Approved: April 2, 2004

MINUTES OF THE HOUSE ECONOMIC DEVELOPMENT COMMITTEE

The meeting was called to order by Chairman Kenny Wilk at 3:30 p.m. on March 23, 2004, in Room 526-S of the Capitol.

All members were present.

Committee staff present:
Kathie Sparks, Legislative Research Department
Susan Kannarr, Legislative Research Department
Renae Jefferies, Office of Revisor of Statutes
Helen Pedigo, Office of Revisor of Statutes
Fulva Seufert, Secretary

Conferees appearing before the committee:

Terry Leatherman, Vice President of Public Affairs, Kansas Chamber of Commerce & Industry
Jeff K. Cooper, Kansas Trial Lawyers Association
Terri Roberts J.D., R.N., Kansas Coalition for Workplace Safety
Bart Thomas, President and CEO, Thomas Outdoor Advertising Company, Manhattan, KS
David Wilson, AARP Kansas Executive Council, Kansas Coalition for Workplace Safety
John M. Ostrowski, Attorney, Kansas AFL-CIO
Roy T. Artman, General Legal Counsel, Kansas Building Industry Workers Compensation Fund

Others attending:
See Attached List

Chairman Wilk asked Ms. Kathie Sparks, Legislative Research, to brief the committee on the following:

SB 441 - Workers compensation; defining date of accident.

Ms. Sparks said **SB 441** would amend the Workers Compensation Act by changing the definition of "accident." 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 three dates include:

- The earliest date upon which an employee gives written notice to the employer of the injury;
- The date the condition is diagnosed as work-related, providing such fact is communicated in writing to the injured worker; or
- 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 Committee amended the bill by adding that written notice must be given to the employer or the injured worker. The original bill required only notice. (Attachment 1)

Chairman Wilk thanked Ms. Sparks and opened the Public Hearing on **SB 441** by asking the conferees to please keep remarks focused on the bill. He first called on Mr. Roy T. Artman, Kansas Building Industry Workers Compensation Fund, who had not yet arrived at the meeting. Ms. Janet Stubbs said he was in another meeting and would be late and would testify later. The Chairman next welcomed Mr. Terry Leatherman, Vice President of Public Affairs, Kansas Chamber of Commerce and Industry, who spoke as a proponent of **SB 441**.

Mr. Leatherman said that **SB 441** proposes a clarifying change which the Kansas Chamber has advocated for many years by establishing a date of accident in workers compensation cases where an injury develops over time, rather than in a sudden accident. (Attachment 2)

Chairman Wilk thanked Mr. Leatherman and welcomed Mr. Jeff K. Cooper, Kansas Trial Lawyers Association, who testified in opposition to **SB 441**. Mr. Cooper said that workers compensation claims have

three statutes of limitation, all of which begin to run or begin with the date of accident.

1. Notice of an accident must be given to the employer within 20 days of the date of the accident.

2. 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. 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 years of the date of accident, or two years from the date of last payment of compensation, whichever is later. (K.S.A. 44-534) (Attachment 3)

Testimony presented earlier to the House Commerce and Labor Committee by the Honorable Bruce E. Moore, Administrative Law Judge, was distributed to members. (Attachment 4)

Chairman Wilk thanked Mr. Leatherman and welcomed Ms. Terri Roberts J.D., R.N., Executive Director of the Kansas State Nurses Association and Chair of the Kansas Coalition for Workplace Safety, who also spoke as an opponent of **SB 441**. Ms. Roberts' testimony said they want to see a balance between the needs of employees injured on the job and employers who are liable for their injuries. She said it is a difficult and complex balancing act affected by factors outside the workplace. The insurance market and skyrocketing medical costs are these factors along with lax safety standards inside the workplace. She said only 1 percent of those polled by the KCCI mentioned the need to change the work comp system as a way to improve business conditions. The U.S. Chamber of Commerce ranks Kansas in the top 10 states in the nation for creating a fair and reasonable legal environment for business. (Attachment 5)

Chairman Wilk thanked Ms. Roberts and welcomed Mr. Bart Thomas, President and CEO, Thomas Outdoor Advertising Company, Manhattan, Kansas, who spoke as an opponent to **SB 441**. Mr. Thomas said that **SB 441** sets a trap for workers who sustain an injury from jobs requiring repetitive motions. He disputed the KCCI claim that this legislation is needed to reduce the cost of workers compensation insurance. He stated that Kansas workers' compensation premiums are among the lowest in the U.S. and that Kansas is one of the most profitable environments for workers' compensation insurance carriers. He said that the KCCI does not speak for small and medium-sized businesses like the Thomas Sign Company. (Attachment 6)

The Chair thanked Mr. Thomas and welcomed Mr. David Wilson, member of the AARP Kansas Executive Council and Representative of the Kansas Coalition for Workplace Safety, who spoke in strong opposition to **SB 441**. Mr. Wilson said the AARP is committed to improving employment opportunities and removing barriers to equal employment opportunity. The AARP strives to promote job security for workers of all ages. He said the AARP believes that the proposed changes in **SB 441** would create potential traps and would have a harmful impact on workers of all ages who suffer an injury whose onset is gradual and cumulative. (Attachment 7)

Chairman Wilk thanked Mr. Wilson and welcomed Mr. John M. Ostrowski, Kansas AFL-CIO. who spoke in opposition to **SB 441**. Mr. Ostrowski asked the committee to proceed with caution on this complex issue. He said there was no reason to rush into passage of bad laws, to increase litigation, and even to complicate the problems that currently exist. Mr. Ostrowski said that this legislation does not address the real cost-drivers in Kansas workers compensation. He, too, mentioned spiraling medical costs, lack of safety, and above normal insurance company profits. He said the Kansas AFL-CIO will urge the newly reformulated Advisory Council to produce comprehensive legislation detailing the multiple issues. (Attachment 8)

Chairman Wilk thanked Mr. Ostrowski, and since there were no other opponents, he then welcomed Mr. Roy T. Artman, Kansas Building Industry Workers Compensation Fund, who testified as a proponent of **SB 441**. His testimony included information stating that the date of the accident is a big deal because it directly impacts the award for the claimant and determines the level of benefits they will receive for their injuries. He said this is important especially in repetitive and micro trauma cases. His testimony included examples of several court cases handled by the appellate courts. (Attachment 9)

MINUTES OF THE HOUSE ECONOMIC DEVELOPMENT COMMITTEE at 3:30 p.m. on March 23, 2004, in Room 526-S of the Capitol.

