Approved: April 1, 2004
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 a.m. on February 17, 2004 in Room 241-N of the Capitol.

All members were present.

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

Conferees appearing before the committee: John Ostrowski, Kansas AFL-CIO
David Wilson, AARP
Kent W. Dederick, International Association of Firefighters
Timothy A. Short, Kansas Trial Lawyers Association
Ami Hyten, Topeka Independent Living Resource Center Inc

Others attending:
See Attached List.

The Chairman opened the hearing on **Sub-SB 181 - Workers Compensation: pre-existing conditions** and stated the hearing today would be exclusively on the first proposed Senate change to existing Kansas workers compensation law found on the first page of the bill.

John Ostrowski, Kansas AFL-CIO, an opponent to **SUB-SB 181** as it relates to pre-existing conditions, stated it was clear that the concerns of the proponents revolved exclusively around the now famous Hanson decision. In summary in Judge Moore's testimony on February 10, 2004, he stated "the Hanson decision has been frequently misread and misinterpreted."

KCCI believes that every injured Kansas worker should receive the full measure of compensation for the effects caused by a workplace injury, even where the injury only aggravates a pre-existing condition. This is an important concept. KCCI was indicating its willingness to pay for "aggravations, intensifications, or accelerations" of underlying conditions. The "full measure of compensation for the effect" of the injury is the worker's present inability to work versus his ability to work pre-injury.

In 1993, employers told the legislature that they would individually be responsible for the "full measure of compensation for the effects caused by workplace injury, even where the injury only aggravates a pre-existing condition." In exchange, they were to receive an offset for pre-existing functional impairment, and the Fund was to be abolished. If there is current dissatisfaction with that choice, then the Legislature should follow the recommendation of the Advisory Council Subcommittee and reestablish the Fund. Some employers/insurance carriers agree with this position, others apparently do not. The point is that the solution to the problem should not be the lowering of benefits (Attachment 1).

David Wilson, AARP Kansas Executive Council, testified as an opponent to **Sub SB 181,** stating more than 33 million men and women age 50 and older are in the labor force. This number will rise sharply as the workforce grows older. AARP strongly opposes pre-existing conditions. Such a change would have a seriously harmful impact on older workers in particular, but workers of any age could find their financial/legal remedies reduced under the proposed definition of pre-existing conditions (Attachment 2).

Kent W. Dederick, International Association of Firefighters, testified in opposition to the pre-existing conditions in **Sub SB 181**. Pre-existing conditions seem to be the most controversial and least understood issue relating to the workers compensation statutes today. Mr. Dederick asked if an employee should expect to lose workers compensation benefits because of arthritis and a degenerate joint disorder that x-rays and MRI's have shown are due to injuries that he had received throughout his working years? Or should the employer be willing to accept the responsibility for the accumulation of injuries that have occurred during his career (Attachment 3)?

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE at 9:00 a.m. on February 17, 2004 in Room 241-N of the Capitol.

Timothy A. Short, Kansas Trial Lawyers Association, testified in opposition to pre-existing conditions in **Sub SB 181,** stating prior to the 1993 changes in the Kansas Workers Compensation Act, a worker who suffered an on-the-job injury was entitled to be compensated for his/her entire injury, even if a prior injury to the same part of the body or a pre-existing condition contributed to the new injury or resulting disability. If the injured worker was still receiving compensation from an earlier workers compensation claim for an injury to the same part of the body, the employer received a dollar for dollar credit for any weeks when compensation paid for the prior claim overlapped weeks when compensation was due for the new injury.

The injured worker has the burden of proving his/her overall functional impairment resulting from an on-the-job injury, and the employer has the burden of proving any pre-existing functional impairment. If the worker fails to present evidence showing the percentage of his/her overall impairment using the American Medical Association's (AMA) Guides, he/she is not awarded any compensation, even though the worker has permanent disability. Conversely, if the employer fails to present evidence showing the percentage of the worker's pre-existing impairment using the AMA Guides, no deduction is made from the overall impairment rating, even though the worker had some pre-existing disability. The Courts are not allowed to "fill in the blanks" for either party.

The proposed change in the pre-existing condition rules would still require an injured worker to prove his/her overall functional impairment using the AMA Guides but his/her employer would be allowed to prove the amount of pre-existing impairment with wild opinions given by a doctor without any basis. The proposed change would allow a doctor to attribute pre-existing impairment to a condition which had no symptoms and did not affect the worker's ability to perform any activity prior to the new injury.

Because there would be no standards for rating pre-existing impairment, the employer's doctor could even give a higher impairment rating for the pre-existing impairment than the doctor gives for the overall impairment (including the pre-existing impairment and the new injury) (Attachment 4).

Ami Hyten, Topeka Independent Living Resource Center, Inc., testified as an opponent to **Sub SB 181**, stating under the Americans with Disabilities Act, an individual is not considered to be a person with a disability if his or her condition has been corrected through medication or other intervention. **Sub SB 181** would turn courts' definition of a person with a disability under the ADA on its head. The bill states in essence that, no matter how capable a worker is in his or her job, in the state of Kansas, for purposes of workers compensation, he or she would always first be considered to be a person with a disability. The burden of proof would be flipped (Attachment 5).

The following written testimony in opposition was distributed: Mark Desetti (Attachment 6), Terri Roberts, Kansas State Nurses Association (Attachment 7), Donald F. Anderson, Risk Manager, City of Olathe, Kansas (Attachment 8). A proponent, Leslie Kaufman, Director, Governmental Relations, Kansas Cooperative Council (Attachment 9).

The Chairman adjourned the meeting at 10:00 a.m. The next meeting will be February 18, 2004.

