test, and for the last 10 years, we have been looking at **wage loss** and **task loss** as the two prongs for the test. Under the current law, these two prongs are averaged together.

A. Wage Loss Prong

2. Wage Loss: The intent of the current law, is to look at actual wage loss. The statute, as written in 1993, states we are to compare wages the employee was earning at the time of the injury to the wages the employee is earning after the injury. As written, theoretically, the employee, if not brought back to work and paid 90%, could sit at home, make no efforts to find a job, and would have a 100% wage loss. The "liberal" Judges, the Appeals Board, and the Court of Appeals have judicially imposed a "good faith" test.

3. Good Faith: Under current law, the finder of fact must determine if the employee has made a valid or "good faith" effort to find a job. If the employee has not made a "good faith" effort to find a job, the Court will impute a wage to the employee. Stated another way, the Court will determine theoretical ability to earn wages if a "good faith" effort is not made by the employee. The cases clearly show the Administrative Law Judges and the Appeals Board do not reward employees for sitting at home and will not hesitate to impute a wage to an employee if a "good faith" effort to find a job is not made.

If the employee makes a "good faith" effort to find a job, and simply cannot find one, the wage loss prong will be 100% based on actual wage loss. If an employee on his own finds a job, then their actual earnings will be compared to the wages earned at the time of the injury.

4. True Litmus Test: Comparing actual earnings is a true test of wage loss. Nobody goes out and purposely refuses a job. Injured workers go out and try to sell whatever abilities they have left to respective employers. True wage loss to determine the adjustment period makes sense. The law gives the individual who has suffered a career-ending injury a period to adjust to the situation.

5. Modification of the Work Disability, i.e., Adjustment Period: The circumstances of the injured worker following the initial determination of the period of adjustment or work disability is subject to review and modification. A worker who has suffered a career-ending injury, even after a good faith job search, may not find a job at the time the determination of wage loss is made. The wage loss prong would then be 100%. At any time from the initial determination until the adjustment period runs out, if the employee finds a job making 90% of his preinjury wages–work disability or the adjustment period ends. Again, we are comparing actual earnings before the injury to earnings after the injury in the current work disability test.

B. Task Loss Prong

1. Task Loss Prong: Task Loss is the second prong of the equation. Under current law, we look at the "tasks" performed by the employee in jobs they have worked for the 15 years before the injury.

2. Actual Task Loss: Similar to "wage loss" the current law has developed a test that looks at actual loss of task performing abilities based on the restrictions of the doctors. The opinion as to the loss of tasks is given by the doctors who have imposed the restrictions. The doctor looks at a list of tasks and says which the employee can or cannot now perform as a consequence of the injury.

3. Realistic Evaluation: The current task loss prong is an attempt to realistically evaluate the loss of abilities suffered by a worker who has career-ending injury. If my secretary, who as far as I know has not had an injury, loses her job, she would likely apply for another. She would take her skills, such as operating a computer with several programs, her telephone skills, her bookkeeping skills, and other skills she has acquired, and attempt to sell those skills in the marketplace. She would list her work experiences, her skills, etc., on any application. She would list those skills, because those skills, i.e., her task performing abilities, is what she has to market to other perspective employers.

A worker, who has a career-ending injury in his particular field, does not have, most likely, a lot of those skills, i.e., task performing abilities, left to market. The current law looks at the task performing abilities, i.e., skills that have been lost due to the injury and those that the employee retains.

A truck driver, who suffers an injury, may still be able to drive a truck, but because of the injury, can no longer unload the truck. He has lost some task performing ability. The current law assigns a realistic measurable test to determine loss of those tasks, i.e., marketable skills, the worker has lost.

4. Task Loss Directly Affects Employability: A career-ending injury will affect a worker's ability to find a job. If a worker, who, for 15 years, does equipment maintenance on machines which requires heavy lifting, and has an injury and can no longer lift over 15 pounds, he has lost the majority of his skills, i.e., tasks that he has performed in the last 15 years. Can that employee easily go out and find a job? If he does, it is probably going to be for a lot less money. Should there be an adjustment period, so that individual can get different training, education, or skills to get a different job so his family does not suffer? The Legislature has wisely answered "Yes." Remember in 1993, vocational rehabilitation was done away with.