Chairman Wilk asked if any members had questions of the conferees. A question was asked concerning the process of litigation at a preliminary hearing level and the reply was that under current law is not a date of injury issue. Only an issue in cases where there is a problem in which an employee just keeps working regardless of the injury. Mr. Cooper said the real cost is in the insurance premiums, and the biggest problem are in situations where there is a change in insurance companies.

Representative Burroughs asked Mr. Ostrowski if it was safe to say that the advisory council moves very slowly and was told "yes."

Representative Burroughs made a motion that **SB 441** be tabled, and Chairman Wilk said the motion was out of order at this point because the Public Hearing was still open.

Representative Brunk asked about what is wrong with written notice and how it is a trap. He was told that there are three statutes of limitations in workman's comp.

Chairman Wilk announced that since there were no additional questions, the Public Hearing for **SB 441** was closed.

The Chair asked the committee members to direct their attention to **SB 441.**

Representative Burroughs made a motion to table **SB 441** until a recommendation comes back from the newly appointed advisory committee. Representative Kuether seconded. A division was called. The motion failed 6 to 8.

Representative Gordon made a motion to pass **SB 441** out marked favorable for passage. Representative Huntington seconded.

Representative Kuether made a substitute motion to amend **SB 441** to remove the language that requires written notice. Representative Loganbill seconded.

With the consent of Representative Loganbill, Representative Kuether withdrew her motion.

Representative Kuether made a substitute motion to repeal K.S.A. 44-520a in **SB 441**. Representative Loganbill seconded. Discussion followed. This would take out the trap of the 200 days and the injured will have two time requirements instead of three. Representative Boyer said that he was opposed to Kuether's amendment because it made a significant change to workman's comp. Representative Carlin supports the amendment. Representative Hill supports Rep. Kuether's amendment while looking foward to more good work from the House. A division was called and the motion failed 7 to 7. (Attachment 10)

Chairman Wilk announced that the committee was back on **SB 441.**

Representative Boyer made a substitute motion to amend on page 3, line 24 by deleting the word "written" and on line 26 the words "in writing," and to pass **SB 441** marked favorable for passage as amended. Representative Krehbiel seconded. Discussion followed. Some thought it streamlined the bill and made it better. Representative Burroughs said that he opposed and Representative Krehbiel said he supports the striking of the 3 words that the senate inserted. The vote was taken, a division was called, and the motion passed 8 to 6.

Representative Hill made a motion to approve the minutes of the March 18, 2004, meeting, and Representative Boyer seconded. Motion passed.

Chairman Wilk directed the committee's attention to **HB 2934 - Tax increment financing; river walk canal facility.**

Representative Brunk made a motion to add the words, "water walk facility" and on page 5, line 14 after the word "area" insert "within a city in Sedgwick County that has a population of not less than 300,000.

Representative Novascone seconded. (Attachment 11) During discussion Representative Burroughs said that he opposed the amendment. Representative Brunk said that the original STAR Bond language was amended to allow for constructing buildings with STAR Bond money, and he wanted to go back to the original language so Wichita could do what Cabelas did in Wyandotte County. He said this was a complex situation and that Lt. Gov. Moore called and asked us what we thought the intent of STAR Bonds was. Initially it was thought that STAR Bond money was not to be used for vertical construction. The language in the law today is ambiguous and needs to be further studied. He said the second amendment limits it even more with the 25% limitation. Representative Kuether said that she opposed the amendment because two wrongs do not make a right. The vote was taken and division was called. Motion passed 8 to 5. (Attachment 12)

Representative Brunk made a motion to pass **HB 2934** marked favorable for passage as amended. Representative Novascone seconded. During discussion Representative Loganbill said she firmly opposed and Representative Burroughs said he also opposed. The Revisor asked for a small technical change to move line 11, "river walk canal facility" to line 12 after the word "including." The vote was taken and a division called. Motion failed 6 to 7. Representative Novascone asked to recorded as voting "yes."

Chairman Wilk asked Representative Gordon to present the subcommittee report from the Lights, Camera, Action (LCA) Subcommittee. Representative Gordon thanked the staff and her subcommittee for all their help and support. She thanked Ms. Susan Kannarr, Legislative Research, for her great job in compiling all the excellent research. Rep. Gordon also thanked Kansas, Inc. for doing the quick feasibility study and offering suggestions on how to proceed. She commented on the committee's informative visit to QuVis which is a local high definition technology facility. The subcommittee recommended the creation of a task force to report to the Joint Committee on Economic Development during the upcoming interim. Rep. Gordon said the goal of this interim activity would be to craft a package of legislative initiatives for consideration by the 2005 Legislature. She reported that Kansas, Inc. has indicated its willingness to continue to provide planning, writing, and analysis services. (Attachment 13)

Chairman Wilk thanked Representative Gordon for the productive work of the subcommittee and said that a letter should be drafted to the LCC requesting the appointment of a committee and asking that the subject matter be assigned to the Joint Interim Economic Development Committee.

Representative Gordon made a motion to send a letter to the Legislative Coordinating Council requesting that a committee be appointed and that the subject matter be assigned to the Joint Interim Economic Development Committee. Representative Kuether seconded. Motion passed.

Chairman Wilk thanked all the members of the Committee for their hard work and cooperation in making the Economic Development Committee a productive and enjoyable committee. He also thanked the staff for all their diligence and hard work.

The meeting adjourned at 5:30 p.m.

HOUSE ECONOMIC DEVELOPMENT COMMITTEE
GUEST LIST
DATE: Tuesday, March 23, 2004

NAME	REPRESENTING
Bill Moore	TEAMSTERS KANSAS
Ed Redmon	Ks State council of fire fighters
Burt Thomas	Thomas Outdoor
Terry Leatherman	Ks. Chamber
Richard Hentz	KDHR-WC
Jeff Cooper	KTLA
HBoom	DPS
Mike Jones	USWA Local 307
Wil Leiker	Ks AFL-CIO
DAN WOODARD	N.E. KS. BCD AND CONST. TRADES
Kelly Edmiston	Washburn University - KSNA
Bill Curtis	Ks Assoc of School Bds
Marlee Carpenter	Kansas Chamber
Scott Heidner	KS Self Insurers Assoc
Wade Hopgood	Sprint
Ashley Sherard	Seneca Chamber
Perri Roberts RN	Ks. State Nurses Assn.
Ryan Hodge	concerned citizen
	KTLA

Please sign in!

