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 13, 2004 in Room 241-N of the Capitol.

All members were present except:
Representative Broderick Henderson- excused
Representative Stephanie Sharp- excused

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

Conferees appearing before the committee:

Others attending:
See Attached List.

The Chairman opened the meeting and stated that staff would be giving a briefing on the Second-Injury Fund as there was some confusion after listening to testimony yesterday.

Jerry Donaldson, Kansas Legislative Research, gave the history of the Workers Compensation Fund, Workers Compensation Fund Oversight Committee, and Kansas Statute No. 46-2401 (Attachments 1, 2 & 3)

Norm Furse, Revisor of Statutes briefed the committee on **Sub SB 181 - Workers compensation-pre-existing condition** (Attachment 4)

The Chairman stated that **HB 2479 - Employment of illegal aliens, penalties** was brought up yesterday. There were some concerns during the discussion and understand those concerns have been satisfied and asked if there was any interest in discussing again.

Representative Swenson moved and Representative Carlin seconded to adopt a balloon on page 1, line 22 add ",except that the term "illegal alien" shall not mean any person who currently has the legal right to remain in the United States and to be employed in the United States even though such person originally entered the United States in violation of the federal immigration and naturalization act or regulations issued thereunder and is not a citizen of the United States." Add "of this state" in lines 26 after "authority"and 31 after "commission", and on page 2 add "law of this" in line 2 after "a"in line 3 after "proceeding and line 5 after "a". The motion carried.

Representative Pauls moved and Representative Swenson seconded to add a new Sec. 3 "A person or entity is considered to have complied with a requirement of this subsection notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the federal requirements found in 8 USC Sec. 1324a." Add Sec. 4 "A person or entity that establishes that it has complied in good faith with respect to the hiring, recruiting, or referral for employment of an alien in the United States has established an affirmative defense." Sect. 3 becomes Sec. 5. On page 2, lines 11 and 12 strike "final order or stipulation" and replace with "not to exceed the federally prescribed civil penalty in 8 USC Sec. 132a." and renumber the following paragraphs. The motion carried.

There was further discussion and Representative Pauls moved and Representative Ruff seconded to strike all of Section 2 and renumber the following paragraphs.

Representative Pauls moved and Representative Lane seconded to move **HB 2479** out as amended. The motion carried.

The Chairman asked what the committee's pleasure was on **HB 2521 - State and municipal contracts;**

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE at 9:00 a.m. on February 13, 2004 in Room 241-N of the Capitol.

preference for Kansas domiciled bidders.

Representative Ruff moved and Representative Pauls seconded to amend and make (a) the first paragraph and in line 20 add ","before "or" and add "or services" before equipment and after "kind"add "but not including contracts for the construction, improvement, reconstruction or maintenance of roads, streets and bridges in the state or contracts with commercial building contractors for construction or repairs for state or municipal owned buildings," add (b) "As used in this section, a 'contractor domiciled in Kansas' includes a contractor who may be domiciled outside the state of Kansas but who employees in at least 50% of the employment positions covered by the contract individuals who are residents of Kansas." "Redesignate items (a) and (d) as items (1) to (4)." The motion carried.

Representative Novascone moved and Representative Humerickhouse seconded to strike in line 25 "but less than" and strike all of (d). The motion carried.

Representative Ruff moved and Representative Swenson seconded to move **HB 2521** out as amended. A Division was called and the "Nos" had it. The bill was defeated.

The meeting adjourned at 10:30 a.m. The next meeting will be February 16, 2004.

COMMERCE AND LABOR COMMITTEE

Date February 13, 2004

NAME	AGENCY
J.P. SMALL	BOMBARDIER LEARJET
Ron Seeber	Hein Law Firm
SCOTT SCHNEIDER	KS CHAMBER
ROY T. ARTMAN	KS BLOCK INDUSTRY WCF
Will Leikel	KS. AFL-CIO
Jane Sieve	Kearney & Assoc.
Dick Cook	KS Ins. Dept.
[illegible]	Dept of Ad[illegible]
RICHARD THUMS	KDHR WORKCOMP
Mike Brink	Ironworker B.A. Local No 10
GARY DAVENPORT	KS MOTOR CARRIERS ASSN
David Hanson	KS Insur Assns & PCI
Scott Heidner	KS Self Insurers Assoc.
DAVID OWEN	HOMELESS Come Home

History of the Workers Compensation Fund

Presentation to the Workers Compensation Fund Oversight Committee
March 10, 1994

Presented By
Murlene K. Priest
Division of Workers Compensation

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2-13-04
Atch #1

In November 1992, the Division of Legislative Post Audit completed a performance audit of the Workers Compensation Fund.