COMMERCE AND LABOR COMMITTEE

Date February 17 2004

NAME	AGENCY
Andy Shaw	Goodyear Tire & Rubber Co.
J. R. Leiker	Ks. AFL-CIO
Ed Redmon	Ks State Fair
Ann Hyten	TILRC
Kim Dietrich	TILRC
JP SMALL	BOMBARDIER AEROSPACE LEARJET
Josie Torres	SILCK
Michael R. Brink	Ironworkers Local No 10 B.A.
KEN FAIRCHILD	Carpenters Local 918
Ron Seeber	Hein Law Firm
John Jaderick	Boeing
SCOTT SCHNEIDER	GISBA
Scott Heidler	KS Self Insurers Assoc.
Bill Curtis	Ks Assoc of School Bds
Grey Wright	KTLA
Timothy A. Short	KTLA
	KTLA
Ken Dedeke	International Association of Fire Fighters
Jim McHaffie	KS AFL-CIO
TERRY FORSYTH	KNEA
Dave Wilson	AARP
Ernest Kutzley	AARP
Jo Ann Bunten	Ks. Ins. Dept.
Dick Cook	Ks Ins. Dept.
RICHARD THOMAS	KDHR-WC
DEBORAH STERN	KHA

HOUSE COMMERCE & LABOR COMMITTEE
TESTIMONY REGARDING HB 2757 AND
BENEFITS IN KANSAS WORKERS COMPENSATION

KANSAS AFL-CIO
JOHN M. OSTROWSKI
PO BOX 1453
TOPEKA KS 66601-1453
785-233-2323
johnostrowski@mcwala.com

Thank you Chairman Dahl for this opportunity to present testimony opposing SB 181 as it relates to preexisting conditions. I appear today on behalf of the Kansas AFL-CIO and other injured workers statewide.

A. ROUND ONE – "IT'S ALL ABOUT HANSON"

As this Committee is well aware, SB 181 was introduced in the last legislative session. At that time, as relates to preexisting conditions, it was clear that the concerns of the proponents revolved exclusively around the now famous Hanson decision. As proof of this, I have marked as Exhibit A information given to various senators by Scott Heidner and Terry Leatherman of the Kansas Self-Insurers Association and the KCCI respectively.

You will note in reading the materials that it specifically refers to Hanson, and goes through the "Wayne Simien analysis." Specifically, that Wayne would end up with a 25% impairment to the shoulder, and having undergone prior shoulder surgery, the employer would still have to pay the entire 25%.

You have heard an extended and comprehensive discussion by Administrative Law Judge Bruce Moore regarding Hanson. Quite frankly, I think that Judge Moore's analysis is not only insightful, but also entirely accurate. In his testimony to you, he explained at great length that: **"In summary, the *Hanson* decision has been frequently misread and misinterpreted."** (Written testimony of Honorable Bruce E. Moore, February 10, 2004)

With the expressed concerns of the proponents of SB 181, the Advisory Council took up the matter by way of committee and subcommittee. Notwithstanding my personal belief that Hanson was being misread, the subcommittee and "super subcommittee" (which included Judge Moore) submitted language to "cure" the Hanson problem. That language is attached as Exhibit B. The intent was to further codify the 1993 reform, or in the worse case scenario, make sure that the Court of Appeals understood that the Work Comp Appeals Board was correctly interpreting the 1993 amendments.

The subcommittee also attempted to respond to the "proof problem" that respondents/insurance carriers were complaining about. In summary, the complaint seemed to be that they had a difficult time proving their case under the AMA Guidelines. The subcommittee, in

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Atch # 1

response to that complaint, was willing to abolish the AMA Guidelines. The subcommittee was not willing to abolish the guidelines for respondents, and simultaneously leave the guidelines in effect for claimants. (I would note that the "super subcommittee" rejected the idea of abolishing the AMA Guidelines, but the super subcommittee did agree that the guidelines must be uniformly used by both sides.)

B. ROUND TWO

When the suggestions of the various subcommittees were circulated, the business community indicated that the "cure" did not fix the problem because the problem had originally been misstated. It was at this point that business representatives began to talk about having to pay all of the temporary total, all of the medical, and having to pay for things like obesity, diabetes, and underlying congenital defects.

While SB 181, as relates to preexisting conditions, was allegedly intended to be a "codification of 1993", the topic now under discussion was an entirely new concept. As proof of my position, I again draw your attention to Exhibit A wherein it is stated:

> **KCCI believes that every injured Kansas worker should receive the *full measure of compensation for the effects caused by a workplace injury, even where the injury only aggravates a preexisting condition.***

This is an important sentence and concept. KCCI is indicating its willingness to pay for "aggravations, intensifications, or accelerations" of underlying conditions. The "**full measure of compensation for the effect**" of the injury is the worker's present inability to work versus his ability to work preinjury.

In other words, KCCI and others were originally concerned that Wayne Simien was getting 25% and not 15%, with 10% preexisting. You cannot pay the "full measure of compensation for the *effects* caused by a workplace injury" and simultaneously not pay for asymptomatic, undiagnosed conditions, or the fact someone was overweight preinjury.

In the December Interim Committee, this was compared to other areas of law. It was stated as follows:

> In a breach of contract case, we look at the effect of the breach, and the outcome to compute the damages. The contractor pays the damages, or effects, for failing to perform pursuant to the contract.
>
> In a car accident case, we do not look at how red the light was, we look at the effect of the accident. That is our measure. In workers compensation, it is the claimant and what they were able to do, and

> able to accomplish preinjury. We then compare that after we have shown a compensable injury with what effect/outcome it has had on their working abilities or bodily functions. (Testimony of Beth Regier Foerster, Adjunct Professor, Legislative Interim Committee, 12/16/03)

With the change in direction, the subcommittee of the Advisory Council again went to work. It was the feeling of the subcommittee and the super subcommittee that in abolishing the Workers Compensation Fund (or Second Injury Fund) that we had "thrown out the baby with the bath water." The problems of the workers compensation were purely in the delivery of the services, and not in the underlying concept of "spreading the insurance risk." In fact, the NCCI commented on reestablishing the Fund as follows:

> If the fund is re-established, Voluntary and Assigned Risk rates would have to be adjusted to account for the reallocation of costs from the carriers back to the fund. The re-establishment of the fund will essentially re-allocate the costs of second injuries. The proposal is at best a wash and more likely lead to an increase in the ultimate system costs if the Second Injury Fund staff is less efficient than carriers in handling claims. This was certainly the case in the past. (NCCI Proposal, 11/03 - Draft)

Again, it is recognized that there were problems with administration of the Fund in the past. However, with appropriate action, reestablishment would be a "wash." The subcommittee of the Advisory Council agreed in principle to what those modifications would be. (See Exhibit C attached)

Kansas is not the only state that has workers with arthritis, workers who are overweight, or workers who had injuries while playing football in college. This is a longstanding debate, and bringing the Fund back is not a pie-in-the-sky suggestion. Attached as Exhibit D is a breakdown prepared by the Division of Workers Compensation that shows that over 35 states currently use a second injury fund, or have a monpolistic state fund.

