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 March 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: Bruce Moore, Administrative Law Judge
Roy Artman, Kansas Building Industry Association Workers Compensation Fund
Terry Leatherman, Kansas Chamber of Commerce and Industry
Michael Helbert, Kansas Trial Lawyers
John Ostrowski, AFL/CIO
David Wilson, AARP Executive Council Member

Others attending:
See Attached List.

The Chairman opened the hearing on **SB 441 - Workers compensation; defining date of accident**.

Staff gave a briefing on **SB 441**. The bill would add three dates to be considered as the date of the accident. The earliest of the three dates would be considered the date of the accident.

The Senate amended on page 3, lines 21 through 29 to read, "In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or micro traumas, the date of accident shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; (2) the date the condition is diagnosed as work-related, providing such fact is communicated in writing to the injured worker; or (3) the first day the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition." The Senate amended by requesting "in writing".

The Honorable Bruce Moore, Administrative Law Judge, briefed the committee regarding contemplated workers compensation legislation: date of accident. The date on which an accident occurs is one of the three primary variables in determining the amount of benefits that are or may be payable. Generally speaking the right to monetary benefits accrues on the date of accident, and the wage in effect on that date determines the benefit rate at which workers compensation benefits are paid.

Where there is a specific, identifiable traumatic event, such as a fall, a motor vehicle collision, a laceration, or a crush injury, the date of accident is readily identifiable. Where the injury is suffered as a result of a series of repetitive mini-traumas, however, a specific "date of accident" may be difficult or impossible to discern. Without a specific traumatic event, an employee may also be unaware that the discomfort being experienced is work-related, as opposed to "just getting old" or some other non-work-related disease process. Whether a treating physician relates a patient's physical complaints of pain to the performance of work duties may depend on the quality and quantity of information shared with, or perceived by, the medical provider. The causal connection between physical complaints and work duties may not even be made until a diagnosis is reached, which may be several months after onset of symptoms. Because the onset of symptoms is generally gradual, the employee may not realize that work duties are causing or contributing to that discomfort.

The determination of an appropriate date of accident in a repetitive mini-trauma claim is crucial to computation of benefits to which the employee may be entitled. From the perspective of the courts, no one approach is better than the others. The computation of a "work disability" award is detailed and complicated. Many variables affect the determination of "task loss" including the number of jobs held by the employee prior to the injury in question; the ability to establish with any reliability the job tasks performed in a job five,

ten or fifteen years before; the physical requirements of each of those tasks; and the perspectives of the vocational consultants who interpret that information for the benefits of the physicians whose opinions ultimately control. Many variables also affect the determination of "wage loss" particularly where the reason for and amount of the "wage loss" is disputed (Attachment 1).

Roy T. Artman, general legal counsel, Kansas Building Industry Workers Compensation Fund, testified as a proponent to **SB 441**. In the majority of the workers compensation claims it is relatively simple to determine the date of the accident. Claims are generally dealing with a very specific traumatic event, be it a fall off a ladder, laceration by power tools, or a lifting injury, etc. There is an increasing trend in the filing of claims that involve repetitive or micro trauma injuries. Carpal tunnel are not the only repetitive injuries, but can also involve the upper and lower extremities as well as the body as a whole.

In workers compensation claims, the date of the accident directly impacts the award for the claimant as it determines the level of benefits they would receive for their injuries. For insurance carriers it all to often determines which party would be held responsible for the payment of the award.

Since 1994 attorneys, administrative law judges, the Appeals Board and the appellate courts have struggled with the date of accident in repetitive and micro trauma cases. Since 1994, attorneys, administrative law judges, the Appeals Board and the appellate courts have struggled with the date of accident in repetitive and micro trauma cases. Since that time there have been no less than eight (8) appellate cases decided regarding the date of accident in repetitive trauma claims.

An insurance company typically writes workers compensation coverage for a set term, subject to renewal. When an insurance company is called upon to defend a claim, the potential exists for a manipulation of the date of accident which can result in the shifting of the claim's liability from one carrier to another. If the last day worked before the regular hearing is the date of the accident, an insurance carrier can simply request continuances or cause delays which push that date beyond the limits of their coverage. A new insurance carrier or group funded pool can unknowingly write coverage for an employer only to find they have just inherited a previously existing claim. Further complicating this is the fact that the new insurance carrier or group funded pool has not participated in any way in the litigation of the claim leading up to the regular hearing.

The language proposed in **SB 441** would eliminate the potential inequities described while providing safeguards for injured workers to ensure their claims are timely reported and benefits provided (Attachment 2).

Terry Leatherman, Vice President–Public Affairs, Kansas Chamber of Commerce, testified as a proponent to **SB 441**, stating the bill proposes a clarifying change to the Kansas workers compensation system which the Kansas Chamber has advocated in support of for many years. The bill would establish a date of accident in workers compensation cases where an injury develops over time rather than in a sudden accident. Establishing a date of accident is useful in these cases because it "starts the clock" on the workers compensation process. Through a Senate amendment two of the three events for establishing a date of accident were amended by requiring the communication be in writing. The Senate action now requires an employee to notify their employer "in writing" or a diagnosis that a condition is work related by "in writing" in order for the action to establish a date of accident. The Kansas Chamber would respectfully request removal of this amendment to require notice "be in writing" (Attachment 3).