The two questions addressed in the report were:

1. Why have expenditures from the Workers Compensation Fund increased in recent years?

and,

2. Is the Workers Compensation Fund being administered efficiently?

Today, I am going to review portions of the report which address the following issues:

History of the Workers Compensation Fund in Kansas
Cost Trends for the Fund
Case Trends for the Fund
and, Types of Employers that Implead the Fund

I will also present additional information on the relationship between accidents and impleadings in Kansas, as well as the employers and insurance companies involved in Fund claims.

Unless otherwise noted, most of the discussion today will be for the Fund before the 1993 statutory changes.

First an historical outline of the Fund. The Fund was originally established in 1945 and was called the Second-Injury Fund. At that time the Fund had a very narrow purpose which was to encourage employers to hire veterans who were disabled during war-time service, or others who were disabled as a result of a previous industrial accident.

This law covered employers who hired people who had lost a body part--like a leg, arm, hand, foot, eye--and who would be at greater risk of being permanently disabled as a result of a work-related accident. In the event these individuals did suffer a work-related accident, and did become totally and permanently disabled, the Fund would pay the workers compensation benefits. Under these narrow definitions, few claims were filed against the Fund from 1945 to 1960.

Under this original design, the Fund was a form of public policy to reduce the risk associated with hiring a handicapped worker. If the Fund had not been established,

handicapped individuals may not have been employed, or their employer would have born the entire cost of the workers disabling injury.

In 1961 the Legislature expanded the types of individual's eligible for coverage under the Fund. An individual's handicap no longer had to be a missing body part, and the work-related injury no longer had to result in permanent, total disability. The Fund was now responsible for a list of 16 handicaps (on page 4 of the Post Audit report):

Epilepsy
Diabetes
Cardiac Disease
Arthritis
Amputated foot, leg, arm, or hand
Loss of sight in one or both eyes, or partial loss of vision greater than 75 percent in both eyes
Disability resulting from polio
Cerebral palsy
Multiple sclerosis
Parkinson's disease
Cerebral vascular accident or stroke
Tuberculosis
Silicosis or asbestosis
Psychoneurotic or mental disease or disorder
Any physical deformity or abnormality

The last category--any physical deformity or abnormality--was expanded to include back injuries and related conditions by a judicial decision in 1970. As part of the 1961 changes, the work-related injury could have been caused by the handicap, or the handicap could make the injury worse, in either case the individual could qualify for benefits from the Fund. In addition, the work-related injury and resulting disability could be partial or temporary and still receive Fund benefits.

The last major round of changes affecting Second-Injury Fund coverage took place in 1974. A 17th category was added to the possible pre-existing conditions the Fund could be liable for. The 17th category was "Any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or retaining employment." The breadth of this 17th category covers any chronic physical condition.

In addition to expanding the pre-existing conditions, the Fund also became liable for claims for workers compensation benefits when the employer was insolvent, the employer had no insurance, or the employer could not be located, and reimbursing workers compensation insurance companies when the company made claims payments that they were later determined not liable for.

At this same time the Second Injury Fund was renamed the Workers Compensation Fund and administration was transferred from the Division of Workers Compensation to the Kansas Insurance Department. From 1945 to 1974, the Fund was financed by appropriations through the State General Fund. In 1974, workers compensation insurance companies started paying annual assessments to finance operations of the Fund.

Between 1974 and 1992, some benefits were added and benefit maximums increased, however, operation and coverage by the Fund remained essentially unchanged.

In 1993, the Legislature removed the pre-existing or "second-injury" provision from the Workers Compensation Fund. However, it leaves the Fund liable for workers compensation benefits when the employer is insolvent, the employer has no insurance, or the employer can not be located, and reimbursing workers compensation insurance companies when the company makes claims payments that they are later determined not liable for. It is too soon to assess what impact this change will have on the Fund. However, the Fund may still have several years in which it must pay claims resulting from second-injury cases.