In 1993, employers told the legislature that they would individually be responsible for the "full measure of compensation for the effects caused by a workplace injury, even where the injury only aggravates a preexisting condition." In exchange, they were to receive an offset for preexisting functional impairment, and the Fund was to be abolished. If there is current dissatisfaction with that choice, then the Legislature should follow the recommendation of the Advisory Council Subcommittee and reestablish the Fund. Some employers/insurance carriers agree with this position, others apparently do not. The point is that the solution to the problem should not be the lowering of benefits.

I will stand for questions.

MAR 0 7 2003

Senator Barone:

Attached please find a copy of some materials that have been prepared by KCCI and the Kansas Self Insurers Association regarding SB 181. At the end of the last subcommittee meeting, Senator Wagle asked for some hard numbers on the cost of work comp insurance. This document is an attempt to provide those numbers. Please review this document, and feel free to contact me if you have any questions at all. Thank you for your time!

SB 181

Workers' Comp

Scott Heidner
Kansas Self Insurers Association

Terry Leatherman
KCCI

EXHIBIT A

PART 2

One of the "what ifs" raised during this testimony, specifically as it relates to pre-existing conditions, was Senator Barone's question about KU basketball player Wayne Simien. We had some attorneys get together and try to spell out the implications in a hypothetical. The work of two of these groups is included below.

(I) Position Paper Regarding S.B. 181: Why current Kansas law on the deduction for pre-existing conditions in workers compensation awards must be changed.

I. Wayne Simien, Claimant, vs. Future Employer, Respondent

Every sports fan in Kansas, regardless of school affiliation, is aware of the recurrent dislocated shoulder that presently plagues KU basketball star Wayne Simien. For purposes of this example, let's suppose the upcoming surgical repair for his condition is less than successful, leaving Wayne unable to return to the basketball court. Further suppose that, disheartened after losing his athletic scholarship, Wayne drops out of college and enters the workplace.

Now let's flash forward two years. Wayne is working as a big and tall man's clothing salesman for a Lawrence retailer. One day as he is reaching up to hang a suit on the rack, his shoulder pops out for the first time since he left college and started working. Knowing his rights, Wayne files a worker's compensation claim against his employer. Wayne undergoes non-surgical medical treatment, including anti-inflammatory medications and physical therapy. His doctor then releases Wayne to return to work with an overall impairment rating of 25% to the shoulder for his chronic shoulder instability and recurrent dislocations, with permanent restrictions against lifting over 10 pounds overhead with the right arm.

Under current Kansas workers compensation law, would Wayne's employer be entitled to credit for his pre-existing shoulder problems? The surprising answer is, maybe not! How can that be?

Although Wayne would have to establish that he sustained an injury on the job, his employer would have the burden to not only establish that Wayne had a pre-existing condition in his shoulder, but also the amount of that pre-existing impairment. Unless the employer can prove these things, Wayne will receive an award of the full 25% impairment to the shoulder, even though the majority of the impairment results from the preexisting sports injury and only a small percentage is actually a result of the work-related aggravation.

But won't it be easy for the employer to prove that Wayne had a pre-existing condition for which a reduction in the award should be taken? Unfortunately, again, the answer is probably not.

Introducing evidence of Wayne's prior shoulder injuries, including not only medical records, but also newspaper clippings and videotape of a couple basketball games, will not be enough. Wayne may never have received an impairment rating for the injuries he sustained during his basketball years before he entered the

workforce, as impairment ratings are typically only meaningful in workers compensation cases. Under curre law, the employer would have to prove that Wayne's pre-existing condition was "ratable" under the *AM Guides to the Evaluation of Permanent Impairment* and what his rating would have been before the workplace injury. The Kansas workers compensation courts are littered with decisions where employers have been denied a credit for pre-existing conditions in cases where a prior injury, extensive medical treatment, and even surgery are undisputed, simply because no impairment rating was given before the work-related injury occurred.

What Wayne's future employer doesn't realize is that it is actually lucky. Why is it lucky?

Fortunately for Wayne's employer, Wayne's shoulder injury is a scheduled injury for which Wayne's workers compensation award is limited to his medical impairment rating. If this scenario involved a sports injury to Wayne's back with a subsequent injury at work, Wayne's employer could also be liable for a much higher "work disability" up to $100,000, with absolutely no credit for Wayne's pre-existing injury, impairment or disability.

II. The Current State of the Law

The current version of K.S.A. 44-501(c), which has been in effect since 1993, provides that:

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

While the above language appears straightforward and easy to apply, it has been interpreted in such a way as to virtually eliminate its intended effect, which was to provide injured workers with compensation for the aggravation of a pre-existing condition by a workplace injury, but not to compensate workers for the pre-existing condition itself. Because the above language has not been applied in the way in which it was intended, the statutory language must be changed.

The current interpretation of this statutory language is found in the Kansas Court of Appeals decision in Hanson v. *Logan USD 326, 28* Kan. App. 2d 92 (2000). In Hanson, *the claimant* had knee surgery in 1989, then re-injured his knee in 1995. In discussing whether the respondent employer was entitled to credit for the pre-existing condition, the court stated: "The parties do not dispute that, before his alleged work-related injury, Hanson had had several knee surgeries and suffered from a degenerative condition that would ultimately necessitate a total knee replacement." Nevertheless, the court denied any deduction for the claimant's pre-existing condition.