Name	Organization
LARRY MAGILL	IL. ASSN OF INS AGENTS
[signature]	Boeing
[signature]	Dennon & Associates
Ron Secbar	Hair Law Firm
[signature]	intern
J.P. SMALL	BOMBARDIER LEARJET
[signature]	Ko. Bldg. Ind. W. C. F.
[signature]	461 / KS

Corrected
SESSION OF 2004

SUPPLEMENTAL NOTE ON SENATE BILL NO. 441

As Amended by Senate Committee on Commerce

Brief*

SB 441 would amend the Workers Compensation Act by changing the definition of "accident". 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 three dates include:

- The earliest date upon which an employee gives written notice to the employer of the injury;
- The date the condition is diagnosed as work-related, providing such fact is communicated in writing to the injured worker; or
- 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 bill also states that whenever an event occurs as outlined above the requirements for notice of injury and written claim for compensation with regard to the time limitation has been satisfied.

Background

The Senate Committee amended the bill by adding that written notice must be given to the employer or the injured worker. The original bill required only notice.

The fiscal note indicates that passage of the bill would have no fiscal effect on the Department of Human Resources.

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*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at http://www.kslegislature.org

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3-23-04
Attachment 1

Legislative Testimony

SB 441

March 23, 2004

Testimony before the Kansas House Committee on Economic Development
By Terry Leatherman, Vice President – Public Affairs

THE KANSAS CHAMBER

The Force for Business

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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 involves one nuance of workers compensation law. In a standard workers compensation injury, the date of accident is easy to determine. It is the day the worker slipped and fell or was hurt by a piece of machinery. With the date of accident established, the processes within the workers compensation act begin. However, not all compensable workers compensation injuries result from a sudden accident. As a result, the current workers compensation process has been challenged to establish a date of accident for workplace injuries that develop over time, rather than a sudden occurrence. For example, what is the date of injury when an employee is diagnosed with work-related carpal tunnel syndrome?

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 terminal 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 preference would be the SB 441, as originally proposed. 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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Attachment 2

Date: March 23, 2004

To: Members of the House Committee on Economic Development

From: Jeff K. Cooper
Kansas Trial Lawyers Association

Re: Senate Bill 441

Chairman Wilk and members of the house Committee on Economic Development; thank you for the opportunity to appear before you today. My name is Jeff Cooper and I am a practicing attorney in Topeka. I am also an adjunct professor at Washburn University where I have taught workers compensation for over 12 years. I represent both injured workers as well as self-insured employers including the City of Topeka, Shawnee County, and State of Kansas, and some small insurance companies. I am also a pro tem member of the Appeals Board for workers compensation. We appreciate the opportunity to appear before you today in opposition to SB 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

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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 employee is not entitled to benefits.

SB 441 would force the employee to use an accident date which is the **earliest** of the three options, creating a trap for the hardworking employee. An employee, who notifies his/her employer of an injury and keeps on working - keeps on doing his job for months while the condition continues to worsen to the point he can no longer keep working - would miss the 200 day statute of limitations if he/she does not file a written claim.

An unscrupulous employer 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 does not know what to do and simply just keeps working.

Obviously, there are serious consequences of changes proposed in SB 441. Certainly, I do not believe the framers of this proposed amendment, not 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 statues of limitation, the date of accident language contained in SB 441 will serve to either inadvertently, or purposely, set a trap for hardworking, Kansans, and otherwise valid claims will be barred based upon the statutes of limitation.

Prior Hearing & Testimony

Proposed changes advocated by the Kansas Chamber of Commerce and Industry including SB 441 do not have the recommendation of the Kansas Workers Compensation Advisory Committee or the support of the majority of members of the House Commerce Committee. This lack of recommendation and lack of support is after more than a year of study and weeks of testimony in the House of Commerce Committee. The House Committee on Economic Development has not had the benefit of hearing the various conferees on the issue including Honorable Bruce E. Moore, Administrative Law Judge, who clearly and succinctly outlined the case law and the current present rule which he stated as follows:

> **The date of accident in a repetitive trauma claim will be the last date that the claimant is exposed to the work activity that is causing the injury, regardless of accommodation or the reason claimant may ultimately leave his or her employment.**

The current law, unlike SB 441, does not punish employees who try to continue to try to work through the pain of their injuries, and does not bar valid claims based on technical rules on statutes of limitation.

As Judge Moore indicated in his testimony, 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 related a patients 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 casual 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 do not go to a doctor the first time they have sore muscles. They may think that soreness will pass or it 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 their work duties are causing or contributing to that discomfort.

Applying these realities, as Judge Moore testified pertaining to SB 441, the proposed legislation would set a trap for unwary or unsuspecting hard working Kansas employees. Under SB 441, which utilizes the earliest of three options, the worker and his family may be out of luck because one of the three statutes of limitation (notice, written claim, or Application of Hearing) may have expired.

Representatives Novascone, Boyer, Hill, and Carlin have all heard Judge Moore and the other conferees present testimony on the proposed changes. They have also heard testimony and have reviewed the Docking Institute study, both of which show that Kansas employers already pay the fourth lowest premiums for workers compensation insurance in the country. They have heard that there is no need for changes and certainly have heard there is absolutely no need for reducing already low Kansas benefits to injured workers and their families.

As this committee may know, a new advisory council is in the process of being constituted and will be fully functional within a couple of weeks. The advisory council was originally instituted by statute as a way to discuss and agree on changes, and to make recommendations on legislation pertaining to workers compensation, which is a complex area. The advisory council has representatives of both employers and employees and can make recommendations that are best for both Kansas employers and employees. Given that a new advisory council has been established, we would request this committee table SB 441 to be evaluated by the new advisory council, which will be in action within a couple of weeks. The new advisory committee can study the legislation and make recommendations to the legislature, rather than rushing important legislation on workers compensation through the Economic Development Committee on a last minute basis.

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

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

Chairman Dahl and Members of the Committee:

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

A Historical Perspective

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

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

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

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

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

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

Preexisting Conditions and the *Hanson* Decision

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

> Except for liability for medical compensation, as provided for in K.S.A. 44-510 and amendments thereto, the employer shall not be liable under the workers compensation act in respect of any injury which does not disable the employee for a period of at least one week from earning full wages at the work at which the employee is employed. **The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes *increased disability*. Any award of compensation shall be reduced by the amount of *functional impairment* determined to be preexisting.** (Emphases added)

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

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

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

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

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

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

Board granted Hanson the full measure of his post-surgical impairment rating, without deduction. An appeal was taken to the Kansas Court of Appeals, which held that there is, indeed, a difference between a preexisting condition and a preexisting disability. Noting that distinction, the Court of Appeals held that, "where there is ***no evidence of the amount*** of preexisting disability or impairment due to a preexisting condition, there is nothing to deduct from the total impairment to ensure that the employer and/or its carrier are excused from covering the preexisting portion." ***Hanson*, supra, Syl. ¶ 4, (emphasis added).**

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

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

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

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

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

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

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

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

Administrative Law Judges

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

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

developed before the ALJ.