In summary, the current work disability, or adjustment period, and the test the Legislature came up with in 1993, and the judicial interpretations of that test makes sense and are based on actual losses that can be figured based on actual numbers, not theoretical speculation. The incentive to the employer is real and benefits injured workers and should remain in place.

Testimony Before House Commerce & Labor Committee
February 12, 2004
Terri Roberts, R.N., chairperson
Kansas Coalition for Workplace Safety

Work Disability

Chairman Dahl and members of the committee, I am Terri Roberts, executive director of the Kansas State Nurses Association and chair of the Kansas Coalition for Workplace Safety. The Coalition is a group of more than 30 organizations representing nearly 500,000 working Kansans, including firefighters, nurses, teachers, senior citizens, businesses, labor unions, and other organizations. Thank you for this opportunity to discuss work disability under the Kansas Workers Compensation Act.

Under current law, injured workers in Kansas receive workers compensation benefits according to the severity and type of disability they sustain on the job. Work disability cases are those in which an employee sustains severe, permanent injuries on the job that are *not* covered by the schedule of injuries in the Kansas statute, such as injuries to the back, the hip or the neck. These are career-ending injuries, injuries that rob employees of their ability to perform the tasks they used to perform to earn the paycheck they used to earn. A laborer who used to make a good wage on the strength of his back who can no longer lift more than 25 pounds. A grocery store checker who used to stand behind a cash register all day who can no longer work on her feet after her hip was shattered. These are real people with real bills to pay and real mouths to feed who must now compete in the real world for a real job.

Although these injured workers suffered permanent, career-changing physical impairments, the disability payments they receive are shamefully low and short-lived. Disability payments serve as a kind of temporary supplemental pay to assist injured workers who earn less after their injury than they did before their injury. Under current law, the amount of disability an injured worker receives is based, in part, on how much the worker *actually* earned both before and after the injury. However, under the proposed amendment, disability benefits will no longer be based on what the injured worker *actually* earned post-injury but instead on what a vocational expert *thinks* an injured worker has the "capacity to earn" after the injury. Why propose such a drastic

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change in the law? Because if the employer's vocational expert can *hypothesize* that the injured worker is capable of earning more in the open labor market than he or she *actually* earned, then the amount of work disability benefits the employer or insurance company has to pay drops precipitously—or disappears altogether. Unfortunately for injured workers, a potential job opening is not the same as a job, and a "capacity to earn" will not keep the bill collectors at bay.

Those of you who have ever searched for a job in the so-called "open labor market" know how difficult it can be, even for the most qualified and able-bodied among us. We have to compete with other jobseekers for jobs available in both our geographical area and within our areas of expertise and ability. It does not require a great deal of imagination to envision the added difficulty of finding a new employer when you have a physical impairment that limits what you can do. That is, in part, why the 1993 reforms included an incentive for employers to retain their injured workers. Under current law, if an employer retains the injured worker at 90% or more of his or her pre-injury wage, the employee is not eligible for work disability benefits. Indeed, since 1993, many injured workers *have* been retained by their employers, and many employers have thereby avoided paying disability benefits.

Unfortunately, the proposed amendments strip away this incentive for employers to keep their injured workers. Under the proposed amendment, an employer can avoid disability payments if the vocational expert can show that the injured worker retains the "capacity to earn" 90% or more of his or her pre-injury wage. Once again, this amendment advocates using a theoretical "earning capacity" rather than actual earnings. There is absolutely no incentive for an employer to keep an injured employee under this amendment, and the injured worker will likely be disposed of like so much "damaged goods."

Once again the amendment goes one step further to ensure that injured workers are denied work disability benefits. Under the proposed amendment, if an injured worker is retained by the employer and is subsequently laid off—ostensibly for reasons that had nothing to do with the worker's injuries— then the employer does not have to pay work disability. Once again, the injured worker, whose work abilities have been forever changed by an on-the-job injury, is thrust out into the labor market to compete on a playing field made uneven by his work injuries.