Michael C. Helbert, Attorney, Emporia, Kansas, testified as an opponent to **SB 441**. Notice of an accident must be given to the employer within 10 days of the date of the accident. Notice may be extended due to "just cause" to 75 days; however, past 75 days no proceeding may be maintained. No proceeding for workers compensation shall be maintainable under the Workers Compensation Act unless written claim for compensation is served on the employer within 200 days after the date of accident.

As worded without additional changes to the statutes of limitation noted previously, the effect would be to exclude otherwise valid claims due to technical time limits. Without changes to the statutes of limitation, the date of accident language contained in **SB 441** would serve to inadvertently, or purposely, set a trap for

hardworking Kansas, and otherwise valid claims would be barred based upon the statutes of limitation (Attachment 4).

John M. Ostrowski, Kansas AFL-CIO, testified as an opponent to **SB 441**. Fixing a date of accident is very important because it determines such items as the claimant's average weekly wage, when oral notice must be given, when written claim must be made, who is the proper insurance carrier, what constitutes a preexisting condition, etc. Many, many issues are determined by the proper date. The subcommittee of the Advisory Council suggested striking the written claim requirement in all cases. In reality, the written claim requirement is an outdated invention which no longer is useful based on the way business is done; i.e., faxes, e-mails and the handling of claims on a regional level (Attachment 5).

David Wilson, AARP Kansas Executive Council, testified as an opponent to **SB 441**, stating AARP believes that the proposed changes in **SB 441** would create potential traps and would have a harmful impact not only on older workers, but workers of all ages, who suffer an injury whose onset is gradual and cumulative (Attachment 6).

The meeting adjourned at 10:45 a.m. The next meeting will be March 18.

COMMERCE AND LABOR COMMITTEE

Date March 19, 2004

NAME	AGENCY
Terry Leatherman	Ks. Chamber
Jan Kly Hoff	Kansas AFL-CIO
Michael R. Brink	Iron Workers Local No. 10
Hal Hudson	NFIB/KS
Larry Magill	Ks. Assn of Ins Agents
Steve Johnson	Kansas Gas Service
Ron Seeber	Fair law Firm
Tom Palace	Assn of Kansas
Gary Davenport	Ks Motor Carriers Assn
Ashley Sherard	Lenexa Chamber
Roy T. Anderson	KBIWCF
Bill Curtis	Ks Assoc of School Bds
Scott Heidner	KS Self Insurers Assoc.
Tom Slattery	AGC/Ks
Matt Bretz	KTLA
Wil Leiby	Ks AFL-CIO

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

Kansas Department of Human Resources (Labor?)
Division of Workers Compensation
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March 17, 2004

Chairman Dahl and Members of the Committee:

Thank you for inviting me to appear today and address you regarding contemplated workers compensation legislation. As you may recall, I am an administrative law judge, one of ten in the State of Kansas, charged with the responsibility of applying whatever changes you enact. I am here, as I understand it, to discuss proposed changes establishing a date of accident in a repetitive mini-trauma claim. I am also here to answer any questions that you may have, to the extent I am capable, regarding other current workers compensation issues, including the topic of "work disability."

"Date of Accident" and Senate Bill 441

The date on which an accident occurs is one of the three primary variables in determining the amount of benefits that are or may be payable. The others are the claimant's pre-injury gross average weekly wage, and the number of weeks for which benefits are payable. Generally speaking, the right to monetary benefits accrues on the date of accident, and the wage in effect on that date determines the benefit rate at which workers compensation benefits are paid. The Workers Compensation Act, **K.S.A. 44-501, et seq.**, provides a schedule or formula for determining the number of weeks of benefits available for a given injury or condition.

Where there is a specific, identifiable traumatic event, such as a fall, a motor vehicle collision, a laceration, or a crush injury, the date of accident is readily identifiable. Where the injury is suffered as a result of a series of repetitive mini-traumas, however, a specific "date of accident" may be difficult or impossible to discern. Without a specific traumatic event, an employee may also be unaware that the discomfort being experienced is work-related, as opposed to "just getting old" or some other non-work-related disease process. Whether a treating physician relates a patient's physical complaints of pain to the performance of work duties may depend on the quality and quantity of information shared with, or perceived by, the medical provider. The causal connection between physical complaints and work duties may not even be made until a diagnosis is reached, which may be several months after onset of symptoms. Typically, people don't go to a doctor the first time they have sore muscles. They may think that the soreness will pass or is too minor to warrant either the cost of the office visit or time away from work. Because the onset of symptoms is generally gradual, the employee may not realize that work duties are causing or contributing to that discomfort.

Commerce & Labor
3-17-04
Atch #1

As far back as **Winkelman v. Boeing Airplane Co., 166 Kan. 503. 203 P.2d 171 (1949)** (hearing loss due to exposure to repeated gunfire), Kansas courts have recognized that some injuries can result from repetitive traumatic events, no one of which causes discrete and identifiable injury, but which in the aggregate satisfy the statutory definition of "personal injury by accident." "If injury occurring as the result of a single accident is compensable, surely we will not declare that injury resulting from a dozen or more of the same or similar accidents, all occurring in the course of the employment, is noncompensable." ***Winkelman, @p. 508***. In **Downes v. IBP, Inc., 10 Kan.App.2d 39, 691 P.2d 42 (1984)**, tenosynovitis and thoracic outlet syndrome were recognized as the product of repetitive mini-traumas, and were compensable as a "personal injury" rather than as an occupational disease. In **Demars v. Rickel Mfg. Corp., 223 Kan. 374, 573 P.2d 1036 (1978)**, the repetitive mini-trauma analysis was extended to a back injury suffered as a result of repeated lifting in the course of work duties.