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

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

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

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

Conclusion

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

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

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

Thank you for the opportunity to address this committee.

Kansas Coalition for Workplace Safety

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

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

S.B. 441 Date of Accident: Workers Compensation

Testimony Before House Economic and Development Committee
Terri Roberts J.D., R.N.
Kansas Coalition for Workplace Safety
March 17, 2004

Chairman Wilks and members of the committee, I am Terri Roberts J.D., R.N., Executive Director of the Kansas State Nurses Association and Chair of the Kansas Coalition for Workplace Safety. The Kansas Coalition for Workplace Safety represents professional organizations, labor unions, industry and others interested in promoting workplace safety. Thank you for this opportunity to discuss the proposed amendments to the Workers Compensation Act contained in S.B. 441.

Before I begin I wanted to give you a sense of how the Coalition partners view this debate regarding workers compensation policy considerations. Many of our partner organizations have lim ited experience w ith l egislative p roposals a nd t hroughout t he interim study and the first six weeks of the session we were able to keep them informed about the process and the issues. The past two weeks this has been a greater challenge. The Interim Committee had a study on workers compensation and we began the 2004 session with three weeks worth of hearings on various aspects of the workers compensation system, how it works, and the history behind the 1993 changes. There were also hearings on Substitute for S.B. 181, which is a very contentious bill that has yet to receive enough votes to get out of the House Industry and Commerce Committee. The complexity of workers compensation laws, implementation and court rulings cannot be over emphasized. It is an extremely complex area of the law, with distinctions, interpretations that have high levels of in many cases emotionally laden perceptions by both the injured worker and/or the employer. The goal in a "no fault" "exclusive remedy system" is to get to and maintain a sense of "balance".

Last fall, the Kansas Coalition for Workplace Safety commissioned the Docking Institute of Public Affairs at Fort Hays State University to perform a n inde pendent analysis of the issue of workers compensation in Kansas. The Docking Institute reviewed data from the United States Department of Labor, the Kansas Department of Human Resources and various private organizations, including NCCI, in order to document the state of workers compensation in Kansas. The Docking Institute has recently completed its study, and we are very pleased to provide the committee with copies of their report today.

As you will see, the Docking Institute report contains a great deal of good news for Kansas employers and work comp insurance carriers. It's so favorable, in fact, that the chamber may wish to use it in pitches to attract new businesses to the state. The Docking Institute concludes:

> **"...[B]y any measure, Kansas employers pay some of the lowest workers compensation costs in the nation."** *(Docking Institute Report, Page 9)*

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Let's look at some of the factors the Docking Institute weighed in arriving at this conclusion. Researchers first looked at how much Kansas employers were actually paying for work comp insurance premiums. They found that employers pay relatively low costs for work comp insurance and that, despite a slight rise since 2001, premiums are still "substantially less than those charged in 1993 and 1994." When they compared premiums in Kansas with premiums in other states, the Docking Institute found that Kansas had *the fourth lowest premium rate in the nation* . Only Virginia, Indiana and North Dakota had lower premiums.

The Docking Institute also looked a t e mployers' premiums as a percentage of total wages. Here, too, Kansas employers are doing well. The study finds that premiums as a percentage of total wages "have been steadily falling for the last decade" to about half the percentage they were in 1992.

To take this comparison a little deeper, the Docking Institute looked at employers' costs in one of the most dangerous industries: Manufacturing. Even here, Kansas ranked 21st among all states for the lowest workers compensation costs in the manufacturing sector, and Kansas was the second lowest among our neighbors Nebraska, Oklahoma, Colorado and Missouri. This is all the more remarkable when you consider that the injury rate in Kansas for manufacturing is *significantly* higher than the national average.

Again, by every measure, Kansas employers enjoy some of the lowest workers compensation costs in the nation. The only ones who might benefit from a premium increase would be the already-profitable insurance carriers. Data obtained from NCCI ranks Kansas *third in the nation* as one of the most favorable environments for workers compensation profitability. The Docking Institute gives us some insight as to why Kansas is ranked in the top three. The study found that for 2002, workers compensation carriers in Kansas earned more than $307 million in premiums and incurred direct losses of $177 million. In other words, for every dollar earned in premiums in 2002, the carriers in Kansas paid out approximately 58 cents in benefits.

The study also examined the average cost per workers compensation case in Kansas. It found that the average cost per case in Kansas, excluding medical costs, is the 11th lowest in the nation. When you factor in medical costs, Kansas' overall costs per case (meaning medical plus indemnity costs) are 72% of the national average. In other words, the average case in Kansas costs employers and insurance carriers 28% less than the national average. Again, by every measure Kansas employers and insurers pay some of the lowest workers compensation costs in the nation. But it's not because workers and workplaces in Kansas are safer than other states. In fact, injury rates in Kansas are significantly higher than the national average in virtually every industry. Kansas employees get hurt more frequently and often more severely than the national average. When you compare our injury rates from 1997 to 2001 to those of surrounding states, Kansas has had the highest injury rate, or tied for highest, three years out of five. In other words, Kansas employers and insurers are thriving *despite* unacceptable levels of injury. How do they do it? By keeping the benefits to injured workers so pitifully low.

According to the Docking Institute, the maximum weekly benefits for injured workers in Kansas are the 7th lowest in the country. Moreover, Kansas offers the lowest weekly benefits in the five-state region including our neighbors Missouri, Nebraska, Colorado

and Oklahoma. As you know, Kansas also is one of only four states that caps permanent total disability rather than provide lifetime benefits, and of the four, Kansas' cap is by far the lowest. Kansas also caps permanent partial disability, and we are a low-benefit state in terms of both scheduled and unscheduled injuries.