A workers compensation claim paid by the Fund is essentially the same as any other claim for workers compensation benefits. The only difference is who will ultimately pay the claim. Most functions of the workers compensation system in Kansas are handled by the Division of Workers Compensation in the Department of Human Resources. The Division is responsible for receiving accident reports, holding hearings, and administrative law judges within the Division are responsible for determining awards. (The process outlined on page 6 of the audit report reflects the process as it existed before the 1993 legislative changes.)

The Workers Compensation Fund is brought into a claim by one of the parties to the claim--the injured worker, employer, or insurance company--when one of the parties allege the Fund is responsible for all or part of the claim. Also, the Fund may be brought into the claim at any time. Based on evidence submitted during hearings, the administrative law judge must then decide if the Fund is or is not responsible for any part of the claim, then must determine what portion of the claim should be paid by the Fund. Attorneys, under contract to the Fund, are responsible for defending the Fund during this hearing process.

In the past the State General Fund contributed a maximum of $4 million into the Fund, but the majority of its financing is from insurance company assessments. Since 1974 insurance companies, group-funded pools, and self-insured plans have been assessed at a percentage of the total workers compensation claims they paid in the previous year. Starting in 1982, the Legislature appropriated a maximum of $4 million annually. In fiscal year 1992, this State appropriation was treated like an operating loan which had to be repaid during the second quarter of the fiscal year. The Fund is now largely supported by assessments and no longer receives any State financing. The current funding mechanism has spread the costs associated with the workers compensation Fund to all workers compensation insurers in Kansas.

From the Post Audit report page 7, for 1983 to 1992 expenditures from the Fund increased from $8 million to more than $32.5 million. The increase from 1992 to 1993 was less than $600,000--the smallest increase in the last 11 years. The expenditures from the Fund go to pay compensation, medical care, attorney's fees, and related administrative expenditures. Compensation and medical care are the two largest expenditure categories--accounting for about 86 percent of the total expenditures. The chart on page 7 provides a breakdown of the expenses in 1983 and 1992. (Exhibit 1 -- copy of chart on page 7 of the report.) The distribution of costs between 1992 and 1993 is relatively unchanged. Between 1992 and 1993, expenditures from the Fund increased 1.8 percent--this is the smallest increase in expenditures during the last 10 years. (There have been a couple of years that had small decreases in expenditures, however, they were followed by larger than expected increases in the following year.) We have provided an update which includes the fiscal year information in the report's Appendix A as well as information for 1993. (Exhibit 2 -- included in the reports distributed at the March 10th meeting.)

In 1983, 80 percent of the Fund's expenditures went to disability compensation, 7 percent to medical costs, and 13 percent to attorney fees. In 1993, 64 percent of the Fund's expenditures went to Disability compensation, 22 percent to medical, 12 percent to attorneys, and the remainder to other operating expenses. (Exhibits 3 and 4. Exhibit 3 is a copy of information presented in the Post Audit report, page 14. Exhibit 4 is the same information for 1993.)

The Legislative Post Audit Report concluded that expenditures have increased primarily because of the cumulative effect of large increases in the number of claims against the Fund and the carryover of older claims from year to year. As well, Kansas has one of the most liberal second-injury funds of any of the states the Division contacted. Even though the laws have changed, the Fund will be dealing with conditions that are essentially the same for the next one to two years because many times, the Fund is not brought into a workers compensation claim for one to two years. Claims that developed in 1992 and 1993 are now being filed against the Fund.

New claims against the Fund have increased over 200 percent from 1983 to 1992 and increased an additional six percent between 1992 and 1993

Increases have been caused by:

1. An increase in the number of industrial accidents during the decade.
2. The 1974 legislative enactment has allowed anyone with a chronic condition who has a work-related accident that is either caused by the condition or made worse by the condition to be eligible for benefits from the Fund. The 17th category with its broad wording has created an open doorway for all types of physical and mental conditions.
3. Judicial decisions have negated some provisions of the law, as well as expanded other provisions to allow people easier access to or greater benefits from the Fund, and workers compensation in general.
4. Much of the literature the Division reviewed during the audit indicated the economic conditions of the last several years have also increased the number of workers compensation claims, as well as encouraged employers and insurance companies to try to control rising claim and premium costs by shifting claims to special use funds like the Workers Compensation Fund.
5. Several officials interviewed during the audit indicated the system and the administrative law judges were too claimant oriented. In their opinion, the judges were granting benefits when none were due, or allowing claimants to receive greater benefits than they were eligible for.
6. There are no deterrents to fraud in the Kansas workers compensation system.