If a series of repetitive traumas is the mechanism of injury, the inquiry must then turn to establishing a date of accident. Without a "date of accident", there is no date from which benefits are payable, and there is no date that determines the appropriate wage or benefit rate.

In **Berry v. Boeing Military Airplanes, 20 Kan.App.2d 220, 885 P.2d 1261 (1994)**, the Kansas Court of Appeals adopted a "bright line rule" for establishing the date of accident in a repetitive mini-trauma case: "The date of accident or date of occurrence in a workers compensation accident involving carpal tunnel syndrome is the last day on which a claimant performs services for his or her employer and is required to stop working as a direct result of the claimant's pain and disability resulting from carpal tunnel syndrome." **Syl.¶ 3.** ***Berry*** worked as a mechanism for establishing the date of accident in a repetitive mini-trauma claim, but only where the employee actually had to stop working "as a direct result" of pain and disability. **K.S.A. 44-510c(b)** does not permit payment of Temporary Total Disability (TTD) benefits if the employer accommodates temporary work restrictions offered by an authorized treating physician. Thus, under the ***Berry*** analysis, if an employee has symptoms of a repetitive use or repetitive mini-trauma injury, there is no "date of accident" if the employee is not taken off work, even if the employee is being treated for that condition or injury, and even if the employer is aware of and is accommodating the restrictions of the treating physician.

In **Condon v. Boeing Company-Wichita, 21 Kan.App.2d 580, 903 P.2d 775 (1995)**, the claimant stopped working after being diagnosed with carpal tunnel and elbow problems, although she stopped working as a result of a general layoff, and not due to her injuries. The Workers Compensation Appeals Board (WCAB) acknowledged that Berry did not control determination of Condon's date of accident, because she did not leave work because of her injury. The date of accident was determined by the WCAB to be the date the claimant reported her complaints to her doctor. The Court in ***Condon*** discussed the different approaches to establishing the date of accident in a repetitive trauma case: (1) the last day worked; (2) the date the complaints first rise to the level that medical treatment is sought; and (3) the date on which the injury manifested itself. The injury was deemed manifested when both the fact of the injury and the causal relationship to the claimant's employment became apparent to a reasonable person. The ***Condon*** court adhered to Berry, in

principle, but noted that it did not control all circumstances.

The Court of Appeals next decided **Durham v. Cessna Aircraft Co., 24 Kan.App.2d 334, 945 P.2d 8 (1997),** which followed ***Berry*** and held the date of the accident from which compensation flows was the last day worked by the claimant where the cessation of work was due to a repetitive use type of injury.

In **Anderson v. Boeing Co., 25 Kan.App.2d 220, 960 P.2d 768 (1998)**, the ***Berry*** rule was applied in a contest between two insurance companies who had provided coverage to Boeing over different periods. ***Anderson*** held the date of the accident or occurrence is the last day the claimant performs services for his or her employer and is required to stop working as a direct result of his or her pain and disability resulting from carpal tunnel syndrome.

In **Alberty v. Excel Corp., 24 Kan.App.2d 678, 951 P.2d 967 (Kan.App. 1998)**, the injured worker continued to work after being diagnosed with carpal tunnel syndrome. The employer accommodated temporary work restrictions designed to minimize additional injury from repetitive activities. Because the employee continued to work, there was no "date of accident" under the analyses of either ***Berry*** or ***Condon***. The Kansas Court of Appeals then determined that the date of accident in such a circumstance, where the employee continued to work in an accommodated position after diagnosis had been made and treatment undertaken, was the last day of work before work restrictions were implemented.

In **Treaster v. Dillon Companies, Inc., 987 P.2d 325, 267 Kan. 610 (Kan. 1999)**, the employee had a number of health problems, and medical restrictions, not all of which were work related. Time off work and/or restrictions and accommodated work for one condition tended to overlap time off work and/or restrictions and accommodated work for another condition. I reasoned that it made sense, in construing the previous decisions on date of accident, that the date of accident should be the date of last injurious exposure to whatever activity was causing the injury. If the employee is accommodated and moved into a position that does not cause additional injury, the date of accident will be the last day the previous work activity was performed. If the accommodated work continues to cause injury, the date of accident will be the last date on which work activities contribute to the injury and resulting disability. This decision went all the way to the Kansas Supreme Court and represents the most recent pronouncement of the state's highest court on this issue. **Highly summarized, the present rule is that the date of accident in a repetitive trauma claim will be the last day that the claimant is exposed to the work activity that is causing injury, regardless of accommodation or the reason the claimant may ultimately leave his or her employment.**

Even with the present ***Treaster*** rule, scenarios occasionally crop up where there is no accommodated work provided, and the claimant continues to perform the same injurious work activity that gave rise to the claim, right up to the date of trial (Regular Hearing). The WCAB has occasionally determined the date of accident in such circumstances to be the date of Regular Hearing, where no other "trigger" exists to establish a date of accident under the present line of appellate decisions.