As you can see from my short overview of the report, there is not a workers compensation crisis in Kansas. Unfortunately, we are here today to testify on the merits of a bill that does more than just alter the date of repetitive motion injuries for purposes of qualifying for workers compensation. This bill is here to give the proponents of Substitute of S.B. 181 a fresh bill on the House floor that they can amend those provisions into. Why, because they couldn't convince the House Committee with concievable the most comprehensive understanding of this system to pass it out. Its no secret that the KCCI and others lobbying Sub. S.B. 181 are desperate. On behalf of the Coalition, I just want to say that we have been in attendance at every hearing on workers compensation, provided educated and instructional testimony to the best of our abilities and that of our partners. We are dissappointed that this policy debate has fallen to this level, one that requires circumventing the system in order to prevail. We are steadfast in our determination to addressing whatever policy issues are presented that undermine the present workers compensation benefits for injured workers.

Date of Accident

The proposed change to date of accident in SB 441 is another example of proponents' disregard for their injured workers. Date of accident is a very complex area of law. Put simply, SB 441 is a "technicality trap" designed to eliminate valid claims by workers who suffer cumulative-trauma injuries, such as carpal tunnel syndrome or degenerative disc disease. The proposed changes to date of accident have been studied in depth by the Workers Compensation Advisory Council, and the Council has recommended several modifications that would clarify date of accident and be fair to injured workers. Unfortunately, proponents have rejected the Council's suggestions. Suffice it to say, in its current form, SB 441 could mean an injured worker with a valid claim would receive no benefits at all. In addition, the proposed change to date of accident will likely lead to more litigation in cumulative-trauma cases.

Proponents of these changes clearly have not taken a balanced approach to the issue of workers compensation. As a member of a coalition that represents almost a half-million workers, it is difficult for me to understand why the industry persists in their endeavors to reduce workers compensation for injured workers, especially since their own surveys show that work comp is a low-priority issue. Why not tackle the real problems: rising medical costs, poor safety records, employer fraud, and spikes in the insurance cycle? It seems easier to target injured workers than it is to ask hard questions and propose real solutions.

In the broadest sense, this hearing is about how best to achieve balance between the needs of employees injured on the job and employers who are liable for their injuries. Recent hearings have demonstrated, this is a difficult and complex balancing act affected by factors *outside* the workplace—such as the hard insurance market and skyrocketing medical costs—and factors *inside* the workplace, such as lax safety standards. Unfortunately, those intent on changing the work comp system do not address any of these complex issues. Instead, they propose to "recoup" their costsby

cutting benefits to injured workers.

Ironically, only 1% of those polled by the KCCI cited the need to change the work comp system as a way to improve business conditions, and a study released this month by the U.S. Chamber of Commerce confirmed those findings. The U.S. Chamber found that only 1% polled felt workers compensation was a top priority for state policymakers. In fact, the U.S. Chamber of Commerce ranked Kansas in the top 10 states in the nation for creating a fair and reasonable legal environment for business.

I strongly urge the committee to reject S.B. 441 on date of accident for Kansas workers compensation claims.

Thank you.

TO: Members of the House Committee on Economic Development

FROM: Bart Thomas, President and CEO
Thomas Outdoor Advertising Co.
Manhattan, KS

RE: SB 441

Chairman Wilk and members of the committee; I am Bart Thomas and I thank you for the chance to be here today to express my opposition to SB 441. As owners of the Thomas Sign Company, a small business in Manhattan, my father and I oppose the punitive legislation that has been proposed and supported by the KCCI and others over the past year. It was our concern and opposition to these efforts that led me to join the Kansas Coalition for Workplace Safety.

I own my own business, Thomas Outdoor Advertising, in Manhattan. My business is one of three divisions within Thomas Sign Company – a business started by my father 69 years ago. Together, we employ eight full-time persons and one part time employee and we try to treat them well. My 84-year-old father, who still works six days a week, taught me to respect the people that we employ because satisfied and respected employees are loyal, more productive and stay with us. My father and I cannot support SB 441 – or any such regressive legislation – that would reduce workers compensation benefits to our employees and their families.

Simply put, SB 441 sets up a trap for workers who sustain an injury from jobs requiring repetitive motions. It is already so frustratingly difficult to get the compensation you are due when you are injured, that we cannot support a bill that could make it even harder for my employees – possibly even denying them benefits, should they be injured on the job.

SB 441, like SB 181, is being pushed by the Kansas Chamber of Commerce and Industry. I am a members and support my local Chamber of Commerce but I cannot support legislation that would punish employees who try to work through the pain of their injuries, not knowing that they their "clock is ticking" causing them to miss their chance to file a claim. I will not benefit as a businessman if either or both bills are ultimately passed by the legislature this year.

The KCCI claims that this legislation is needed to reduce the cost of workers compensation insurance. However, studies show that workers compensation premiums paid in Kansas are among the lowest in the United States and that Kansas is one of the most profitable environments for workers compensation insurance carriers.

I am confused about how cutting workers compensation benefits to the people I work with if they are injured on the job, will help the Kansas economy. That just doesn't add up.

After more than a year of study, these punitive workers compensation proposals do not have the recommendation of the Workers Compensation Advisory Committee or the support of the majority of the members of the House Commerce Committee. It seems to me that it is time to stop wasting our efforts on proposals that will not improve the workers compensation system. Instead we should begin to study how we can reduce the increase in health care costs and improve benefits to workers injured on the job.

Thank you for allowing me the opportunity today to express our opposition to SB 441. My father and I believed it was important for us to register our opposition to SB 441 and to let you to know that the KCCI does not speak for small and medium-sized businesses like the Thomas Sign Co. We urge you to reject SB 441.

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AARP Kansas

March 23, 2004

Representative Wilk, Chair
House Economic Development Committee

Good afternoon Chairman Wilk and Members of the House Economic Development 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 shrinks 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.

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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TESTIMONY OF KANSAS AFL-CI0
REGARDING SB 441
HOUSE ECONOMIC DEVELOPMENT COMMITTEE - RM 526S
BY
JOHN M. OSTROWSKI
785-233-2323
March 23, 2004

Thank you Chairman Wilk and members of the Committee. My name is John M. Ostrowski and I appear on behalf of Kansas AFL-CIO. I am an attorney, and a former member of the Advisory Council. I have been involved in workers compensation for over 25 years.

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:

a) the claimant's average weekly wage,

b) when oral notice must be given,

c) when written claim must be made,

d) who is the proper insurance carrier,

e) what constitutes a preexisting condition, and

f) what entity will direct and control medical care.

The bottom line is that fixing a certain date of accident is an important concept. In part, it is a "legal fiction" and one which the courts have struggled with in Kansas. Be assured that the problem is not unique to Kansas, but is dealt with in all states.

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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 (K.S.A. 44-520a).