These last two items have been at least partially remedied by the recent changes made to Kansas Workers Compensation law, however, it is too soon to assess the overall impact of the changes on costs to the workers compensation system.

In the audit report, page 10, you can see the increase in the number of new claims entering the Fund, as well as the number of claims that stay with the Fund from year-to-year. (Exhibit 5 -- provides 1993 data similar to that presented in the report.) The black portion of each of these bars represents claims which are continuing to receive payments or have not been resolved. Once the Fund is liable for a claim, the claim will stay active for the life of the claimant. The Fund may be held liable for monthly payments and future medical bills.

Based on Division of Workers Compensation records, between 1987 and February 1994, there were 507,600 accidents reported to the Division. (Exhibit 6 -- data on accidents, docketed cases, and Fund cases for 1987 through February 1994.) These accidents resulted in 52,800 litigated cases. Of the 52,800 litigated cases, 8,160 involved the Fund. As a percentage of accidents, about two percent of all accidents during the time period resulted in claims against the Fund. This is not a significant percentage. However, about 15 to 20 percent of the litigated cases will result in cases against the Fund. For 1987 through 1991, there were steady increases in the percentage of accidents leading to litigation and the involvement of the Fund in the litigated cases. This trend will most likely continue for the 1992 and 1993 accidents. (In many instances, the Fund will not become involved in a case until close to the end of the claim and a typical claim may take as long as 18 months to be resolved.)

The majority of claims filed against the Fund are for second-injuries. Second-injury claims made up more than 95 percent of all Fund cases for 1987 though 1993. Page 37 of the audit report shows types of claims submitted to the Fund. (Exhibit 7 -- 1993 information about types of claims. In addition, this table was inserted in the reports distributed at the March 10th meeting.)

During the post audit study, the staff did a study of Fund cases closed in 1989 and 1992. I did not attempt to replicate the analysis Legislative Post Audit completed during their audit, however, the highlights are:

two-thirds of the claims closed in 1992 were in manufacturing, services, and retail trade and involved companies like Boeing, Excel, Gott, and the State of Kansas. The top 25 employers impleading the Fund for 1987 through 1991 are shown in exhibit eight. (Exhibit 8 -- list of top 25 employers impleading the Fund for 1987 through 1991.)

multiple injuries and back injuries were by far the most common in the Post Audit Analysis. Other common injuries included upper extremities and knees. (Exhibit 9 and 10 -- copy of Appendix C from the audit report.)

half the claims closed in 1992 were for lifting objects, falling on the same level, or no explanation

Medical costs and compensation costs have increased dramatically over the past decade. The table on page 13 of the report shows a breakdown of average costs per-active claim. This cost breakdown is remarkably unchanged for 1993.

1. Medical costs have had the largest increase and the largest impact on cost-per-claim.
2. Compensation is the largest part of expenditures per claim, but has increased only 8 percent over the last decade. In fact, it is a smaller part of an average claim in 1992 than it was in 1983.
3. Again, judicial decisions have allowed higher benefits in some specific types of cases.

Kansas has the most liberal second-injury fund of any of the states we contacted. During the Legislative Post Audit Study, Division personnel contacted officials in Arizona, Missouri, Nebraska, Ohio, Oklahoma, and South Dakota. They found:

1. It is easier to file a claim against the second injury fund in Kansas than in some other states.
2. It is easier to qualify for benefits from the Fund in Kansas than in some other states because of the 17th category that is essentially a "catch-all."
3. Benefits tend to be more liberal in Kansas because many states limit the time period for receiving benefits or require the disability to be of a specific degree.

Again, many of these deficiencies have been eliminated because of the 1993 legislation; however it will be about two years before we see a definite impact on the number and cost of claims filed against the Fund.

These trends in expenditures will likely continue for at least a few years into the future. In early fiscal year 1993, Fund officials estimated they would spend $46.2 million by the end of the fiscal year, and might spend as much as $83 million in fiscal year 1997 if the Fund was left to operate as it was. So far, the $46.2 million projection has been wrong. The Fund spent $33.1 million in fiscal year 1993 and at the current rate may spend about $35 million in this fiscal year - or about a four percent increase.