Illustration #1

Mary earns $700 per week. Since January 1, 2001, she has worked for XYZ Battery Company, constantly picking up automobile batteries from the floor, and stacking them on shelves. She has no specific traumatic event. In June, she starts noticing some occasional low back stiffness. She works for several months with minor but ever-increasing low back pain, until she starts having right knee pain. She puts off going to a doctor for two more months, until the right knee pain finally demands attention. She sees the doctor on May 3, 2002, and tells him her knee hurts but she doesn't know why. He performs some testing, including a referral for an MRI. He issues temporary work restrictions of no lifting over 15 pounds and no stair or ladder climbing, pending the completion of testing. Mary takes those restrictions to her employer, but the employer has no information that the complaints are work-related. On June 11, 2002, the doctor tells Mary that her knee pain is radicular pain from a herniated disk in her low back. He asks her what she does for a living, and she tells him she stacks automobile batteries. He suggests (verbally) that her back injury (herniated disk) and knee pain are probably the result of her work duties. He recommends additional or revised temporary work restrictions of no bending or stooping, and no lifting over 10 pounds. She takes her work restrictions to her employer on June 12, 2002. She then sees a lawyer, and submits a written claim for compensation for her back injury, attributable to the repetitive work duties, on June 26, 2002. The lawyer requests a written causation opinion from the doctor, which is received July 10, and delivered to the employer on July 14, 2002.

Mary has been suffering from a sore back since June, 2001, and right knee pain since March, 2002. She has been treated for these complaints since May 3, 2002, yet her date of accident could be: (1) June 26, 2002, the date she first gave written notice of her injury and claim for compensation; (2) July 10, 2002, the date the doctor's written causation opinion is received; or (3) June 12, 2002, the first day her doctor either took her off work or issued temporary work restrictions.

If Mary's date of accident is either the date she gave written notice of injury (June 26, 2002) or the date temporary work restrictions were issued (June 12, 2002), Mary's compensation rate would be $417.00 per week. If her date of accident was July 10, 2002, the date she first received a written diagnosis and causation opinion, her compensation rate would be $432.00 per week.

If Mary's date of accident was the date she first started having back pain, in June, 2001, her compensation rate would be $401.00 per week.

Assuming a 10% whole body functional impairment, from DRE (Diagnosis Related Estimate) Category III of the AMA ***Guides to the Evaluation of Permanent Impairment***, 4th Edition, Mary's claim for functional impairment would be worth **$16,641.50** if her date of accident was in June, 2001; **$17,305.50** if her date of accident was in June, 2002; **$17,928** if her date of accident was after July 1, 2002. Temporary Total Disability (TTD) weekly benefits would be payable at $417 per

week for a date of accident prior to July 1, 2002 and $432 for a date of accident on or after July 1, 2002

The date of accident thus determines the weekly TTD benefit amount payable during convalescence from a work-related injury, and the weekly PPD (permanent partial disability) benefit payable upon determination of permanent partial impairment of function or disability in the ultimate Award of compensation. It also determines the date from which compensation is payable. **K.S.A. 44-510e(a)(3)** provides that, "[i]f there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury." Ultimately, it affects the amount of compensation due for permanent partial impairment or disability.

Work Disability

The Workers Compensation Act differentiates between functional impairment and work permanent partial disability. **K.S.A. 44-510e(a)** defines "**functional impairment**" as

> the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

"**Permanent partial general disability**" (also known generically as "work disability") is defined at **K.S.A. 44-510e(a)**:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

There are thus two "prongs" to the formula for measuring "work disability": *task loss* and *wage loss*. The term "work task" is not defined in the Workers Compensation Act. Courts and parties have thus had to rely upon the opinions of vocational experts who interview claimants, obtain a work history for the fifteen years preceding the work-related accident in question, who break down those previous employments into "work tasks." Typically, vocational consultants rely upon federal publications like the Dictionary of Occupational Titles, which profile various jobs, identify the tasks inherent in performing those jobs, and project the expected physical requirements of those tasks.

The vocational consultant then compares the physical requirements of the tasks identified in the claimant's work task inventory, and offers an opinion as to the number of tasks that the claimant can no longer perform, due to the physical restrictions imposed as a result of the work-related accident. The Act requires that the task loss opinion be rendered by the physician, not the vocational consultant, but most doctors simply adopt the vocational consultant's opinions. **Many doctors are quite critical of the statutory requirement that they render task loss opinions, as they feel that such opinions are well outside their areas of expertise, and they don't feel comfortable rendering opinions in an area in which they have no training and little experience.**

The "task loss" prong of the formula is subject to manipulation, either by having a doctor issue onerous permanent work restrictions that are disproportionate to the injury suffered (e.g., no lifting over one pound, no use of arms above chest level, no standing, walking, or sitting for more than one hour at a time, no bending, stooping, crawling, no use of vibratory machinery, no keyboarding, for a low back muscle strain or strained knee ligament) or by having a doctor issue disproportionately light restrictions or no restrictions at all (despite, e.g., multi-level spinal fusion surgery or bilateral knee replacement).

The "wage loss" prong is also subject to manipulation, either by a claimant's refusal to return to work, an employer's refusal to offer bona fide accommodated work within permanent work restrictions, or the employer's pretextural termination of the employee. The appellate courts have provided some direction, requiring consideration of the "good faith" of the parties in determining whether a work disability claim has been demonstrated.