Denial of credit to an employer for an obvious pre-existing condition has also occurred in numerous cases decided by the Workers Compensation Board of Appeals. A few examples follow:

1. Esparza v. *National Beef Packing Company, Docket 239,452, Sept. 2000;* failure to allow deduction for pre-existing arthritis;

2. Shouse v. *Goodyear Tire & Rubber Co., Docket 247,065, Oct. 2002; failure* to reduce to prior low back injuries;

3. Wright v. *Lawrence Paper Co., Docket 241,804, Oct. 2001; failure* to deduct for pre-existing arthritis and arthroscopic surgery to right knee.

Perhaps a hypothetical example drawing upon a current sports figure will help to illustrate the inadequacies of the current law regarding pre-existing conditions.

III. The Law Must Be Changed

KCCI believes that every injured Kansas worker should receive the full measure of compensation for the effects caused by a workplace injury, even where the injury only aggravates a pre-existing condition. But KCCI rejects a law which saddles employers with liability for the pre-existing conditions themselves, whether caused by an old college sports injury, a previous motorcycle accident, or even the cumulative effects of arthritic joints that are in no way related to work activities. Kansas employers cannot and should not have to shoulder the expense of compensating non-work related impairments and disabilities except to the extent--and only to the extent-- that work activities aggravate those pre-existing conditions.

This is why S.B. 181, which addresses and corrects the current inadequacies in Kansas workers compensation law regarding pre-existing conditions, must be passed.

(II) Pre-Existing Impairment

At the present time, the Kansas Workers Compensation Act, at Section 44-501(c), provides, "Any award of compensation shall be reduced by the amount of functional impairment determined to be pre-existing." The Kansas Court of Appeals has discussed the statute in one (1) reported decision, but, in that decision, the court refused to reduce the award of compensation by finding that there was insufficient evidence of the pre-existing impairment.

The Appeals Board for the Division of Workers Compensation has discussed 44-501(c) in several decisions and has basically set the "policy" for the application of the statute. In the following paragraph from a June, 2000 decision, the Board sets forth its rather confusing manner of applying the statute:

> "The appeals board construes K.S.A. 44-501(c) to require proof that a ratable functional impairment pre-existed the work-related accident. Conversely, it is not required that the functional impairment was actually given a rating before the work-related accident occurred, nor is it required that the individual was given formal medical restriction. But it is critical that the condition actually constituted an impairment in that it somehow limited that worker's abilities or activities. In this case, the evidence fails to establish that claimant's back permanently impaired him before the February, 1996 accident and, therefore, it would not be proper to reduce the award for pre-existing impairment."
> Bradford v. Manhattan Mercury/Seaton Publishing Co.,
> Docket No. 210,583

It is impossible to predict precisely how the Board would rule on any particular fact situation; however, it is helpful to attempt to demonstrate how the Board's language may be applied to a hypothetical fact situation.

For that fact situation, we would suggest a hypothetical involving KU basketballer Wayne Simien. Assume that Simien proceeds with should surgery and that surgery requires an excision of a portion of his distal clavicle in the shoulder. A number of physicians would testify that, pursuant to the 4th Edition of the AMA Guides, the surgical procedure alone would result in an impairment of functional rating of 10% (AMA Guides, page 61, Table 27).

However, for the purposes of this hypothetical, let's presume that Simien enjoys an excellent result from the surgery, that he requires no medical restrictions and that no impairment of function is given in 2003 by the physician treating him for this sports injury; further presume that the surgery places his basketball career back on track and Simien continues to star for the rest of his time in the KU basketball program.

ten (10) years later, after an illustrious NBA career, Simien decides to return to Kansas and takes a job building airplanes for Boeing in Wichita. While lifting a wing strut in 2013, he re-injures his right shoulder. He files a Workers Compensation claim. His attorney argues that Boeing should not receive any reduction for a pre-existing impairment.

If the present version of 44-501(c) is in effect, Boeing would not receive any credit for a pre-existing impairment despite shoulder surgery for which a rating could have been given in 2003. Because there was no limitation of the abilities of Simien and because that shoulder surgery would not have "impaired him" before the 2013
accident, the interpretation of 44-501(c) would not afford the employer any offset for the pre-existing impairment, despite the previous shoulder surgery.

The changes to 44-501(c) as set out in Senate Bill 181 are intended to clarify this situation and to allow a reduction for the pre-existing problem.

McCULLOUGH, WAREHEIM & LaBUNKER, P.A.
ATTORNEYS AT LAW
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TELEPHONE 785-233-2323
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December 5, 2003

FAX TRANSMITTAL

TO: THE HONORABLE BRUCE MOORE
KIP KUBIN
FAX #785/827-0942
FAX #816/531-8588

FROM: JOHN M. OSTROWSKI
NO. OF PAGES: _____

IF THERE IS A PROBLEM RECEIVING THIS FAX, CALL 785/233-2323 AND ASK FOR KAREN.

THE HONORABLE BRUCE MOORE

KIP KUBIN

Gentlemen:

Below is my attempt at codifying 501(c) pursuant to our previous discussions. Please review. Thanks.

> (c) In the event an employee has an aggravation of a preexisting functional impairment, any Award of compensation shall be reduced by the amount of said preexisting functional impairment. A prior impairment rating or permanent restrictions are not necessary to prove the preexisting functional impairment. The trier-of-fact shall consider all medical testimony on the issue of functional impairment.

Very truly yours,

John M. Ostrowski

JMO:kn
cc: The Honorable Paula Greathouse (Via fax 296-0025)

EXHIBIT B

CONFIDENTIAL
+
DRAFT

REPORT OF SUBCOMMITTEE
PAULA GREATHOUSE
KIP KUBIN
JOHN OSTROWSKI

The subcommittee met and discussed various topics. The subcommittee makes the following recommendations "as a package" with the recognition that some portions are beneficial to different players in the system, and others can be viewed as detrimental. The goal of the subcommittee was to improve the overall system without any increase in litigation.