During the past year the Division of Workers Compensation has taken steps to improve its data collection procedures and develop concrete data base analysis capabilities within the Division of Workers Compensation. The Second-injury fund has not changed much of its data collection techniques and is still not in a position to tell you what types of injuries or industries are having the biggest impact on their costs; however, the Division and the Fund are taking steps to share information to better assess costs to the Fund.

There has been much discussion about using staff attorneys to work all Fund cases. In 1987, the Division of Post Audit recommended that much of the legal work performed on behalf of the State should be performed by staff attorneys rather than contracted. The Insurance Department has routinely reviewed this question and found that it would be a costly move. The Department would need to have staff attorneys available in all regions of the State, as well as provide ancillary office staff to assist the attorneys. The last cost estimate performed by the Department indicated it would cost more to hire staff attorneys to defend the Fund than to contract with outside attorneys.

We cannot say it is necessarily bad that expenditures from the Fund have increased so dramatically over the years. From its origination through 1993, the Fund served as an incentive for employers to hire handicapped workers by relieving the employer of the cost of some handicapped workers on-the-job injuries. As it operated through 1993, insurance companies, self-funded and group-funded pools paid an annual assessment into the Fund, and in turn can draw from the Fund when paying claims for a handicapped worker. Some employers and insurance companies are able to shift a number of claims to the Fund while others may not shift as many claims. Both the employer and insurance company can benefit from sending claims to the Fund since claims paid by the Fund do not count toward an employers' workers compensation premium nor does it count towards the claims payments for the insurers annual assessment.

Through 1993, the Fund had very liberal provisions, but limiting the Fund or even doing away with it would not save State General Fund money since the Fund does not receive State appropriations. If the Fund did not pay these claims, they would be paid by the insurance companies or the employers themselves. The Fund is simply another checkbook to pay the costs of workers compensation as a whole and any real costs savings will have to develop in general workers compensation through reforms of workers compensation law, increased workplace safety, and tighter control of frivolous

and fraudulent claims. Many of these cost saving measures have been built into the current law. It is just a matter of time to determine whether the changes have the desired effect.

WORKERS COMPENSATION FUND
OVERSIGHT COMMITTEE

COMMITTEE MEETINGS

During 1994, the Workers Compensation Fund Oversight Committee (WCFOC) held a series of one-day meetings in Topeka in February, March, April, May, August, October, and November.

Minutes and material provided to the Committee are available for inspection in the office of the Division of Legislative Administrative Services.

BACKGROUND

The WCFOC was created as a result of the 1993 legislation that enacted major changes in the Workers Compensation Act and can be found at K.S.A. 46-2401. The 11-member Committee is charged to make an annual report by September 1 of each year to the Legislative Coordinating Council (LCC). Such report shall contain legislative recommendations about whether to advise the continuation of the termination of the Workers Compensation Fund or the reinstatement of the Fund, an analysis of the federal Americans With Disabilities Act (ADA) and its effect on the Fund, and recommendations on ways to reduce claim and operations costs of the Fund (if reinstated). In addition, the Committee will have legislation drafted, if needed, to implement its recommendations.

COMMITTEE ACTIVITIES

The WCFOC held the first three meetings during the 1994 Legislative Session. The history of the Fund was explored through an examination of the Post Audit report entitled *History of the Workers Compensation Fund*. Another Post Audit report, entitled *Examining Increases in Expenditures from the State Workers Compensation Fund*, was presented to the WCFOC. At the conclusion of the meeting in March, the WCFOC voted to extend the phase-out of the Fund from the original date of July 1, 1994 (as drafted in the 1993 legislation) to April 1, 1995. As a result, 1994 S.B. 830 was drafted with the date change. During the legislative process, S.B. 830 was further amended and then ultimately vetoed by the Governor which meant the beginning of the phase-out of the Fund became effective on July 1, 1994.

During the course of hearings the WCFOC heard from an expert in the area of ADA and its impact on second injury funds, a commonly used descriptive name for the Workers Compensation Fund in Kansas and other states. The expert concluded that ADA and second injury funds serve separate, but similar purposes with each retaining uniqueness in their operation. According to this expert, the full certainty of the impact of ADA lies in the future and the certainty of the interrelationship with second injury funds remains unclear. The official stated that most states have a second or subsequent injury type fund but data is lacking that linked the impact of ADA on these funds. Other factors such as tax incentives may be an incentive in hiring disabled workers.