The sad irony of the proposed amendments that rely so heavily on the opinions of vocational experts theorizing about an injured worker's "capacity to earn" is that they are, in many ways, much like the provisions the 1993 Legislature did away with. Back then they called it an "abilities test," and it did not result in workers returning to work but in employers arguing that they could, hypothetically, return to work. In reality, it failed. Let's not delude ourselves into thinking it can succeed today. Instead, let's turn our attentions to getting real compensation and real vocational rehab to injured workers so that they can earn real paychecks to support their very real families.

Thank you.

Kansas Coalition for Workplace Safety

Promoting Economic Security Through Workplace Safety for Kansas Workers and their Families.

Coalition Members:
- AARP Kansas
- Construction and General Laborers Local 1290 & 142
- Greater KC Building and Construction Trades Council
- Int Assoc of Fire Fighters, Local 64 and Local 83
- International Association of Machinist and Aerospace Workers, Dist. Lodge No. 70
- Kansas AFL-CIO
- Kansas Fire Service Alliance -- KS State Fire Fighters Assoc, KS State Fire Chiefs Assoc, KS State Prof Fire Chiefs Assoc
- Kansas Association of Public Employees
- Kansas National Education Association
- Kansas Staff Organization
- Kansas State Building and Construction Trades Council
- Kansas State Council of Fire Fighters
- KS State Nurses Assoc
- KS Trial Lawyers Assoc
- Roofers Local #20
- Southeast Building and Construction Trades Council
- Teamsters Local No. 696, Local No. 795 & Joint Council 56 KS, MO & NE
- Topeka - Lawrence Building and Construction Trades Council
- Tri-County Labor Council
- United Auto Workers Local No. 31
- United Steelworkers of America, District 11
- United Steelworkers Local 307
- Wichita Building and Construction Trades Council
- Wichita-Hutchinson Labor Federation of Central Kansas
- Thomas Outdoor Advertising, INC

Testimony Before House Commerce & Labor Committee

Pre-Existing Conditions

Terri Roberts, R.N., chairperson
Kansas Coalition for Workplace Safety
February 11, 2004

Chairman Dahl and members of the committee, I am Terri Roberts, executive director of the KANSAS STATE NURSES ASSOCIATION and chair of the KANSAS COALITION FOR WORKPLACE SAFETY. The Coalition is a group of more than 30 organizations representing nearly 500,000 working Kansans, including firefighters, nurses, teachers, senior citizens, businesses, labor unions, and other organizations. Thank you for this opportunity to discuss an important component of workers compensation insurance in Kansas: Preexisting conditions.

My colleague, Dennis Horner, will address the issue of preexisting condition in more detail. But I wanted speak briefly about the critical importance of understanding some of the language in the workers compensation law. In particular, I want to call the committee's attention to some of the word games being played by those who advocate changing the definition of "preexisting condition." Let me begin by quoting from material provided to the committee by Larry Karns last Friday, Feb. 6. I believe Mr. Karns raised some excellent points that go to the heart of our discussion on preexisting conditions. With regard to the term "preexisting condition," Mr. Karn's written testimony says:

> "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***....The reform is a ***surgical strike***, not a broad and excessive reform, and applies only to indemnity payments for pre-existing conditions." (emphasis added)

As with most areas of law, workers compensation has many parts, and it is difficult to reform singular sections of the law without affecting the statute as a whole. Let me assure you that changing the language used to define "pre-existing condition" is much more than a "surgical

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strike." If the Legislature adopts the definition of "preexisting condition" being proposed, it will ultimately affect every worker in Kansas who sustains a permanent injury on the job. To use Karns' metaphor, this so-called "language reform" is not a "surgical strike" but a carpet bombing, with lots of collateral damage in the form of injured workers and their families. That is because the new definition of "preexisting condition" being proposed is so broad that virtually any worker over a certain age who sustains a permanent injury on the job will have a preexisting condition. What this new proposal does is use the term "preexisting condition" to mean ***any*** condition—even conditions that have never been symptomatic, have never been diagnosed or have never interfered with your ability to work or carry out your daily activities of living. This new definition is intentionally confusing and is perhaps best illustrated by following graphic scenario:

> Joe, a 35-year-old male, has never had an injury to his arm or shoulder. He has never had any treatment and has no physical limitations of any kind. While at work, Joe's arm is cut off just below his shoulder by machinery.
>
> As a result of the new proposed definition of "preexisting condition," the insurance carrier will be able to take Joe's amputated limb, haul it to the emergency room, have it x-rayed, and prove that there is a degree of arthritis in the severed limb. The insurance carrier will then argue that the injured worker is not entitled to his 100% loss of the arm because his arm was imperfect due to the preexisting arthritis!
>
> What that means for Joe, whose ability to work has been tragically and permanently changed, is that he will not receive full compensation for his injury. Instead, his compensation will be reduced by whatever percentage of arthritis the insurance carrier's doctor determines existed before Joe's arm was amputated on the job—***even though the underlying arthritis—a normal part of the human aging process—did not contribute to the accident and had never affected Joe's ability to work.***

Clearly, and contrary to what proponents have said, this definition of "preexisting condition" was never intended by the 1993 Legislature. What the 1993 Legislature intended by allowing employers to receive an offset for an injured worker's preexisting condition was to prevent the injured worker from receiving compensation more than once for the *same* injury. In other words, it was to prevent the employee from "double-dipping." We oppose such "double-dipping," and under current workers compensation law, employers can —and do— receive an

offset when an injured worker has a preexisting impairment. What's more, under current law, employers are not asked to jump "higher hurdles" to prove a preexisting condition. Employers must use the same *AMA Guidelines* to prove a preexisting impairment that employees must use to prove they are entitled to a work disability.

We are not arguing semantics here. What the proponents of changing the definition of "preexisting condition" are asking for is a dramatic and material change in the law in order to reduce the already meager benefits offered to injured workers in Kansas. Please keep in mind that 94% of all Kansas workers are covered by the workers compensation system. There are lives and livelihoods at stake based on changing "mere words."

PREEXISTING IMPAIRMENTS /CONDITIONS - MISCONCEPTIONS AND APPLICATIONS

TESTIMONY BY THE KANSAS TRIAL LAWYERS ASSOCIATION
February 11, 2004

Presented by: Dennis L. Horner

Prior to 1993, repeat injuries to the same part of the body could result in repeat compensation to the injured worker. The 1993 changes to the Kansas Workers Compensation Act (K.S.A. 44-510 et. seq., specifically K.S.A. 44-501(c)) changed the application of the law to the end that employers are no longer responsible for pre-existing impairments.

Proponents of Senate Bill 181 have suggested the intent of the law in 1993 was to avoid employers being responsible for paying benefits for preexisting conditions. In carefully considering the proposed legislation, it is necessary to fully and completely understand how the law has been applied.

Before 1993, a worker could injure his/her knee, have a 10% impairment established and collect benefits based upon a 10% impairment. Two years later, the same employee could reinjure the same knee, have the same rating or perhaps a higher rating and recover for all the impairment which existed. This was permitted since the benefit weeks from the prior injury had expired. In theory, a worker could have collected over 100% on one knee for multiple injuries as long as the benefit period for the prior injury had expired. If there was an overlap between benefit periods, K.S.A. 44-510a provided for an offset to the extent benefit periods overlapped.

In 1993, K.S.A. 44-501(c) was amended to provide:

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

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Since 1993, all claims for compensation have been subject to the provisions of the Act as highlighted above. In all cases where proof of preexisting impairment is offered in accordance with the AMA Guides to the Evaluation of Permanent Impairment, awards for benefits have been appropriately reduced. (See Appendix A)

Proponents of SB 181 are now suggesting that the judges, Workers Compensation Appeals Board and appellate courts are not following the law. The unfounded suggestions are based upon assertions that the judges are not providing offsets to employees who have a preexisting condition as opposed to a preexisting impairment. Proponents are wishing to equate preexisting impairments with preexisting conditions. While the terms are used interchangably by proponents of SB 181, they are not the same and should not be considered the same.

First of all, it is imperative to understand basic principles of litigation.

The party bringing a claim has the burden of proof. In Kansas there are several statutes which provide a necessary threshold to establish entitlement to compensation.

I. K.S.A. 44-501 (a) provides:

... " In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

The burden of proof is defined in K.S.A. 44-508 (g) as:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

Injured workers have had the burden of proving their cases for many years. Burden of proof is not peculiar to workers compensation claims. Rather it is mandated in all legal proceedings and requires a party asserting a claim to prove it with evidence.