A. ADVISORY COUNCIL

In an attempt to respond to criticisms, the subcommittee feels any of the following changes would be appropriate:

1. Change the voting requirements to three votes "from each side of the table" to make recommendations to the legislature, or

2. Add members to the Advisory Council, making the Council similar in makeup to the Unemployment Insurance Council, or

3. Make the Advisory Council a body of four lawyers and an active Administrative Law Judge. Members would be selected by KADC, KCCI, KTLA, and AFL-CIO. The Administrative Law Judge would be selected by a majority of the four attorneys with approval of the Governor.

B. PREEXISTING CONDITIONS

Drafting appropriate language to rectify any perceived problems with the treatment of preexisting conditions proved difficult. The "devil appeared to be in the details." The subcommittee would recommend either or both of the following:

1. Reestablish the Workers Compensation Fund to be responsible for a portion of payments "from dollar one." This would give the employer reimbursement for medical, TTD and PPD on a percentage basis. The reimbursement would be decided administratively, *and without any litigation.* An example would be that the Director's office would issue a decision within a range of choices (*e.g.* 0%, 33.33%, 66.67% or 100%). One review could be requested by the ALJ.

2. Abolish use of the AMA Guidelines. This would solve the problem of multiple editions of the AMA Guides, incomplete historical medical data, etc.

EXHIBIT C

C. *ECONOMIC LAYOFFS*

It was unclear to the subcommittee how large of a problem exists with regard to economic layoff. It is suggested that the recent case of *Tallman v. Case Corporation* codifies some of the issues presented by the economic layoff situation in accepting the 1997 decision of *Watkins v. Food Barn.*

D. *DATE OF ACCIDENT*

The previous definition for date of accident in repetitive use cases is acceptable with the following modifications:

a) The requirement of written claim is abolished.

b) An Application for Hearing must be filed within two years from the date of accident or two years from the last payment of medical whichever is later.

c) Notice is extended to 30 days with 75 for just cause.

E. *BENEFITS*

The following changes are suggested for benefits paid to workers:

1. Change the 75% figure to 100% as contained in K.S.A. 44-510e, and

2. Strike the $50,000 limitation for functional impairment cases.

F. *REINSURANCE FUND*

Create a state-run Reinsurance Fund for pools such that the market is more accessible to pools.

Memorandum

Date: November 24, 2003

To: Paula Greathouse, Director Division of Workers Compensation

From: Richard Thomas, Administrator Ombudsman/Rehabilitation Sections

Re: "Pre-existing Condition" Issues

I have researched the question on how other states handle the "pre-existing condition" issue. Without looking at each state's controlling statute and case laws, I can only give you an overview. There are two (2) key issues to be addressed.

The first issue is the way the state determines functional impairment. If the state uses a version of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides), the authorized edition would be used to determine the pre-existing condition. States with a "competent medical evidence" criterion would use the same to determine pre-existing. Twenty-nine (29) states designate the AMA Guides by statute or regulation, and fifteen (15) states allow the AMA Guides, when substantiated with competent medical evidence. Other states have their own Guides, or use other criteria. This information is based on a 2001 study and may have somewhat changed.

The second issue is the availability of the Second Injury Fund to cover part or all of the cost when there is a subsequent injury and a pre-existing condition. According to the 2002 State Workers Compensation Administrative Profiles, published by the Department of Labor, Office of Workers Compensation Programs, thirty-five (35) states have a Second Injury Fund that covers pre-existing conditions in some format. There are fifteen (15) states that do not have funds, but several of those states have Monopolistic State Funds, so there is no need to have a Second Injury Fund.

There were several states that abolished their second injury funds during the "Workers Compensation Crisis," in the mid to late 1990's. The break down of states with or without a Second Injury Fund is listed below.

If you need further information on this issue, please let me know.

RLT:vph

cc: Secretary Jim Garner, KDHR

EXHIBIT D

STATE WITH 2ND INJURY FUND

Alaska
Arizona
Arkansas
California
Colorado
Delaware
District of Columbia
Georgia
Hawaii
Illinois
Indiana
Iowa
Louisiana
Maine
Maryland
Massachusetts
Michigan
Mississippi
Missouri
Montana
Nevada
New Hampshire
New Jersey
New York
North Carolina
North Dakota
Oregon
Pennsylvania
South Carolina
Tennessee
Texas
Virginia
Washington
West Virginia
Wisconsin

NO CURRENT 2ND INJURY FUND

Alabama	
Connecticut	Abolished in 1995
Florida	Abolished in 1998
Kansas	Abolished in 1994
Kentucky	Abolished in 1996
Minnesota	Abolished in 1993
Nebraska	Abolished in 1997
New Mexico	Abolished in 1999
Ohio	Monopolistic State Fund
Oklahoma	Abolished in 1999
Rhode Island	
South Dakota	
Utah	
Vermont	
Wyoming	Exclusive State Fund

AARP Kansas

February 17, 2004

Representative Dahl, Chair
House Commerce and Labor Committee
Workers Compensation – Pre-existing Condition

Good morning Chairman Dahl and Members of the House Commerce and Labor Committee. My name is David Wilson and I am a member of the AARP Kansas Executive Council. AARP Kansas represents the views of our more that 350,000 members in the state of Kansas. Thank you for this opportunity to express our comments and strong opposition on pre-existing conditions.

More than 33 million men and women age 50 and older are in the labor force, a number that will rise sharply as the workforce grows older. More than 80 percent of AARP's youngest members (ages 50 to 54) are employed and forty four percent of all AARP members work full or part time.

By 2010 there will be a serious labor shortage as baby boomers begin to retire and fewer younger workers are available because of slow population growth between 1985 and 1996. Unless we can keep older, productive people working, labor tightness will slow down the economy.