Minnesota officials presented material to the WCFOC regarding their experience in doing away with their second injury fund. According to the Minnesota officials, the repeal of the Minnesota Fund in 1992, due in part to the passage of ADA, seems to be working well in their state. Minnesota, it was revealed, was vastly different from Kansas, especially in the elaborate bureaucratic mechanism that controlled the operation of their second injury fund. Another workers compensation expert from the State of Maine provided information to the WCFOC about the recent trend of some states to eliminate the second injury fund. In his remarks, the expert reemphasized the unknown factor concerning the full impact of ADA. The Maine official concluded that Kansas, based on the information he had, probably has little reason to retain the Fund.

The Committee also heard from various individuals, including Kansas attorneys who work in the Workers Compensation area, as well as representatives from the Kansas Chamber of Commerce and Industry, Wichita Independent Business Association, Stryker Company, Independent Insurance Agents of Kansas, American Insurance Association, Whelan's, Kansas AFL-CIO, Beechcraft, an orthopedic surgeon, and the Kansas Association of School Boards regarding the advisability of renewing the Fund. Recommendations covered a spectrum of suggestions including the following:

1. No position yet.

2. Do not reinstate the Fund. The reasons included such things as there is no need for the Fund since small businesses do not benefit from the Fund.

3. Do reinstate the Fund. The reasons included such things as small businesses do benefit from the Fund and public policy reasons.

4. Reinstate the Fund with modification of the administration of the Fund.

5. If the Fund is reinstated, tighten up on the availability of the Fund.

6. If reinstatement of the Fund is not possible, the costs to schools will increase.

Other suggestions offered to the WCFOC, if the Fund were continued, included recommendations for an enhanced educational effort to alert more small businesses as to the availability of the Fund; to require a Form 88 type document for all compensable injuries; to eliminate category 17 regarding the application of the Workers Compensation Act; and to institute some form of experience rating for small businesses.

A preliminary report was sent to the LCC on September 1, 1994. In the report, the Committee determined to explore dual recommendations which are addressed in the final report. The preparation of these dual options involve exploring:

1. a continued phase-out of the Workers Compensation Fund, which began on July 1, 1994, with recommendations as to how to best accomplish this purpose; and

2. a recommendation to reinstate the Workers Compensation Fund with further suggestions on how to institute changes aimed at "reducing claim and operational costs" of the Fund.

Investigative efforts of the latter option can include a look at the possibility of using in-house agency counsel, instead of outside counsel to defend the Fund. Subsequently, information was presented to the WCFOC regarding the significant cost of hiring in-house counsel to defend the Fund, during the phase out of the Fund. Further, discussion of this topic can be found in the section on Conclusions and Recommendations.

The Americans With Disabilities Act and the Kansas Act Against Discrimination

Title I of ADA and the Kansas Act Against Discrimination (KAAD) share many similarities, as well as distinctions. Both acts cover other issues beyond the scope of this review. For example, KAAD affords protection in the areas of public housing and accommodations as well as to persons on the basis of familial status. KAAD is administered by the Kansas Human Rights Commission, whereas, ADA is administered by the federal Equal Employment Opportunity Commission (EEOC). Coverage of ADA affects employers with 15 or more employers since July 26, 1994. Originally, ADA applied to employers with 25 or more employees.

ADA is civil rights legislation that, in the area of employment is geared toward counteracting discriminatory employment practices, including hiring, toward individuals with disabilities. Other federal acts which preceded ADA include provisions of the 1973 Rehabilitation Act and Title VI of the 1964 Civil Rights Act as well as Title IX of the Education Amendments of 1972.

Specifically, ADA makes it unlawful to discriminate in all employment practices such as: recruitment, hiring, promotion, training, layoff, pay, firing, job assignments, leave, benefit, and all other employment related activities.

KAAD covers employers with four or more employees. Regarding employment issues, KAAD makes it illegal for employers and others to discriminate against persons with disabilities. Examples of specific prohibited acts include:

1. classifying a job applicant or employee in a way that adversely affects the opportunities or status of the applicant or employee because of the disability;

2. participating in a contract or other arrangement providing fringe benefits or in an organization providing training and apprenticeship programs that have the effect of discriminating against a person with a disability;

3. utilizing standards criteria, or methods of administration that have the effect of discriminating on the basis of disability; and

4. refusing to make reasonable accommodations for qualified persons with a known physical or mental disability, unless the employer can demonstrate that the accommodation would impose an undue hardship.