II. As a result of the changes in 1993, claimants are now burdened with an additional threshold to obtaining benefits. K.S.A. 44-510d and K.S.A. 44-510e were amended to require workers to prove their entitlement to benefits in accordance with the AMA Guides to the Evaluation of Permanent Impairment. Courts have held that failure to prove an impairment in accordance with the AMA Guides is

fatal to their claim. (See Appendix C)

III. K.S.A. 44-501(c) does not mention any particular threshold in establishing what impairment may have existed prior to a work related injury. However, the Courts have determined that the offset provisions of this statute are intended to offset impairments of the worker which must be established by the Guides. Since the Guides mandate the approach to determining impairment of function, the court has determined that the offset evidence must be offered in accordance with the same standards. In other words, an apples to apples comparison.

IV. The courts have long held that an aggravation of a preexisting condition is compensable. That has been the law in Kansas for many years and is an accepted premise nationwide. However, there is a difference between a preexisting condition and a preexisting impairment. This difference is clearly referenced in the case of *Hanson v. Logan USD 326 and EMC Insurance Company*, 28 Kan. App.2d 92, 11 P.3d 1184 (2000) In *Hanson*, the court clearly distinguishes between an impairment and a preexisting condition. Since all entitlement is based upon an impairment in accordance with the Guides, any setoff must be established in accordance with the same Guides.

In essence, the preexisting impairment is a preexisting condition. In contrast, a preexisting condition is not necessarily a preexisting impairment. Why is that so?

Example: Nellie Hardwork, a 53 year old assembly line worker at General Motors has worked without incident for 20 years. Up to today, Nellie has not missed work for any injuries nor has she been treated for any orthopedic problem. On February 11, 2004, Nellie has the misfortune to fall on grease left on the concrete floor, sustaining a hip fracture. During the initial phase of diagnosis, it is discovered that Nellie has osteoporosis in the area of the fracture.

Fact: The osteoporosis is a preexisting condition. However, the condition did not restrict or impact Nellie's work or activities of daily living. There is no medical evidence Nellie had prior treatment, findings, complaints, or impairment of function relative to her bone structures/ hips. Without prior complaints, treatment, medical restrictions or some loss of use, there is no basis under the Guides for assessing an impairment.

Accordingly, Nellie did not have a preexisting impairment since

neither her personal daily activities or work duties were ever impacted in any way.

Contrasting Example: Troy J. Moody sustained an injury to his low back on October 15, 1998. The evidence introduced by claimant established an impairment of 25% and a preexisting impairment of 4% for a net impairment from the 1998 accident of 21%.

Respondent offered evidence of a cumulative impairment of 19% with a preexisting impairment of 7% for a net impairment from the 1998 accident of 12%.

The administrative law judge referred claimant for an independent medical examination. The court appointed doctor concluded claimant had a cumulative impairment of 15% of which 5% preexisted for a net impairment of 10%.

The judge concluded the claimant suffered a 20 % impairment and had a preexisting impairment of 5% for a net impairment of 15%.

Here, the judge weighed all the evidence offered by both parties and the court ordered evaluator and gave an appropriate offset to the employer/carrier. (Troy J. Moody v. Farmers Coop Equity Company and Farmland Insurance Company, Docket No. 247,106)

The courts have reached similar conclusions in many cases. For a listing of cases in which the courts have granted offsets pursuant to K.S.A. 44-501(c), see Appendix A.

For an comparison of how benefits are reduced under current law, see Appendix B.

Many workers, especially those over the age of forty (40), will have x-ray changes in the event x-rays are taken. The changes may be asymptomatic. In other words, the worker may never have known there were changes. For workers who have reached the age of fifty (50), it highly likely that x-rays would reveal changes in many areas of the body. However, those changes do not mean the worker has had an "injury" or "accident". The presence of the changes merely means the body has some wear in that area. Changes in x-rays do not mean the worker had loss of use, medical treatment or loss of function.

Further, the worker's job and health history reflect the ability to perform all of his/her activities of daily living and work duties without complaint or medical treatment.