In **Copeland v. Johnson Group, Inc., 24 Kan.App.2d 306, 308, 944 P.2d 179 (1997)** the Kansas Court of Appeals interpreted the provisions of **K.S.A. 44-510e(a)** to require an injured worker to exercise good faith in seeking replacement employment. "[T]he factfinder must first make a finding of whether a claimant has made a good faith effort to find appropriate employment. If such a finding is made, the difference in pre- and post-injury wages based on actual wages can be made." Alternatively, if the factfinder is unable to make a finding of good faith, "the factfinder will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages." ***Copeland, 24 Kan.App.2d at 320.*** **Lowmaster v. Modine Mfg. Co., 25 Kan.App.2d 215, 962 P.2d 1100 (1998).**

The factfinder must also assess whether a legitimate offer of accommodated work was made by the employer and, if so, whether that work truly complied with the permanent work restrictions of the treating physician. If work is offered, but does not comport to the permanent work restrictions, the employer will be deemed to have failed to offer accommodated work, and a 100% wage loss will be imputed. If the employer terminates the employee for reasons other than the employee's permanent work restrictions, no work disability may be payable, but if the termination is pretextural, e.g., the employer fired the employee for ostensible "good cause reasons", but the evidence establishes that the "good cause" was just a pretext for getting rid of an employee that required accommodation, a work disability award is warranted.

Illustration #2

Mary (from Illustration #1, above), is unable to return to her job stacking automobile batteries, due to the potential for additional injury. The parties have stipulated that she has suffered a 10% whole body functional impairment, according to the AMA ***Guides to the Evaluation of Permanent Impairment***, 4th Edition. Her personal doctor has issued permanent work restrictions of no lifting over 15 pounds maximum, no repetitive lifting over 10 pounds, and no standing for more than 2 hours at a time. She is also restricted against repetitive bending, twisting and stooping.

The treating physician authorized by the employer and insurance carrier issued permanent work restrictions of no lifting over 30 pounds maximum, and no repetitive lifting over 20 pounds. She also restricted the claimant from more than occasional bending, twisting and stooping.

Mary's jobs for the fifteen years preceding her accident were primarily production work. The weights that she customarily lifted were in the range of 15 to 20 pounds, although she occasionally had to lift up to 40 pounds, and she was required to stand on her feet 8 hours per day.

Mary finds alternative work at minimum wage ($5.15 x 40 = $206.00 per week). Compared to her previous wages of $700.00 per week, **Mary's wage loss would be 71%.**

The employer's vocational consultant testifies that Mary has many transferable job skills, particularly as a production lead and in management. He believes she is capable of earning at least $500.00 per week, and that there are jobs available in Mary's community at that scale. If Mary is capable of earning $500.00 per week, but has not exercised good faith in trying to secure such employment, the court could impute the $500.00/week wage to her, yielding an **imputed wage loss of 29%.**

Scenario A: Using Mary's personal doctor's restrictions, she cannot perform 18 of the 24 tasks that she performed in her previous production jobs, according to her vocational consultant. Her task loss is primarily attributable to the weights she can no longer lift and the prohibition against standing 8 hours per day. **Task loss (18/24) = 75%**

Scenario B: Using the treating physician's restrictions, Mary would no longer be able to perform only 2 of the 27 job tasks identified by the employer's vocational consultant. The employer's vocational consultant characterized the claimant's previous employment than did the claimant's vocational consultant, breaking jobs down into different elements or tasks, with different physical requirements. Since the treating physician authorized greater lifting limits, and because there was no restriction against standing, the claimant "lost" fewer tasks. **Task loss (2/27) = 7.4%**

Mary's "work disability" would thus range from:

1) 71% wage loss averaged with 75% task loss = 73% work disability

With a date of accident of either June 12 or June 26, 2002, a 73% work disability award would be worth approximately **$100,000.00** (the maximum for a permanent partial disability award), payable in weekly installments of $417.00..

With a date of accident of July 10, 2002, a 73% work disability would also "max out" at **$100,000.00**, payable in weekly installments of $432.00.

2) Imputed 29% wage loss averaged with 7.4% task loss = 18.2% work disability

With a date of accident of either June 12 or June 26, 2002, an 18.2% work disability would be worth approximately **$31,496.01**, payable at $417.00 per week.

With a date of accident of July 10, 2002, an 18.2 % work disability would be worth **$32,628.96,** payable at $432.00 per week.

Scenario C: Same as above, but Mary returns to work for her employer, making at least 90% of her pre-injury gross average weekly wage, or Mary is thereafter terminated "for cause", such as stealing from her employer. Mary is limited to her functional impairment. Assuming a 10% whole body functional impairment, from DRE (Diagnosis Related Estimate) Category III of the AMA ***Guides to the Evaluation of Permanent Impairment***, 4th Edition, Mary's claim for functional impairment would be worth **$17,305.50** if her date of accident was prior to July 1, 2002, and **$17,928** if her date of accident was after July 1, 2002.

Conclusion

The determination of an appropriate date of accident in a repetitive mini-trauma claim is crucial to computation of benefits to which the employee may be entitled. From the perspective of the courts, no one approach is "better" than the others. We apply the law, we don't offer judgements on what the law ought to be. Any approach will be somewhat arbitrary, where the precise date of injury is unknown.