Reasonable accommodation is defined as making existing facilities used by employees readily accessible to and usable by individuals with disabilities; job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modification of equipment or devices;

appropriate adjustment or modifications of examinations, training materials, or policies; provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

ADA and KAAD both provide for restitution of lost wages, benefits, etc., when discrimination is proven. Since the passage of the 1991 amendments, ADA has provided for damage awards of up to $2,000 for pain, suffering, and humiliation, as well as punitive damages. KAAD has no provision for punitive damages. In addition, attorney fees under ADA are awarded to the prevailing party but not, for these purposes, under KAAD. Kansas Administrative Rules (K.A.R.) and Regulations in this area are basically the same as adopted by the EEOC. The pertinent K.A.R., among other things, provides for clarification of terminology, such as "disability," "under hardship," and the like.

CONCLUSIONS AND RECOMMENDATIONS

The WCFOC rejected the concept of recommending a bill draft aimed at clarifying the phase out of the Workers Compensation Fund's second injury liability. The WCFOC concluded that such legislation would not be necessary since the WCFOC believes the 1993 legislation (S.B. 307) clearly dictated the Workers Compensation Fund's liability for all injuries to handicapped workers no longer exists from and after July 1, 1994. The WCFOC further concludes that any additional statutory language to clarify the Act at this point in time could give the erroneous impression that an employer's right to receive a Workers Compensation Fund reimbursement was not extinguished in certain cases for an injury occurring on and after July 1, 1994.

In addition, the WCFOC concluded that there is insufficient data to enable the WCFOC to determine whether the original intent of the Fund (to hire disabled workers) is still being fostered. As a result, the WCFOC concludes that it cannot recommend a reinstatement of the Fund.

Although the Fund will continue to cover those cases already in the system, the WCFOC concluded, based on preliminary actuarial results, that the cost of hiring in-house counsel to defend the Fund in these instances would be cost prohibitive. As the Fund continues in operation during the phase-out period, it will remain funded as it is currently. Additionally, although significant cost amounts will be involved throughout the phase-out period, for a number of years, the WCFOC will continue to monitor the Fund during this period of time. At future meetings the WCFOC will focus on other components, such as insolvent employers, of the Fund. Throughout the process there will be a need for counsel to defend the Fund albeit on a diminishing basis as the Fund winds down. Consequently, the WCFOC concludes there is no need for in-house counsel.

46-2401

Chapter 46.--LEGISLATURE
Article 24.--WORKERS COMPENSATION FUNDOVERSIGHT COMMITTEE

46-2401. Workers compensation fund oversight committee; composition; chairperson and vice-chairperson; duties; annual report; actuarial services; staff assistance; meetings; expense allowances. (a) There is hereby created the workers compensation fund oversight committee to consist of eleven members as follows: (1) One member shall be the commissioner of insurance or the commissioner's designee, (2) one member shall be appointed by the president of the senate, (3) one member shall be appointed by the minority leader of the senate, (4) one member shall be appointed by the speaker of the house of representatives, (5) one member shall be appointed by the minority leader of the house of representatives, (6) two members shall be persons appointed by the legislative coordinating council, (7) three members shall be persons appointed by the governor, and (8) one member shall be the director of workers compensation or the director's designee. The four members appointed by the president and minority leader of the senate and the speaker and minority leader of the house of representatives shall be members of the legislature. The two members appointed by the legislative coordinating council shall be appointed in accordance with the following: One member shall represent employers having 25 or more employees and one member shall represent employers having 24 or less employees. The three members appointed by the governor shall be appointed in accordance with the following: One member shall represent employers having 25 or more employees, one member shall represent employers having 24 or less employees and one member shall be appointed from the public at large. None of the five members appointed by the legislative coordinating council and the governor shall be members of the legislature. Each member serving on the workers compensation fund oversight committee shall serve at the pleasure of the officer or council that appointed the member.