In a 2002 study by AARP "Staying Ahead of the Curve-The AARP Work and Career Study, the top 3 reasons listed that kept workers who were 45 plus year of age on the job were the need for money, enjoyment of working and the need to be productive. The survey also showed that loyalty to employers was very strong. The average worker 45 plus had been with their employer 15.5 years and 78 said that they will remain until they retire. The major worry by this group was ageism. Sixty seven percent of all respondents said that they believe that age discrimination exists in the work place today. Ageism is exactly what pre-existing is about.

Extensive research has found no relationship between age and job performance. Americans age 55 and above take fewer sick days, adapt to new technologies successfully, and are more loyal to their employer than those in their 30's.

As part of our national employment policy, AARP is committed to expanding employment opportunities and promoting job security for workers of all ages and to removing all barriers to equal employment opportunity. These goals include increasing employment opportunities and providing access to jobs through training, retraining and other programs designed both to encourage older workers to remain in the labor force and to improve the job security of all working Americans.

Therefore, AARP strongly opposes pre-existing conditions. Such a change would have a seriously harmful impact on older workers in particular, but workers of any age could find their financial/legal remedies reduced under the proposed definition of pre-existing conditions.

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | 785-232-4070 | 785-232-8259 fax
Jim Parkel, President | William D. Novelli, Executive Director and CEO | www.aarp.org

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AARP wonders where workers compensation is headed once employers have the means of testing for any possible kind of genetic inheritance.

There is no workers compensation crisis in Kansas. Weekly benefits for injured workers in Kansas are among the lowest in the nation and the lowest in the surrounding five-state region. Business decisions about whether to locate in Kansas are defiantly not going to hinge on the cost of a program that is among the country's worst.

Thank you for this opportunity to present our comments and strong opposition on per-existing conditions.

Respectfully
David Wilson

TO: Members of the House Commerce and Labor Committee

FROM: Kent W. Dederick, International Association of Firefighters, Local 83; Topeka, Kansas

Chairman Dahl and members of the committee, thank you for the opportunity to speak to you on some of the concerns I have regarding workers compensation and preexisting conditions. I am Kent Dederick, a captain with the Topeka Fire Department and a member of the Kansas Coalition for Workplace Safety.

Pre-existing conditions seem to be the most controversial and least understood issue relating to the workers compensation statutes today.

We have all heard from conferees who claim that they have had to pay for a high school football injury, or a worker who has only worked for an employer for a couple of weeks and made a claim for a long standing repetitive use injury. Although these occur, I do not believe that this is a fault of the legislation at hand, but rather the misrepresentation and misinterpretation of the laws that exist. What concerns me is, what happens to the worker who spends their career working for an employer for 20...30 years or more? These employees' duties may require them to load heavy boxes, handle construction materials, or in my case fight fires which require me to drag charged hose lines and lift patients.

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In performing many of these jobs, where heavy work is required, a person may receive a relatively minor injury several times to the same body site without ever seeking medical attention, or having the need to file a workers compensation claim. Here is a dedicated worker who only wants to get a job done and doesn't mind working with a little pain. Let's say that this worker takes a fall after 20 years of service and injures their back and it is determined that they can no longer do the job that they have been trained for. After undergoing all medical treatment and evaluation, it is determined that this worker did in fact receive a career ending injury on the job, but the medical evidence also shows that arthritis and a degenerative disc condition also exist.

Under this scenario the employer can claim that only a fraction of the disability that the worker received was related to the actual incident, which caused the worker to lose the ability to do their job. But does the employer not have a responsibility of accepting the liability for the injuries, and wear and tear that the worker received over the past 20 years of service? Or should they be able to say that these were preexisting conditions and are not the employers' responsibility?

I can relate with the hypothetical case that I have presented to you. In 1989 I fell while fighting a fire. A ceiling collapsed on me and injured my back. Without going into great detail, I was transported to the hospital with no feeling in my lower extremities. After several hours the feeling returned to my legs and I

recovered after a week of lying flat on my back. Since that time, I have received several injuries to my back, some receiving medical treatment but many not.

I am here today as a working firefighter, some may consider me the walking wounded. I still do my job every shift, probably better and more efficiently than I did before my initial injury. Do I have pain? Yes. But I work through it with occasional help of medication. God forbid I ever receive that career ending injury that would not allow me to continue my job. Should I expect to lose workers compensation benefits because of arthritis and a degenerative joint disorder, that x-rays and MRI's have shown are due to injuries that I have received throughout my work history? Or should my employer be willing to accept the responsibility for the accumulation of injuries that I have received during my career as a firefighter, saving lives and property?

Kent W. Dederick

Kent W. Dederick

PREEXISTING CONDITIONS AND THE WORKERS COMPENSATION ACT

Testimony of the Kansas Trial Lawyers Association
Presented by Timothy A. Short

Prior to the 1993 changes in the Kansas Workers Compensation Act, a worker who suffered an on-the-job injury was entitled to be compensated for his/her entire injury, even if a prior injury to the same part of the body or a preexisting condition contributed to the new injury or resulting disability. If the injured worker was still receiving compensation from an earlier workers compensation claim for an injury to the same part of the body, the employer received a dollar for dollar credit for any weeks when compensation paid for the prior claim overlapped weeks when compensation was due for the new injury.

To encourage employers to hire workers with some preexisting disability, the Act provided that the Kansas Workers Compensation Fund would assume all or part of the responsibility for paying compensation due in the new claim, provided the employer proved that the preexisting condition contributed to the overall disability resulting from the new injury, or that the new injury would not have occurred but for the preexisting condition. If the employer failed to prove the degree to which the old injury contributed to the new accident or overall disability, Fund liability was denied.

In 1993, the Act was amended to provide that an injured worker should only be compensated for the increase in disability resulting from a new injury, so any preexisting functional impairment to the same part of the body was to be deducted from the overall disability upon which compensation is calculated. The Kansas Workers Compensation Fund to no longer assumed for any portion of the liability for re-injuries to the same body part.