The computation of a "work disability" award is detailed and complicated. Many variables affect the determination of "task loss", including the number of jobs held by the employee prior to the injury in question; the ability to establish with any reliability the job tasks performed in a job five, ten or fifteen years before; the physical requirements of each of those tasks; and the perspectives of the vocational consultants who interpret that information for the benefits of the physicians whose opinions ultimately control. Many variables also affect the determination of "wage loss", particularly where the reason for and amount of the "wage loss" is disputed.

Thank you for the opportunity to address this committee.

Testimony before the House Commerce and Labor Committee
March 17, 2004 - 9:00 a.m.

Senate Bill No. 441

Presented by Roy T. Artman
Kansas Building Industry Workers Compensation Fund

The Honorable Chairman Dahl and Distinguished Committee Members:

I would like to thank you for the opportunity to address the committee on Senate Bill No. 441. My name is Roy T. Artman and I'm here today as a representative of the Kansas Building Industry Workers Compensation Fund (the Fund). I serve as general legal counsel to the Fund and oversee the claims department. In this capacity, I represent the Fund in all litigated claims before the Division of Workers Compensation. As to my background, I graduated from Washburn University School of Law and have been practicing since 1991. During this time, I have represented employers and insurance carriers, group funded pools, injured workers, as well as the Kansas Workers Compensation Fund.

In a majority of the workers compensation claims that I see, it is relatively simple to determine the date of the accident. We are generally dealing with a very specific traumatic event, be it a fall off a ladder, laceration by power tools, or a lifting injury, etc. However, I have begun to see an increasing trend in the filing of claims that involve repetitive or micro trauma injuries. Typically, one thinks of repetitive trauma cases to be confined to carpel tunnel injuries. This is not the case. These types of injuries can involve the upper and lower extremities as well as the body as a whole.

You may ask yourself what is the big deal about the date of the accident? Well, in workers compensation claims, the date of the accident directly impacts the award for the claimant as it determines the level of benefits they will receive for their injuries. For insurance carriers, it all to often determines which party will be held responsible for the payment of the award. The date of the accident is an important issue for all parties to the claim.

Since 1994, attorneys, administrative law judges, the Appeals Board and the appellate courts have struggled with the date of accident in repetitive and micro trauma cases. Since that time, there have been no less than eight (8) appellate cases decided regarding the date of accident in repetitive trauma claims. This trend will continue absent action by the legislature to remedy the situation.

Comm. Labor
3-17-04
Atch #2

It is not my intent to provide a detailed analysis of each of the major appellate decisions handed down since 1994, but I do want the committee to understand the evolution that has occurred with respect to the determination of the date of accident in micro trauma cases and to see how the appellate courts have struggled with the issue.

The first case handed down by the Kansas Court of Appeals in 1994, was Berry vs. Boeing Military Airplanes, 20 Kan. App. 2d, 230. This case established a "bright line rule" for determining the date of accident in carpal tunnel syndrome claims. The Court held that the date of accident in a carpal tunnel syndrome claim is the **last day on which the claimant worked for the employer**. This is the date upon which the disability benefits are computed.

In 1995, the Court issued it's opinion in Condon vs. Boeing Company, 21 Kan. App, 2d, 580, wherein the Court determined that date of accident was actually the **day that medical restrictions were imposed upon the injured worker**. The Condon decision also expanded the Berry decision by applying the holding to other repetitive or micro trauma cases , not just carpal tunnel syndrome. This decision began to blur that "bright line rule" previously established by the Court.

The third case in this line was Durham vs. Cessna Aircraft, 24 Kan. App. 2d 334 (1997) wherein the Court held that the date of accident in a micro trauma case is the **day the worker is required to stop working due to pain and forced to seek medical treatment**.
The next case was Alberty vs. Excel Corporation 24 Kan. App. 2d 678, decided in 1998. In that case, the Court found that the date of accident should be determined by finding the **last day worked before work restrictions were imposed upon the claimant**. This holding followed the decision in the Condon case.

Next was Anderson vs. Boeing 25 Kan. App. 2d 220, decided in 1998. The Court followed the Berry decision and rationale and found the **last day worked was the correct date of accident**.

The sixth case in this series was Treaster vs. Dillon Companies, Inc., 267 Kan. 610. This 1999 Kansas Supreme Court decision held that the date of accident in a micro trauma claim was the **last day the claimant performed services or work or was unable to continue a particular job and move to an accommodated position**. The Court noted that the bright line rule intended in Berry was immediately blurred by the Condon decision.

The next stop was Lott-Edward v. Americold Corporation, 27 Kan. App. 2d 689. This June 2000 decision handed down by the Kansas Court of Appeals held that the **last day worked rule is applicable if the work done in an accommodated position offered to and accepted by the claimant continues to aggravate a repetitive use injury.**

The last case I will cite is Kimbrough vs. KU Medical Center, (Docket No. 89,214)decided by the Kansas Supreme Court on December 12, 2003. The Court in Kimbrough held that the **last day worked before the regular hearing** (in essence the final trial date in a workers compensation claim) **is the date of the accident in repetitive or micro trauma cases.** As it stands, Kimbrough represents the state of the law on determining the date of the accident in repetitive micro trauma cases. It is my understanding that two (2) more cases are currently before the appellate courts so we can expect more decisions in the near future. Needless to say, this body of case law demonstrates the uncertainty in the law and in determining the proper date of accident in repetitive micro trauma cases. Again, without legislative intervention, I believe this trend in litigation will most likely continue.

