

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 a.m. on March 10, 2004 in Room 123-S of the Capitol.

All members were present.

Committee staff present:

Kathie Sparks, Legislative Research
Susan Kannarr, Legislative Research
Helen Pedigo, Revisor of Statutes
Nikki Kraus, Committee Secretary

Conferees appearing before the committee:

Paula Greathouse, Division of Workers' Compensation
Richard Thomas, Division of Workers' Compensation

Others attending:

See Attached List.

Chairperson Brownlee asked the committee to consider several sets of minutes.

Senator Jordan moved to approve the minutes from Jan 28-Feb 4th. Senator Steineger seconded. The motion passed.

Chairperson Brownlee invited Ms. Greathouse to come before the committee to provide an update on the Workers' Compensation Advisory Council (WCAC).

Ms. Greathouse provided the committee with an update on the Advisory Council's work over the past year. (Attachment 1) In addition to this, she provided a "Report of Subcommittee Paula Greathouse, Kip Kubin, John Ostrowski" (Attachment 2). She also included the minutes from the Workers Compensation Advisory Council meeting of December 9, 2003 (Attachment 3) and a draft of the minutes from the February 23, 2004 meeting. (Attachment 4)

Chairperson Brownlee asked if Ms. Greathouse had a sense that there has been final resolution of anything. Ms. Greathouse stated that at the super subcommittee, she had hope, however, their results had not been passed by the full committee. She stated that there has been a lot of good discussion, but that the committee has not passed out anything favorably.

In response to Chairperson Brownlee, Ms. Greathouse stated that the House committee had sent similar requests to the WCAC.

Chairperson Brownlee stated that her letter had also asked the WCAC to review **SB 181**, so she was curious as to what it would take to have some resolution. Ms. Greathouse replied that she had not had discussions with Secretary Garner to see what might be done, but they had discussed changing from a super majority to a simple majority for WCAC recommendations.

Senator Barone stated that in regard to the proposal to increase ALJ's salaries; in Ms. Greathouse's document, everyone seems to be in agreement, but it seems that they could not iron out the details. Ms. Greathouse stated that there was discussion about whether or not the positions would have to be pulled out of classified service to raise their salaries; the council is still collecting all of that information and trying to make that into a situation that is workable. She stated that they are trying to decide if they want to go through the legislature or through the Department of Administration.

Senator Barone asked if it is possible to bump them up to a higher classified position. Ms. Greathouse stated that they may adjust the pay matrix for that particular position. She stated that they received a letter from the Department of Administration but that they are not able to look at this classification or declined to look at the situation. She stated that the Secretary of Administration and she had been in touch since then regarding the

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MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 10, 2004 in Room 123-S of the Capitol.

possibility of changing the pay matrix.

Senator Barone expressed concern about the inability of the WCAC to reach consensus.

Senator Bunten suggested pulling the judges out of classified service in order to offer higher pay.

Chairperson Brownlee asked how ALJs are appointed. Ms. Greathouse stated that they go through an application process like any other position. She stated that we are allowed 10, and then once they are hired, they are classified, and then stay until they leave or die.

Chairperson Brownlee stated that the challenge was to be able to make sure the statutes are written so that ALJs make their decisions according to those. She asked if the Legislature should say that ALJs need to be reviewed every 4 years or something like that. Ms. Greathouse referred the committee to Mr. Dick Thomas. Mr. Thomas stated that in the cases he looked at, there were several cases that went both ways dealing with Superior, four of which were in favor of the company, and another where a worker appealed and was denied. Mr. Thomas stated that the cases he had seen were not consistent with what the company had testified. Committee members agreed on the importance of accurate information being presented in committee meetings.

Chairperson Brownlee asked what percentage of cases go through the appeals process. Ms. Greathouse stated that would be in the annual statistical report.

Chairperson Brownlee it was disappointing that Advisory Council was unable to advise because of its inability to reach consensus; the legislature has to move on. She stated that members of the Council should not be so committed to their own self interest, but, rather, committed to the resolution; otherwise, the Council is to the point of having no value.

Ms. Greathouse stated that they would get something to the committee to see what Secretary Garner thinks might be done. Chairperson Brownlee asked if they were under KDHR, and Ms. Greathouse said yes.

The committee discussed the need for a written claim regarding date of accident.

Chairperson Brownlee stated that the committee would write a letter back to the Council with its thoughts. Ms. Greathouse asked if the Chair would like her to ask the Council for revamping to make it more effective, and Chairperson Brownlee stated that all of the parties involved with the council have to get moving.

Senator Wagle stated that as an example from the Public Health and Welfare, because the state has established a council and it gives a recommendation, the committee and the Legislature do not necessarily have to accept their recommendations.

Chairperson Brownlee directed the committee's attention to **SB 395**, stating that language being passed out would include Wyandotte county. (Attachment 5) Senator Brungardt asked why the bill is Wyandotte specific, and Senator Steineger replied that this was because Wyandotte is the only county who has issued bonds, but that the will was actually bonds specific, not county specific.