Also in 1993, the Act was amended to require that doctors testifying in workers compensation cases base their opinions rating an injured worker's functional impairment upon the American Medical Association's Guides to the Evaluation of Permanent Impairment (originally using the Third Edition revised, now the Fourth Edition). This change was made to prevent a doctor from giving wild opinion for rating functional impairment without any basis. The Courts have interpreted the Act to require that employers prove any preexisting functional impairment using the same A.M.A. Guides which are used to rate a workers overall functional impairment.

The injured worker has the burden of proving his/her overall functional impairment resulting from an on-the-job injury, and the employer has the burden of proving any preexisting functional impairment. If the worker fails to present evidence showing the percentage of his/her overall impairment using the A.M.A. Guides, he/she is not awarded any compensation, even though the worker has permanent disability. Conversely, if the employer fails to present evidence showing the percentage of the worker's preexisting impairment using the A.M.A. Guides, no deduction is made from the overall impairment

rating, even though the worker had some preexisting disability. The Courts are not allowed to "fill in the blanks" for either party.

The proposed change in the preexisting condition rules would still require an injured worker to prove his/her overall functional impairment using the A.M.A. Guides, but his/her employer would be allowed to prove the amount of preexisting impairment with wild opinion given by a doctor without any basis. The proposed change would allow a doctor to attribute preexisting impairment to a condition which had no symptoms and did not affect the worker's ability to perform any activity prior to the new injury.

If such a preexisting condition were work-related and the injured worker had filed a prior claim for that condition, he/she would not have been awarded any compensation. Under the A.M.A. Guides, an injury which results in no symptoms and does not affect a worker's ability to perform any activity is rated as 0% functional impairment. The proposed change would allow the employer to reduce the worker's overall impairment by 10% or 20% or whatever number the employer's doctor pulls out of thin air, even though it was rated as 0% impairment in the prior claim. Because there would be no standards for rating preexisiting impairment, the employer's doctor could even give a higher impairment rating for the preexisting impairment than the doctor gives for the overall impairment (including the preexisting impairment and the new injury).

The proposed change in the preexisting condition rule is fundamentally unfair and should be rejected.

Topeka Independent Living Resource Center, Inc.

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Testimony
Presented to the House Commerce and Labor Committee
February 17, 2004
by Ami Hyten

RE: Opposition to SB 181

Dear Chairperson Dahl and Committee Members;

The Topeka Independent Living Resource Center (TILRC) is a 501(c)(3) not-for-profit civil and human rights organization. Our mission is to advocate for equality, justice and essential services for a fully integrated and accessible society for all people with disabilities.

In passing the Americans with Disabilities Act, Congress made a series of findings, including the following:

> "... (3) discrimination against individuals with disabilities persists in such critical areas as **employment**, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services; ...
>
> ... (5) individuals with disabilities continually encounter various forms of discrimination, including **outright intentional exclusion**, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, **exclusionary qualification standards and criteria**, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;...
>
> ... (7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of **purposeful unequal treatment**, and relegated to a position of political powerlessness in our society, **based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of**

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the individual ability of such individuals to participate in, and contribute to, society;" (42 U.S.C. 12101; emphasis added).

For proof of these Congressional findings, look no further than Substitute for SB 181 and its proposed amendments. Under the ADA, an individual is not considered to be a person with a disability if his or her condition has been corrected through medication or other intervention. Substitute SB 181 would turn courts' definition of a person with a disability under the ADA on its head; SB 181 states in essence that, no matter how capable a worker is in his or her job, in the state of Kansas, for purposes of workers compensation, he or she will always first be considered to be a person with a disability.

Substitute SB 181 also has the effect of violating the ADA's prohibitions against unwarranted and intrusive questions into the nature and severity of employees' disabilities.

We would ask that this Committee reject Substitute SB 181. Thank you for your time and thoughtful attention.

In Justice and Equality,

Ami S. Hyten, Esq.
Assistant Executive Director

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

Mark Desetti, Testimony
House Commerce and Labor Committee
February 17, 2004
Workers Compensation – Pre-existing Condition

Chairman Dahl, members of the committee, thank you for the opportunity to submit written testimony on behalf of the Kansas National Education Association concerning workers compensation and pre-existing conditions. The proposal you are being asked to consider is frightening in its potential impact on the families of injured Kansas workers.

What happens when one's workers compensation benefit is allowed to be offset by something that is not symptomatic? What happens when one's workers compensation benefit is allowed to be offset by something that has never before impaired one's work performance or ability to perform work tasks?

You are handing an employer every excuse in the book to reduce benefits. Under the proposed language, benefits can be offset because an employee is subject to the natural aging process. Under the proposed language, benefits can be offset because an employee is overweight. Under the proposed language, benefits can be offset because an employee is pregnant. Once you get started, where do you stop?

As I have said in previous testimony, there is no workers compensation crisis in Kansas. Kansas employers enjoy the fourth lowest premiums in the nation and workers compensation benefits are already among the lowest in the nation. Weekly benefits for injured workers are well below the standard recommended by the National Commission on State Workmen's Compensation Laws. We are one of only four states that caps benefits for permanent total disability and our cap is the lowest in the nation.

The effect of this pre-existing condition proposal would be to further reduce benefits paid to injured workers. And it would do so by punishing them for forces in their lives beyond their control – it would punish workers just for having a few additional birthdays. This proposal is just plain wrong.

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KANSAS STATE NURSES ASSOCIATION

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TERRI ROBERTS J.D., R.N.
EXECUTIVE DIRECTOR

S.B. 181- Pre-Existing Conditions

Written Testimony To House Commerce & Labor Committee
February 17, 2004

Chairman Dahl and members of the House Commerce and Labor Committee, the KANSAS STATE NURSES ASSOCIATION is strongly opposed to the amendments being proposed in Substitute for S.B. 181, and any others that might be offered by the Insurance industry and the KCCI that would exploit the consideration of *pre-existing conditions* (pre-existing impairments) when determining benefits for work related injuries.

If the Legislature adopts the definition of "preexisting condition" being proposed in Substitute for S.B. 181, it will ultimately affect every worker in Kansas who sustains a permanent injury on the job. That is because the new definition of "pre-existing 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**. The testimony presented by some conferees and statements like "employers should not be responsible for bad genetics" (Human Resources Director for Via Christi Health System, Wichita) is distasteful and goes way beyond what should be considered *as a matter of public policy in a "no fault, exclusive remedy"* debate.