With the Kimbrough decision, we are faced with what some have called a moving target when it comes to determining the date of accident in repetitive micro trauma cases. It has also created a situation wherein the parties to the claim can easily manipulate the date of the accident. This may be done in an attempt to increase the levels of benefits that the injured worker may be entitled to receive, or from an insurance carrier's standpoint, to shift the liability to an oncoming carrier. It is this latter concept that I wish to focus on in the remainder of my testimony.

An insurance company typically writes workers compensation coverage for a set term, subject to renewal. When an insurance company is called upon to defend a claim, the potential exists for a manipulation of the date of accident which can result in the shifting of the claim's liability from one carrier to another. If the last day worked before the regular hearing is the date of the accident, an insurance carrier can simply request continuances or cause delays which push that date beyond the limits of their coverage. A new insurance carrier or group funded pool can unknowingly write coverage for an employer only to find they have just inherited a previously existing claim. Further complicating this, is the fact that the new insurance carrier or group funded pool has not participated in anyway in the litigation of the claim leading up to the regular hearing. Their rights may be prejudiced as they have not had the benefit of attending depositions and other related proceedings.

This is the in-equitable position we now find ourselves in due to the judicial decisions handed down to date. It is also why I'm here today asking that you take action and amend the definition of "accident" in K.S.A. 44-508. The language proposed in SB #441 would eliminate the potential inequities I've described while providing safeguards for injured workers to ensure their claims are timely reported and benefits provided.

Again, thank you for your consideration and the opportunity to address you today. I would be happy to stand for questions by the committee.

Legislative Testimony

SB 441

March 17, 2004

Testimony before the Kansas House Committee on Commerce and Labor
By Terry Leatherman, Vice President – Public Affairs

THE KANSAS CHAMBER

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Mr. Chairman and Committee Members:

My name is Terry Leatherman. I am the Vice President of Public Affairs for the Kansas Chamber of Commerce and Industry. Thank you for the opportunity to appear this morning in support of SB 441.

SB 441 proposes a clarifying change to the Kansas workers compensation system which the Kansas Chamber has advocated in support of for many years. The bill would establish a date of accident in workers compensation cases where an injury develops over time, rather than in a sudden accident. Establishing a date of accident is useful in these cases because it "starts the clock" on the workers compensation process.

During Senate deliberations on SB 441, two of the three events for establishing a date of accident were amended by requiring the communication be in writing. The Senate action now requires an employee to notify their employer "in writing," or a diagnosis that a condition is work related by "in writing" in order for the action to establish a date of accident. The Kansas Chamber would respectfully request this Committee remove the Senate amendment to require notice be in writing. Allowing the date of accident to be established through verbal communication would make notice in non-traumatic accident cases similar to the notice requirement for sudden injury in K.S.A. 44-520.

Thank you for the opportunity to express the Kansas Chamber's support for the bill before you and to urge your favorable consideration of SB 441. I would be happy to answer any questions.

The Kansas Chamber is the statewide business advocacy group, with headquarters in Topeka. It is working to make Kansas more attractive to employers by reducing the costs of doing business in Kansas. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have nearly 7,500 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, large and medium sized employers all across Kansas.

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3-17-04
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March 17, 2004

TESTIMONY BEFORE
THE HOUSE COMMITTEE ON COMMERCE AND LABOR
SENATE BILL 441

My name is Michael C. Helbert and I practice law in Emporia, Kansas. I have served at Governor Graves' request on Citizens Civil Justice Initiative and have practiced workers compensation law for 25 years.

I am appearing before you today on behalf of the Kansas Trial Lawyers Association regarding Senate Bill 441.

Workers compensation claims have three statutes of limitation. All of which begin to run or begin with the date of accident.

1. Notice:

Notice of an accident must be given to the employer within 10 days of the date of the accident. Notice may be extended due to just cause to 75 days; however, past 75 days no proceeding may be maintained. K.S.A. 44-520.

2. Written Claim:

No proceeding for workers compensation shall be maintainable under the Workers Compensation Act unless written claim for compensation is served on the employer within 200 days after the date of accident. K.S.A. 44-520a.

3. Application for Hearing:

No proceeding for compensation shall be maintained under the Workers Compensation Act unless an Application for Hearing is on file with the Office of the Director within three (3) years of the date of accident, or two (2) years from the date of last payment of compensation, whichever is later. K.S.A. 44-534.

As you probably all know, the employee has the burden of proof on all issues, including meeting all the statute of limitation periods. If the employee fails on any one of the three, the

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employee is not entitled to benefits.

The problem is, by forcing the employee to use an accident date which is the earliest of the three options, in Senate Bill 441, a trap is set for the hardworking employee. An employee who notifies his employer of an injury and keeps on working, keeps on doing his job for seven months, and his condition continues to worsen to the point he can no longer keep working, would miss that 200 day statute of limitations if he does not file a written claim.

Unscrupulous employers could manufacture "notice" from the employee to potentially avoid a claim all together. The company doctor/company nurse could testify "I told the employee his condition was work related a year ago" when maybe that information was not clearly relayed to the worker. Perhaps the worker is not sophisticated enough to know what to do and simply just keeps working.