Proponents of SB 181 would have you believe that Nellie Hardwork, the example on page 3 or the fictional worker in the paragraph above should be denied compensation because of a preexisting condition. This proposal is a substantial departure from the law which has guided our system since its inception in the early 1900's. The proposal is very regressive and dangerous in that it reduces benefit to workers who may have some changes in their body of which they have no knowledge, nor have been restricted in the use of their body. This proposal is extremely repugnant to older workers who often have x-ray changes and have no history of medical problems.

What the proponents don't openly admit is that when the employer offers evidence of an impairment which predates the work related accident, the employer and carrier obtain a set off in accordance with the AMA Guides, the same "threshold" which the claim must meet to prove impairment under our law.(Appendix A)

When workers do not meet the burden of proof and do not prove their entitlement to benefits in accordance with the Guides, their claims are denied by the judges/Board. (See Appendix C)

Should the burden of proof vary between injured workers and employers? Or is it more equitable that both parties follow the same set of rules for proving the elements of their positions as suggested by the statutes cited above? It is suggested both employees and employers should use the same guidelines to establish entitlement to benefits or setoff of benefits.

At this point in time, participants in the workers compensation community have spent the last 11 years assessing, litigating and learning how the 1993 changes in our system are to be applied. It has been a long 11 years with significant litigation and expense to all parties involved. While there may be new approaches on some issues, we now know:

a. Claimant must prove his/her impairment in accordance with the AMA Guides.
b. Employers have the burden of proving their claim to an offset by the same Guides.
c. When the evidence is introduced in accordance with the Guides, the employer and carrier obtain an appropriate offset.

Further, it is important to note:

a. Passage of SB 181 would not have any significant impact on workers compensation costs.

b. Kansas has a favorable cost structure for workers compensation is one of the states with very low costs.

c. Any changes in the current law will cause increased litigation over a long period of time. The increased litigation will increase costs to both employers insurance carriers and workers.

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PREEXISTING IMPAIRMENTS /CONDITIONS - MISCONCEPTIONS AND APPLICATIONS

APPENDIX A

The following reported cases are evidence that judges and Board follow K.S.A. 44-501(c) which provides for a setoff of benefits. In the following cases, the employer/carrier offered evidence of preexisting impairment in accordance with the Guides.

Robert D. Leroy v. Ash Grove Cement Co., (Kansas Court of Appeals, Docket No. 88,748, Not designated for publication (April 2003)

Arthur Wagoner v. Exide Corporation and Zurich Insurance Company, Docket No. 251,226 (March 2002)

Leonard Coe v. McPherson Contractors, Inc. and Kansas Building Industry Workers Compensation Fund, Docket No. 231,325 (June 2000)

Michael D. Hitch v. The Boeing Company and Aetna, Docket No. 179,689 & 230,397 (February 2002)

Troy Moody v. Farmers Coop Equity Company and Farmland Insurance Co. Docket No. 247,106 (March 2001)

Salvador Robles v. National Beef Packing Co. and Wausau Insurance Co. Docket No. 242,197 (December 2001)

George Flowers v. City of Olathe and Kansas Eastern Regional Insurance Trust Docket No. 234,203 (Dec. 1999)

James C. Bauman v. Goodyear Tire & Rubber Co. and Travelers Insurance Co and the Kansas Workers Compensation Fund, Docket No. 199,815 & 199,816 (January 1999)

Donna Massoth v. Raytheon Aircraft Co., Docket No. 213,006 (April 1998)

Doris M. Reisigel v. Dillon Companies, Inc., Docket No. 201,044 (February 1998)

David Carver v. Missouri Gas Energy, Docket No. 195,270 (July 1997)

Clarence L. Horton v. Bob's Super Saver Country Mart and
Crum & Forster, Docket Nos. 220,167, 220,168 (April 1999)

Terry Boyer v. Binney & Smith, Inc. and Royal Insurance Co.
Docket No. 228,897 (May 2000)

Tina Wells v. USD 503 and Kansas Association of School Boards
Docket No. 264,213, (February 2003)

Marilyn Fuller v. Farmers Insurance Company and Liberty Mutual
Insurance Co., Docket No. 262,620 (April 2003)

James Banks, Jr. V. Magna Corporation and Topeka
Metal Specialties and Safeco Insurance Co. and Travelers
Docket No. 255,009 & 255,417 (November 2002)