Senator Wagle asked if this were to apply to all cities, they would actually have more money to help pay off the bond, and the money would stay in the city without going to local bonds. She stated that Wichita is interested in these bonds.

Senator Steineger stated that with this, they are restricted a little bit with this change. In response to a comment from Senator Barone, he stated that as written, the bill keeps STAR bonds like they are; with the amendment, they will be a little stronger. Chairperson Brownlee clarified that this would provide relief.

Senator Barone stated that we change sales tax rates and property tax rates among others, so as he understands it, nothing is being impaired in the repayment of these bonds. Senator Emler stated that the bonds are being paid off now, but they might not be paid off as quickly as they are predicting. Senator Barone stated that they

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MINUTES OF THE SENATE COMMERCE COMMITTEE at 8:30 a.m. on March 10, 2004 in Room 123-S of the Capitol.

are 20 year bonds, and as currently scheduled, they would be done 3-4 years sooner.

Chairperson Brownlee stated that at one point, an amendment was made to take them up to 30 year bonds; without the passage of **SB 395**, the payment would be accelerated. Senator Steineger stated that this was assuming that sales keep up. Senator Barone stated that this was according to current predictions. Chairperson Brownlee stated that the situation was unique in Wyandotte because Nebraska FurnitureMart is particularly impacted by destination sourcing since the bulk of its sales are delivered.

Senator Kerr expressed concern regarding Cabela's non-payment of certain fees. Senator Steineger stated that it had been clarified that the store in Kansas is paying them. Senator Kerr stated that they clearly have nexus in Kansas; they should be complying with sales tax requirements of the state, despite the private letter they may have had. Chairperson Brownlee stated that the private letter was given to them by the Graves administration before the company came to Kansas.

Senator Steineger stated that Cabela's has agreed to and is meeting with Secretary Wagnon regarding the sales tax that it needs to be collecting on remote sales; Cabela's had previously not returned the Secretary's phone calls.

Senator Barone stated that talk is cheap; Cabela's has been less than forthcoming, and he wondered what leverage the state has to resolve this. Chairperson Brownlee stated that the Department of Revenue would have leverage.

Senator Barone asked if the committee could see the private letter. Following further discussion, the committee concluded that this was not possible without Cabela's consent.

Senator Steineger stated that the private letter ruling came out before Kansas set up destination sourcing; they had their letter 3-4 years ago; this is only marginally related to **SB 395** which is about sticking to our word when we make business agreements. He stated that Cabela's is now subject to compliance with Kansas sales tax. Chairperson Brownlee stated that they have to comply with nexus. Senator Steineger stated that Kansas can audit them at any time.

Senator Wagle asked if the Legislature has been able to see if other large businesses received private letters from the Graves administration when destination sourcing was forced on small businesses, many of which experienced a significant loss of revenue. Chairperson Brownlee stated that she would hope we could request what private letter rulings have been issued and what the impact of those is.

Senator Wagle pointed out that there have been other letters to large businesses, one example of which was Amazon.com. Chairperson Brownlee noted that it ironic that they were always wondering why these companies do not pay.

Senator Steineger stated that Senator Wagle was interested in possible STAR bonds, and that the Hutchinson State Fair was looking into using these funds for Fair improvement.

Senator Steineger moved the bill as written. Senator Brungardt seconded the motion.

Chairperson Brownlee asked the committee if there was any discussion. Senator Emler asked if the bill would be dead if the motion failed, or if the committee could make a decision in the next couple days. The Chair stated that the committee can still consider the bill further.

The motion failed 5 to 4.

The meeting was adjourned at 9:30 a.m. The next meeting will be at 8:30 a.m. on March 11, 2004 in Room 123-S of the Capitol.

Senate Commerce Committee
Workers' Compensation Advisory Council Update
Paula Greathouse, Director of Workers' Compensation
10 March 2004

Chair Brownlee and members of the committee. Thank you for allowing me to appear before you this morning to provide you with an update on the Advisory Council's work this year.

The Advisory Council first met on November 17, 2003. At this meeting a subcommittee consisting of Kip Kubin, John Ostrowski and myself presented several recommendations to the full Advisory Council

Those recommendations are attached as Exhibit 1. In part, they deal with portions of SB181 and Substitute SB 181. The items were discussed at the full Advisory Council but no action was taken on these recommendations. The Advisory Council agreed to appoint a "super" subcommittee to further study these issues to attempt to formulate a compromise agreement. On December 1, 2003, the super subcommittee consisting of myself, three members of the business community (Terry Leatherman, Pat Bush and Kip Kubin) and three members representing labor (Wil Leiker, Doug Stuewe and John Ostrowski) met. In addition, Senator Brownlee, Representative Ruff, Administrative Law Judge Bruce Moore, defense attorney Jeff King, and claimant attorney Carlton Kennard participated.

The super subcommittee met for several hours and discussed multiple issues, but primarily centered on preexisting conditions, date of accident, and "retirement disability." Language was drafted with input from Judge Moore, Kip Kubin and John Ostrowski. The recommended language is attached as Exhibit 2.