Bear in mind that Kansas has three time limits relative to any given workers compensation claim. These time limits are 10 days for oral notice, 200 days for written claim, and filing an timely Application for Hearing with the Division of Workers Compensation (usually 2 years). This is very unusual. No other state has *three* statute of limitations for workers compensation. If a claimant stumbles on any one of the three, the claim is totally denied.

It is not felt that abolishing written claim is prejudicial to employers in the State of Kansas. Written claim is simply outdated based on the way claims are handled. That is, multiple written documents are generated and exchanged once a claimant gives oral notice of injury. There are emails, faxes, electronic transfer of medical records, etc.

Very few claims are successfully defended because of written claim, but it does add to the litigation system. Understand that if there is any doubt about a timely written claim, the insurance carrier's attorney must litigate that issue. When coupled with the amendments proposed in SB 441, it is possible that claimants will once again fall trap to the written claim time limit.

Understand, again, the backers of SB 441 within the Advisory Council never intended to exclude valid workers compensation claims. In fact, it will be the faithful employee who continues to do his work who will most likely be waylaid by this provision. The worker who fakes an injury is not going to lose out because of time limit problems.

The Kansas AFL-CIO opposes the passage of SB 441 in its present form, and requests that it be enacted only if the provisions of K.S.A. 44-520a are simultaneously abolished.

A REQUEST FOR CAUTION

This year a substantial amount of testimony was presented to the House Commerce and Industry Committee on SB 441, and other proposed workers compensation legislation. No consensus was able to be reached, in part, because of the complexities of the issues. As we believe was demonstrated in the House Commerce Committee, workers compensation is extremely fertile for the passage of laws "with unintended consequences."

There is simply no reason to rush into passage of bad laws, increasing litigation, and perhaps complicating the problems that do exist. We believe that this Committee is aware that there is not a premium crisis in Kansas. In fact, between June 1994 and January 2003, there has been a combined ***decrease in premiums of more than 35%.*** In addition, Kansas has the lowest premiums regionally, and nationally, is the seventh lowest.

If anything, the Kansas Legislature should be concerned about the woeful benefits paid to injured workers and their families. Just two small examples will be given. First, for the

permanently totally disabled, the worker who can never return to work, we pay by far the lowest benefits in the nation. It is sad that "we're #1." Also, caps on permanent partial disability for injured workers have not been increased in over 17 years!

SB 441 does not address, and no legislation introduced by the proponents of this bill, has addressed the real cost drivers in Kansas workers compensation; i.e. spiraling medical costs, lack of safety, and above normal insurance company profits.

The Kansas AFL-CIO would urge that the newly reformulated Advisory Council be given an opportunity to produce comprehensive legislation detailing with the multiple issues.

I will stand for questions.

Testimony before the House Economic Development Committee
March 23, 2004 - 3:30 p.m.

Senate Bill No. 441

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

The Honorable Chairman Wilk 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.

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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.

As Amended by Senate Committee

Session of 2004

PROPOSED
AMENDMENT
Representative Kuether
March 23, 2004

SENATE BILL No. 441

By Committee on Commerce

2-4

AN ACT concerning workers compensation; relating to the date of accident; amending K.S.A. 2003 Supp. 44-508 and repealing the existing section; also repealing K.S.A. 44-520a

Be it enacted by the Legislature of the State of Kansas.

Section 1. K.S.A. 2003 Supp. 44-508 is hereby amended to read as follows: 44-508. As used in the workers compensation act:

(a) "Employer" includes: (1) Any person or body of persons, corporate or unincorporate, and the legal representative of a deceased employer or the receiver or trustee of a person, corporation, association or partnership; (2) the state or any department, agency or authority of the state, any city, county, school district or other political subdivision or municipality or public corporation and any instrumentality thereof; and (3) for the purposes of community service work, the entity for which the community service work is being performed and the governmental agency which assigned the community service work, if any, if either such entity or such governmental agency has filed a written statement of election with the director to accept the provisions under the workers compensation act for persons performing community service work and in such case such entity and such governmental agency shall be deemed to be the joint employer of the person performing the community service work and both shall have the rights, liabilities and immunities provided under the workers compensation act for an employer with regard to the community service work, except that the liability for providing benefits shall be imposed only on the party which filed such election with the director, or on both if both parties have filed such election with the director; for purposes of community service work, "governmental agency" shall not include any court or any officer or employee thereof and any case where there is deemed to be a "joint employer" shall not be construed to be a case of dual or multiple employment.

(b) "Workman" or "employee" or "worker" means any person who has entered into the employment of or works under any contract of service or apprenticeship with an employer. Such terms shall include but not be limited to: Executive officers of corporations; professional athletes;

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ness in terms of both the level and the quality of health care and health services provided a patient, based on accepted standards of the health care profession involved. Such evaluation is accomplished by means of a system which identifies the utilization of health care services above the usual range of utilization for such services, which is based on accepted standards of the health care profession involved, and which refers instances of possible inappropriate utilization to the director for referral to a peer review committee.

(n) "Peer review" means an evaluation by a peer review committee of the appropriateness, quality and cost of health care and health services provided a patient, which is based on accepted standards of the health care profession involved and which is conducted in conjunction with utilization review.

(o) "Peer review committee" means a committee composed of health care providers licensed to practice the same health care profession as the health care provider who rendered the health care services being reviewed.

(p) "Group-funded self-insurance plan" includes each group-funded workers compensation pool, which is authorized to operate in this state under K.S.A. 44-581 through 44-592 and amendments thereto, each municipal group-funded pool under the Kansas municipal group-funded pool act which is covering liabilities under the workers compensation act, and any other similar group-funded or pooled plan or arrangement that provides coverage for employer liabilities under the workers compensation act and is authorized by law.

(q) On and after the effective date of this act, "workers compensation board" or "board" means the workers compensation board established under K.S.A. 44-555c and amendments thereto.

(r) "Usual charge" means the amount most commonly charged by health care providers for the same or similar services.

(s) "Customary charge" means the usual rates or range of fees charged by health care providers in a given locale or area.

Sec. 2. K.S.A. 2003 Supp. 44-508 is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

44-520a and K.S.A.

are

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21. Defense of no required notice not waived by pleading defense of intoxication. Sayers v. Colgate-Palmolive-Peet Co., 134 K. 872, 874, 875, 8 P.2d 383 (1932).