Clearly, and contrary to what proponents have said, this proposed 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. What would have been a better term in 1983 would have been "pre-existing impairment", so that the work "condition" is not misconstrued. In other words, it was to prevent the employee from "double-dipping." KSNA opposes "double-dipping," and under current workers compensation law, employers can —and do— receive an offset when an injured worker has a ***preexisting impairment***. 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. Changing the standards (from the AMA Guidelines) that was enable employers to use a different set of criteria for determining the potential offset will not only be fundamentally imbalanced, but may create chaos for those adjudicating these matters.

We are not arguing semantics here–if we were the KCCI and others would not be so adamant that the statutory standards be changed.. 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.

Thank you for consideration of these comments.

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Written Testimony

Commerce and Labor Committee

February 11, 2004

TOPIC: PREEXISTING CONDITIONS

Example: Chronic back pain and Degenerative bone disease

The following represents a common profile of claims experienced by the city of Olathe costing $60,000 to $220,000 in workers compensation medical, wage indemnification and expense costs. Over a three year period, 2001 to present, such claims with pre-existing conditions have cost the city more than $800,000.

The example is fairly representative of such claims that have been experienced over 17 years of handling and monitoring workers compensation claims in tax payer supported public entities in Kansas. In particular, it represents one to three claims a year or more than 30 such claims in Olathe over those 17 years.

The case:

An employee reports that he experienced back pain climbing into the cab of his truck. Something he and other employees in his position do every day without incident. However, today he reported pain. He is sent to the clinic for treatment. The doctor hears the complaint of pain and orders an x-ray, medication and a return visit in one or two days. Upon examination of the x-rays, and re-examination of the patient, it is determined that there is a reasonable source of his pain beyond a simple pulled muscle. The doctor now diagnosis chronic pain, the result of aggravation of degenerative bone disease. The pain is the result of possible "aggravation" of the degenerative bone disease. There is no finding of acute injury such as a strained muscle causing the pain; but, because he "aggravated" a "preexisting condition," he is experiencing pain. Over the next few weeks, the individual continues to have pain and surgery is recommended to stabilize the patient and reduce the pain.

What was the cause of this extensive pain situation? Was it an injury on the job? Was it his life style involving smoking, alcohol, improper diet, being over weight to the point of obesity, genetics, or some other non-work related issue? None of these factors can be or are considered when a workers compensation case is presented to the administrative law judge; if they are, they are dismissed. Why? Because none of these pre-existing conditions ever were rated in a workers compensation environment. How could they. The individual never went to a doctor with the complaints even though he had experienced repeated minor pain caused by this progressive chronic disease. He routinely dismissed these aches and pains as "just getting older" until the day the pain was to great to ignore.

Please be aware that this individual has access to an excellent health insurance program with very small co-pays. However, now, that this individual is faced with a prospect of surgery and a prolonged recovery, he panics. He has only 2 to 5 days of paid sick leave left. He is a 10 year employee and could have up to 100 days of accumulated sick leave. But for some reason, he has used this benefit regularly in one or two day absences and has never accumulated more than 15 days during his employment tenure. Such short

absences do not require medical excuses. It is only a coincidence that the days taken may concur with the beginning of a hunting or fishing season. He knows if he does not file a workers compensation claim for the condition which had been a minor irritant in the past, he will have no income while he recuperates. So he wants this condition to be treated as a work related injury. And you know what? The current workers compensation system not only allows this but encourages such claims.

Note the doctor diagnosed a condition of degenerative bone disease. There is no exposure for such a disease in his work place. Such a disease can be the result of the normal aging process, life style, diet, or other medical conditions. Other employees doing the same job and functions in the same environment, even longer than this employee, have not filed a claim or injury report alleging they injured their back getting in or out of the trucks.

An injury or disease caused by the work environment belongs in the workers compensation system, but a life style disease belongs in a health insurance plan environment. Degenerative bone disease will be experienced by everyone; some sooner than others, and in a small minority, maybe never. But, as the work force begins to age and retirement prior to 70 becomes a luxury, this type of claim will continue to grow in frequency and cost.

The above synopsis represents a cost in the workers compensation system which is rapidly becoming out of control.

Respectfully presented this 11th day of February, 2004

Donald F. Anderson
Risk Manager
City of Olathe, Kansas

Reference:
SB 181

Existing Chapter 44 provisions, which result in increased workers compensation costs as a result of non-work related preexisting conditions.

> **44-501** (c) the employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.
>
> **44-508** (e) "Personal injury" and "injury" means any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such a character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the normal aging process or by the normal activities of day-to-day living.

Leslie Kaufman, Director
Governmental Relations
Kansas Cooperative Council

House Commerce & Labor Committee

February 17, 2004

Sub SB 181 – Pre-existing Conditions and Workers Comp.

Chairman Dahl and members of the House Committee on Commerce & Labor, thank you for the opportunity to share support, on behalf of the Kansas Cooperative Council (Council/KCC), for Sub. SB 181. I am Leslie Kaufman and I serve the Council as Governmental Relations Director. The Council includes 186 cooperative business members. Together, they have a combined membership of nearly 200,000 Kansans.

Increasing workers compensation rates and a small number of companies willing to write for our industry are serious concerns for the agri-business sector and our cooperative members. The KCC supports efforts to slow the rate of increase in, or reduce, workers compensation costs to agribusiness. Additionally, we encourage additional efforts to reduce fraud and abuse within the Workers Comp system.

During previous meetings, your committee was able to hear from a representative of one of our members, Scott Anderson with Kansas Farmers Service Association (KFSA) of Hutchinson. We appreciate the efforts Scott has gone to in order to attend the hearing and provide specific details relative to agri-business interests. We will not repeat his testimony, but would respectfully remind the committee of his earlier comments and ask for your support of Sub. SB 181.

Thank you.

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