(b) The legislative coordinating council shall designate a chairperson and a vice-chairperson of the workers compensation fund oversight committee from among the members thereof. The committee shall meet upon the call of the chairperson. The committee shall make an annual report to the legislative coordinating council on or before September 1 of each year and shall perform such additional duties as the legislative coordinating council shall direct. The report to the legislative coordinating council shall include recommendations to the legislature on the advisability of continuation or termination of the workers compensation fund or any provisions of the workers compensation act relating thereto, an analysis of the federal Americans with disabilities act and its effect on the workers compensation fund, recommendations on ways to reduce claim and operational costs of the workers compensation fund, and draft legislation which would implement recommendations of the committee.

(c) The commissioner of insurance, or the commissioner's designee, shall provide any consulting actuarial firm contracting with the legislative coordinating council with such information or materials pertaining to the workers compensation fund deemed necessary by the actuarial firm for performing the requirements of any actuarial reviews for the workers compensation fund oversight committee notwithstanding any confidentiality prohibition, restriction or limitation imposed on such information or materials by any other law. The consulting actuarial firm and all employees and former employees thereof shall be subject to the same duty of confidentiality imposed by law on other persons or state agencies with regard to information and materials so provided and shall be subject to any civil or criminal penalties imposed by law for violations of such duty of confidentiality. Any reports of the consulting actuarial firm shall be made in a manner in which will not reveal directly or indirectly the name of any persons or entities or individual reserve information involved in claims against the workers compensation fund. Information provided to the actuary shall not be subject to discovery, subpoena or other means of legal compulsion in any civil proceedings and shall be returned by the actuary to the commissioner of insurance.

(d) The staff of the legislative research department, the office of the revisor of statutes and the division of legislative administrative services shall provide such assistance as may be requested by the workers compensation fund oversight committee and to the extent authorized by the legislative coordinating council.

(e) Members of the workers compensation fund oversight committee attending meetings of the committee, or attending a subcommittee meeting thereof authorized by the committee, shall be paid compensation, travel expenses and subsistence expenses or allowances as provided in K.S.A. 75-3212 and amendments thereto.

History: L. 1993, ch. 286, § 21; July 1.

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MEMORANDUM

TO: House Committee on Commerce and Labor

FROM: Norm Furse, Revisor of Statutes

DATE: February 13, 2004

RE: Substitute for SB No. 181

Substitute for SENATE BILL NO. 181

I. Section 1, Subsection (c).

A. Current law. Subsection (c) in current law reads as follows:

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

B. Proposed change. Sub for SB No. 181 would change this language to read as follows:

"(c) The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased functional impairment or disability. A prior impairment rating or permanent restrictions are not necessary to prove preexisting [symptomatic] functional impairment or disability. The trier of fact shall consider all medical testimony on the issue of preexisting impairment or disability. Any award of compensation shall be ~~reduced~~ determined by showing, through medical evidence, the amount of functional impairment ~~determined to be preexisting~~ or disability caused by work activity for the employer from whom the employee is seeking compensation.

C. Supplemental note. The supplemental note to this bill on preexisting conditions reads as follows:

"Under current law, an employee is not entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. The bill would

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expand the exception to say that an employee is not entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased functional impairment or disability. The bill also would clarify that a prior impairment rating or permanent restrictions are not necessary to provide preexisting functional impairment or disability. Instead, under the bill the administrative law judge would be directed to consider all medical testimony on the issue of preexisting impairment or disability. The bill provides that any compensation would be determined by showing, through medical evidence, the amount of functional impairment or disability caused by the work activity at issue."

II. Section 2. Subsection (a).

A. New language added. The new language in this section is added in addition to the current law.

B. Proposed change. The new language reads as follows: "An employee shall not be entitled to receive general disability compensation in excess of the percentage of functional impairment as long as the employee was not under work restrictions at the time of separation from employment. If due to the work-related injury the employee is not 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 employee shall be entitled to permanent partial general disability compensation in excess of the percentage of functional impairment."

C. Supplemental note. The supplemental note describes this separation from employment subsequent to work-related injury language as follows: "Under the bill, if an employee is not under work restrictions at the time of separation from employment, the employee would not be entitled to receive general disability compensation in excess of the percentage of functional impairment. However, if due to the work-related injury the employee is not engaging in any work for wages equal to 90 percent or more of the average gross weekly wage for wages that the employee was earning at the time of the injury, the employee would be entitled to permanent partial general disability compensation in excess of the percentage of functional impairment."