EFFECT ON EMPLOYER OF NOTICE (22-23)

22. Employer having notice of injury did not give notice thereof to commissioner; written claim filed within one year sufficient. Almendarez v. Wilson & Co., 188 K. 303, 304, 362 P.2d 1 (1961).

23. Knowledge of accident by employer or his agent or notice to employer within ten days of accident is all this section requires; all limitations in act suspended if employer then fails to report accident as provided in 44-557. Ricker v. Yellow Transit Freight Lines, Inc., 191 K. 151, 153, 154, 155, 379 P.2d 279 (1963).

OUTDATED CASES (25)

25. Notice and claim sections were combined until 1927 amendments; cases largely outdated as to notice and claim points of law are listed.

(a) Mortimer v. Edgar Zinc Co., 123 K. 259, 262, 255 P. 35 (1927);

(b) Doty v. Crystal Ice & Fuel Co., 122 K. 653, 661, 253 P. 611 (1927);

(c) Lovely v. Railway Co., 115 K. 784, 786, 225 P. 103 (1924);

(d) Brownrigg v. Swift & Co., 114 K. 115, 117, 217 P. 278 (1923);

(e) Vassar v. Swift & Co., 106 K. 836, 840, 189 P. 943 (1920).

Cases after 1973

26. Mentioned in case determining sufficiency of written claim for compensation. Ours v. Lackey, 213 K. 72, 75, 515 P.2d 1071.

27. Claim not barred for lack of notice where no determination that employer was prejudiced thereby. Pike v. Gas Service Co., 223 K. 408, 409, 410, 411, 412, 573 P.2d 1055.

28. Mentioned; case involving time limits under 44-534 and 44-557. Childress v. Childress Painting Co., 3 K.A.2d 135, 136, 590 P.2d 1093.

29. Widow timely commenced proceedings under this section; employer filed later than 28 days; all time limits of act are tolled (dissenting opinion). Childress v. Childress Painting Co., 226 K. 251, 255, 597 P.2d 637.

30. Mentioned in authorizing retroactive payment for past medical expenses due to recurrence of medical condition. Morris v. Kansas City Bd. of Public Util., 3 K.A.2d 527, 534, 598 P.2d 544.

31. Claim timely filed; knowledge of accident by employer who fails to file report operates to extend time for filing to one year from accident. Morgan v. Inter-Collegiate Press, 4 K.A.2d 319, 321, 322, 606 P.2d 479.

32. Cited in holding administrative decision finding accidental injury where occupational disease claimed supported by substantial competent evidence. Bahr v. Iowa Beef Processors, Inc., 8 K.A.2d 627, 632, 633, 663 P.2d 1144 (1983).

33. Where employer brings money suit, worker cannot claim offsets alleged due under act when provisions not utilized. Bethany Medical Center v. Knox, 10 K.A.2d 192, 194, 196, 694 P.2d 1331 (1985).

34. Brucellosis compensable as either occupational disease or accidental injury; no prejudice on notice where claim different from finding. Baldwin v. Jensen-Salsbery Laboratories, 10 K.A.2d 673, 708 P.2d 556 (1985).

35. Cited; claimant's oversight in filing claim following second injury notice with notice and claim for earlier injury examined. Pyeatt v. Roadway Express, Inc., 243 K. 200, 201, 756 P.2d 438 (1988).

36. Employer's agent for receiving notice of injury must give employer notice of agent's own injury. Wiethorn v. Safeway Stores, Inc., 16 K.A.2d 188, 191, 194, 820 P.2d 719 (1991).

37. Ten day notice of injury required in workers compensation cases computed under K.S.A. 60-206, not K.A.R. 51-17-1 which is more restrictive and invalid. Bain v. Cormack Enterprises, Inc., 267 K. 754, 757, 986 P.2d 373 (1999).

38. Back injury which occurred during treatment for claimant's primary injury was a natural and probable result of primary injury. Frazier v. Mid-West Painting, Inc., 268 K. 353, 355, 995 P.2d 855 (2000).

44-520a. Claim for compensation; time limitation. (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

(b) Where recovery is denied to any person in a suit brought at law or in admiralty or under the federal employers' liability acts to recover damages in respect of bodily injury or death on the ground that such person was an employee and the defendant was an employer subject to and within the meaning of the workmen's compensation act, or when recovery is denied to any person in an action brought under the provisions of the workmen's compensation law of any other state or jurisdiction on the ground that such person was an employee under and subject to the provisions of the workmen's compensation act of this state, the limitation of time prescribed in subsection (a) of this section shall begin to run only from the date of termination or abandonment of such suit or compensation proceeding, when such suit or compensation proceeding is filed within two hundred (200) days after the date of the injury or death complained of.

History: L. 1927, ch. 232, § 20; L. 1939, ch. 213, § 3; L. 1947, ch. 289, § 1; L. 1955, ch. 250, § 13; L. 1957, ch. 293, § 4; L. 1967, ch. 280, § 7; L. 1974, ch. 203, § 26; July 1.

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Representative Brunk
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(14) landscaping and plantings, fountains, shelters, benches, sculptures, lighting, decorations and similar amenities; ~~and~~

(15) *museums and related public areas; and*

(16) all related expenses to redevelop and finance the redevelopment project.

Redevelopment project costs shall not include costs incurred in connection with the construction of buildings or other structures to be owned by or leased to a developer, however, the "redevelopment project costs" shall include costs incurred in connection with the construction of buildings or other structures to be owned or leased to a developer which includes an auto race track facility *or a river walk canal facility* or is in a redevelopment district including some or all of the land and buildings comprising a state mental institution closed pursuant to section 2 of chapter 219 of the 1995 Session Laws of Kansas.

: (1) A river walk canal facility in which building construction is limited to no more than 25% of the total redevelopment project cost; or (2)

(r) "Redevelopment district" means the specific area declared to be an eligible area in which the city may develop one or more redevelopment projects.

(s) "Redevelopment district plan" or "district plan" means the preliminary plan that identifies all of the proposed redevelopment project areas and identifies in a general manner all of the buildings, facilities and improvements in each that are proposed to be constructed or improved in each redevelopment project area.

(t) "Redevelopment project" means the approved project to implement a project plan for the development of the established redevelopment district.

(u) "Redevelopment project plan" or "project plan" means the plan adopted by a municipality for the development of a redevelopment project or projects which conforms with K.S.A. 12-1772, and amendments thereto, in a redevelopment district.

(v) "Secretary" means the secretary of commerce.

(w) "Substantial change" means, as applicable, a change wherein the proposed plan or plans differ substantially from the intended purpose for which the district plan or project plan was approved.