Thomas A. Hoge v. Concrete Service Co. Inc. & Depositors
Insurance Co., Docket No. 251,937 (August 2002)

Debra Ann Phillips v. J.C. Penney, Inc., Docket Nos. 244,924, 244,925
& 251,351 (April 2002)

Carol S. Gethins v. Cedar Living Center and Travelers
Insurance Co. Docket No. 250,491 (December 2002)

Walter Samuel Hahn v. Midwest Drywall., Inc.
and Hartford Accident, Docket No. 258,223 (June 2003)

Pamela J. Houk v. Community Living Opportunity & CIGNA
Docket No. 189,952 (February 1999)

Stanley D. Converse v. ADIA Personnel Services and Pacific Employers
Insurance, Docket No. 184,630 (December 1996)

David A. Carver v. Missouri Gas Energy, Docket No. 195,270 (July 1997)

Leva Bohanan v. USD 260 and Kansas Association of School Boards
Docket No. 190,281 (November 1995)

Nestor Villalobos v. National Beef Packing Co. and Lumberman's
Underwriting Alliance, Docket No. 184,413 (April 1998)

PREEXISTING IMPAIRMENTS /CONDITIONS - MISCONCEPTIONS AND APPLICATIONS

APPENDIX B

Mathematical comparison of benefits when K.S.A. 44-501(c) is applied.

Assume John Doe injures his right knee while working for Acme Manufacturing. John has surgery and it is determined he has a current impairment in accordance with the AMA Guides of 20%. John admits having a prior injury to his right knee and it is established he had a preexisting impairment of 5%. We must also assume certain facts for comparison purposes.

Average weekly wage	$600.00
Temporary total benefits	10 weeks.

The benefit comparison is as follows:

Pre 1993		**Post 1993**	
200 weeks	Maximum benefit weeks for a leg	200 weeks	
		x 15%	Impairment after reduction for prior
		30	Weeks of benefits
$400	Benefit rate; 66.67% of Average Weekly Wage	x$400.00	
x 20%	Impairment		
80	weeks of benefits		
x 200	weeks		
$16,000.00	Award for permanency	**$12,000.00**	

In this fictional case, the post 1993 law would result in a reduction in benefits of $4000.00.

PREEXISTING IMPAIRMENTS /CONDITIONS - MISCONCEPTIONS AND APPLICATIONS

APPENDIX C

The following reported cases reflect a denial of benefits to the worker when the Workers Compensation Appeals Board determined claimant had failed to meet his/her burden of proof that he/she suffered a permanent aggravation of a preexisting condition.

Andrew E. Bradford v. Manhattan Mercury/Seaton Publishing and Cincinnati Insurance Co., Docket No. 210,583 (June 2000)

Jane Fuhr v. Dillon Companies, Inc. and Jane Fuhr v. Albertson's, Inc. Docket Nos. 233,475 & 248,793 (June 2000)

Saul Zapata v. IBP, Inc., Docket Nos. 168,211 & 177,505 (August 2000)

Fidel Esparza v. National Beef Packing Co. and Wausau Insurance Co. Docket No. 239,452 (September 2000)

Linda Everly v. Dillon Companies, Inc. Docket No. 233,739 (June 1999)

Justin King v. Acme Foundry, Inc., Docket No. 258,656 (May 2002)

Lori Walz v. APAC Customter Services and Travelers Indemnity Co. Docket No. 258,206 (May 2001)

Fernando Jimenez v. Prestige, Inc. and National Surety Corp. Docket No. 256,161 (March 2002)

Michael Finney v. Amazon.Com and Kemper Insurance Co., Docket No. 255,741 (April 2003)

Sonnie Johnson v. Acme Foundry, Inc., Docket No. 253,871 (July 2002)

Barbara A. Elkins v. Cowley County Community College and Kansas Association of School Boards, Docket No. 253,708 (March 2002)

Tyrone Tyner v. Southeastern Public Service and Insurance Company Of Pennsylvania, Docket No. 196,907 (February 1999)

Sarah L. Walker v. Vanguard Piping System and Hartford Accident & Indemnity Docket No. 261,336 (February 2003)