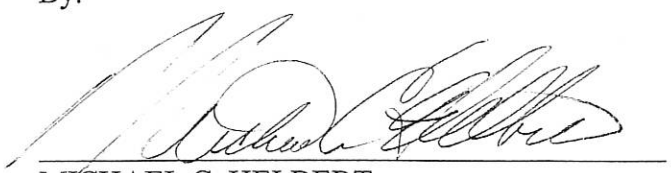
Obviously, there are serious consequences of the change as made in Senate Bill 441. Certainly, I do not believe the framers of this proposed amendment, nor this Committee, purposely intend to exclude valid claims due to technical time limits. However, as worded without additional changes to the statutes of limitation noted previously, the effect will be to exclude otherwise valid claims due to technical time limits.

A Subcommittee of the Advisory Council, made up of the Director of Workers Compensation and attorneys representing both labor and industry, met and made various recommendations. That Committee recommended that the date of accident be clarified, as well as changes made to the statutes of limitation, including abolishing written claim, extending notice, and changing the dates for filing an Application for Hearing on repetitive trauma cases.

Without changes to the statutes of limitation, the date of accident language contained in Senate Bill 441 will serve to inadvertently, or purposely, set a trap for hardworking Kansas, and otherwise valid claims will be barred based upon the statutes of limitation.

The Kansas Trial Lawyers Association opposes Senate Bill 441 based upon the effect it will have on honest hardworking Kansas employees.

LAW OFFICES OF MICHAEL C. HELBERT
By:



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TESTIMONY OF KANSAS AFL-CI0
REGARDING SB 441
HOUSE COMMERCE & LABOR COMMITTEE
BY
JOHN M. OSTROWSKI
785-233-2323
March 17, 2004

Thank you Chairman Dahl and members of the Committee. My name is John M. Ostrowski and I appear on behalf of Kansas AFL-CIO. In its present form, Kansas AFL-CIO must oppose the passage of SB 441.

In Kansas workers compensation, as in all other states, a "series of microtraumas which culminates in a disability/impairment" is compensable. A legitimate issue is when to fix the date of "accident." Consider a meatcutter who cuts meat for eight or more hours at a meatpacking company who notices fatigue in his wrist after working all day. He continues working at his regular job and the problem gets worse. He takes some aspirin, and continues working. The fatigue eventually turns to numbness, and then outright pain. He finally sees a doctor, and receives a temporary restriction from work. He returns to work, the problems return, and this scenario goes on and on with more pain, more restrictions, and finally surgery. Assume that there is an 11 months history between the time the claimant first noticed fatigue, and when he ultimately returns to work following surgery. This is not an unusual scenario as most workers try to continue working.

Fixing a date of accident along this 11 month continuum is very important because it determines such items as the claimant's average weekly wage, when oral notice must be given, when written claim must be made, who is the proper insurance carrier, what constitutes a preexisting condition, etc. Many, many issues are determined by the proper date of accident.

The intention of SB 441 as discussed in the subcommittees of the Advisory Council was never to exclude these workers from the system, or set a trap in terms of time limits. It was merely to simplify the date in an attempt to reduce litigation. To avoid the "time limit trap", the subcommittee and super subcommittee recommended abolishing written claim. Because there may be a constitutional problem in only abolishing written claim for a particular accident, the subcommittee suggested striking the written claim requirement in all cases. In reality, the written claim requirement is an outdated invention which no longer is useful based on the way we currently do business (i.e. faxes, emails, and the handling of claims on a regional level).

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AARP Kansas

March 17, 2004

Representative Dahl, Chair
House Commerce and Labor Committee

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 and a representative of the Kansas Coalition for Workplace Safety. 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 to SB 441.

AARP is committed to expanding employment opportunities, removing barriers to equal employment opportunity and promoting job security for workers of all ages. More than forty four percent of all AARP members work full or part time.

A new national AARP survey, titled "Staying Ahead of the Curve 2003: The AARP Working in Retirement Study," showed that older workers will continue to have a prominent and increasing role in the labor force in coming decades. Many of the workers now between the ages of 50 and 70 plan to work far into their "retirement years" or are poised to take service type jobs as they retire.

The survey also showed that loyalty to employers was very strong and the leading reasons for working in retirement or for returning to the workforce included:

- Need for money and health benefits.
- Desire to remain mentally active, productive and useful.
- Need to support family (Grandparents raising grandchildren).

The study summarizes that if employers are to reap the benefits and work ethics of older workers as the workforce contracts over the next decade, they must consider carefully how older workers are treated in the workplace. Regardless of age, SB 441 will not treat workers fairly.

Extensive research has found no relationship between age and job performance. Americans age 55 and above take fewer sick days and are more loyal to their employer than those in their 30's. However, workers of all ages are at risk in situations of repetitive use or degenerative diseases. Because of strong work ethics, older workers as well as others may not report every ache and pain that they incur in the process of completing their routine job duties.

AARP believes that the proposed changes in SB 441 would create potential traps and would have a harmful impact not only on older workers, but workers of all ages, who suffer an injury whose onset is gradual and cumulative. These workers, with valid claims, would find their rights for financial/legal remedies denied. Therefore, AARP strongly opposes SB 441 and respectfully request that you not support SB 441.

Thank you for this opportunity to present our comments and opposition to SB 441.

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