(x) "Tax increment" means that amount of real property taxes collected from real property located within the redevelopment district that is in excess of the amount of real property taxes which is collected from the base year assessed valuation.

(y) "Taxing subdivision" means the county, city, unified school district and any other taxing subdivision levying real property taxes, the territory or jurisdiction of which includes any currently existing or subsequently created redevelopment district.

(z) "Special bond project" means a redevelopment project with at least a $50,000,000 capital investment and $50,000,000 in projected gross

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annual sales revenues or for areas outside of metropolitan statistical areas, as defined by the federal office of management and budget the secretary finds the project meets the requirements of subsection (g) and would be of regional or statewide importance, but a "special bond project" shall not include a project for a gambling casino.

(aa) "Marketing study" means a study conducted to examine the impact of the redevelopment or special bond project upon similar businesses in the projected market area.

(bb) "Projected market area" means any area within the state in which the redevelopment or special bond project is projected to have a substantial fiscal or market impact upon businesses in such area.

(cc) "River walk canal facilities" means a canal and related water features located adjacent to a river which flows through a major commercial entertainment and tourism area and facilities related or contiguous thereto, including, but not limited to pedestrian walkways and promenades, landscaping and parking facilities.

within a city in Sedgwick County that has a population of not less than 300,000,

(dd) "Commence work" means the manifest commencement of actual operations on the development site, such as, erecting a building, excavating the ground to lay a foundation or a basement or work of like description which a person with reasonable diligence can see and recognize as being done with the intention and purpose to continue work until the project is completed.

(ee) "Major commercial entertainment and tourism area" may include, but not be limited to, a major multi-sport athletic complex.

(ff) "Major multi-sport athletic complex" means an athletic complex that is utilized for the training of athletes, the practice of athletic teams, the playing of athletic games or the hosting of events. Such project may include playing fields, parking lots and other developments.

Sec. 2. K.S.A. 2003 Supp. 12-1770a is hereby repealed.

Sec. 3. This act shall take effect and be in force from and after its publication in the statute book.

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Representative Brunk
March 23, 2004

(14) landscaping and plantings, fountains, shelters, benches, sculptures, lighting, decorations and similar amenities; ~~and~~

(15) *museums and related public areas; and*

(16) all related expenses to redevelop and finance the redevelopment project

Redevelopment project costs shall not include costs incurred in connection with the construction of buildings or other structures to be owned by or leased to a developer, however, the "redevelopment project costs" shall include costs incurred in connection with the construction of buildings or other structures to be owned or leased to a developer which includes an auto race track facility [*or a river walk canal facility*] or is in a redevelopment district including some or all of the land and buildings comprising a state mental institution closed pursuant to section 2 of chapter 219 of the 1995 Session Laws of Kansas.

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(v) "Secretary" means the secretary of commerce.

(w) "Substantial change" means, as applicable, a change wherein the proposed plan or plans differ substantially from the intended purpose for which the district plan or project plan was approved.

(x) "Tax increment" means that amount of real property taxes collected from real property located within the redevelopment district that is in excess of the amount of real property taxes which is collected from the base year assessed valuation.

(y) "Taxing subdivision" means the county, city, unified school district and any other taxing subdivision levying real property taxes, the territory or jurisdiction of which includes any currently existing or subsequently created redevelopment district.

(z) "Special bond project" means a redevelopment project with at least a $50,000,000 capital investment and $50,000,000 in projected gross

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Lights, Camera, Action Subcommittee Report
to House Economic Development Committee
March 23, 2004

Summary of Activities and Issues

The Lights, Camera, Action Subcommittee received testimony from a number of parties interested in developing a film industry in Kansas. The Subcommittee received follow-up information from two groups that presented to the full committee regarding the development of a home for independent film making and the support for the construction of a full-scale production studio. In addition, it also looked at technology being developed in Kansas to advance the digital motion picture industry.

The Subcommittee engaged Kansas, Inc. to pull together information on the current status of the Kansas film industry, perform a brief assessment of available options, and make recommendations on "next steps." In its draft report to the Subcommittee, the agency identified the following four research areas for consideration and identified the potential risks and rewards of each option:

- Production of films in Kansas through either the development of the independent film industry or construction of a production studio.
- Recruitment of film productions to shoot in Kansas.
- Infrastructure Development to enhance the potential workforce for a future film industry through education and training at universities and community colleges.
- Hardware and Facilities investments to provide the appropriate equipment and facilities for film production in the state.

The Subcommittee recognizes the excitement building for the development of a film industry as a viable economic development opportunity. Competition has been fierce among states to attract film production to their state through tax and other financial incentives to make production less expensive. However, the Kansas, Inc. paper pointed out that these intermittent productions do not provide a stable economic impact, that competition is now global, and that simply being the low cost option is not enough in the current environment. Information the Subcommittee received indicated that for a state to succeed in developing a successful film industry, it must have a strategic approach to developing an environment that supports the industry on a number of levels.

Recommendations

The Subcommittee received a variety of good information during its work but ultimately has more questions than clear answers about this complex issue. The Subcommittee also realizes the importance of crafting a well thought out strategy to enhance the chance of success both in the legislative process and in the creation of a viable economic development initiative. Therefore, the Subcommittee recommends the creation of a taskforce to report to the Joint Committee on Economic Development during the upcoming interim, potentially at the end of September. The goal of this interim activity is to craft a package of legislative initiatives for consideration by the 2005 Legislature.

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Kansas Inc., which suggested the taskforce creation in its draft report to the Subcommittee, has indicated its willingness to continue to provide planning, writing, and analysis services and submitted a preliminary budget and work plan for the project.

Members of the taskforce would include: 3 representatives of the Kansas Film Commission appointed by the president of the Kansas Film Commission Board; all 7 members of the Lights, Camera, Action Subcommittee; 3 representatives from the Kansas, Inc. Board of Directors; and 1 representative from the Department of Commerce appointed by the Secretary. The work of the taskforce would include:

- Closer examination of the opportunities presented on the development of independent film making and construction of a production studio. This examination would need to include research of the financial tools currently available and those that might need to be developed. In particular, the taskforce will need to research the concept of a state issued letter of credit to support one of the proposals.

- Consideration of options for the state, including the four areas referred to in the summary section. This consideration would include projected outcomes, risks and rewards, and costs for each option.

- Determination of how to define success for the initiative.

- Discussion of how the development of a film industry fits in within the state's economic development strategy.

- Examination and analysis of other state and community initiatives.