The recommendation on date of accident is found in Senate Bill 181 (Page 9, lines 10-18) and the super subcommittee was in general agreement that the language would be an improvement if adopted, along with the recommendations to written claim, notice of injury and filing an application for hearing as recommended in the original Subcommittee Report (Exhibit 1) and as outlined in my letter to Senator Brownlee dated 12-3-03. The letter is attached as Exhibit 3.

The disability retirement issues contained in Senate Bill 181 (Page 4, lines 1-8) were seen by the super subcommittee as only pertaining to a very limited number of cases and was not recommended by this committee.

On December 9, 2003, the full Advisory Council met with Acting Director Anne Haught and the recommendations of the super subcommittee failed to pass. The business side had additional issues and did not reach a consensus at this meeting of the Advisory Council.

In addition, at the December 9, 2003, meeting the Advisory Council listened to a proposal to increase the administrative law judges' salary. Both sides were in agreement that the salaries of the judges are low, but a consensus on whether to pursue administrative remedies or

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Attach #1

propose amendments to the current statute which requires the judges to be within the classified state service was not reached. The issue was tabled pending a report from the Division.

The Council has met two additional times over the past few months, on February 23, 2004, and March 9, 2004. Currently, they have appointed a subcommittee and are attempting to reach consensus on a number of issues including administrative law judges' salaries, SB 441, HB 2809, HB 2527, HB 2737 and the Substitute for SB 181.

At the March 9, 2004, council meeting, Mr. Terry Leatherman reported to the full council that the subcommittee would like the opportunity to continue to meet to work on a compromise of the pending issues. The Advisory Council agreed to have the subcommittee continue to meet.

The subcommittee, consisting of Terry Leatherman and Wil Leiker, will contact the Division when negotiations have come to a conclusion so that another meeting of the council can be arranged. Finally, I have included all the minutes from the Advisory Council meetings this year for your review.

Thank you.

REPORT OF SUBCOMMITTEE
PAULA GREATHOUSE
KIP KUBIN
JOHN OSTROWSKI

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

A. *ADVISORY COUNCIL*

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

1. Change the voting requirements to three votes "from each side of the table" to make recommendations to the legislature, or
2. Add members to the Advisory Council, making the Council similar in makeup to the Unemployment Insurance Council, or
3. Make the Advisory Council a body of four lawyers and an active Administrative Law Judge. Members would be selected by KADC, KCCI, KTLA, and AFL-CIO. The Administrative Law Judge would be selected by a majority of the four attorneys with approval of the Governor.

B. *PREEXISTING CONDITIONS*

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

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

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Attach #2

EXHIBIT 1

C. *ECONOMIC LAYOFFS*

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

D. *DATE OF ACCIDENT*

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

- a) The requirement of written claim is abolished.
- b) An Application for Hearing must be filed within two years from the date of accident or two years from the last payment of medical whichever is later.
- c) Notice is extended to 30 days with 75 for just cause.

E. *BENEFITS*

The following changes are suggested for benefits paid to workers:

1. Change the 75% figure to 100% as contained in K.S.A. 44-510e, and
2. Strike the \$50,000 limitation for functional impairment cases.

F. *REINSURANCE FUND*

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

MCCULLOUGH, WAREHEIM & LaBUNKER, P.A.
ATTORNEYS AT LAW
PO BOX 1453
TOPEKA KS 66601-1453

TELEPHONE 785-233-2323
FAX 785-233-0430

December 5, 2003

FAX TRANSMITTAL		
TO:	THE HONORABLE BRUCE MOORE KIP KUBIN	FAX #785/827-0942 FAX #816/531-8588
FROM:	JOHN M OSTROWSKI	NO. OF PAGES: _____
IF THERE IS A PROBLEM RECEIVING THIS FAX, CALL 785/233-2323 AND ASK FOR KAREN.		

THE HONORABLE BRUCE MOORE

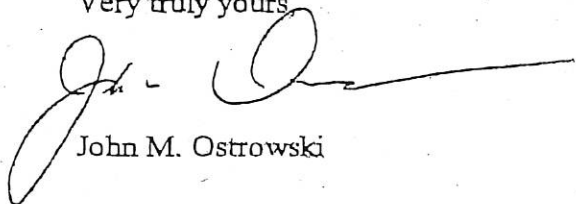
KIP KUBIN

Gentlemen:

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

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

Very truly yours,



John M. Ostrowski

JMO:kn

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

Messa

Linda Eckhart

To: WC Advisory Council
Cc: Anne Haught
Subject: FW: KSA 44-501(c) Revisions

Here is the language proposed by Administrative Law Judge Bruce Moore relative to preexisting condition. The language was discussed at the last advisory council meeting, but a copy was not furnished to the members.

-----Original Message-----

From: Bruce Moore
Sent: Friday, December 05, 2003 2:21 PM
To: 'Johnstrowski@mcwala.com'; 'kkubin@kc-lawyers.com'
Cc: Paula Greathouse
Subject: KSA 44-501(c) Revisions

John, Kip and Paula:

I have John's suggested language for K.S.A. 44-501(c). I have no real problem with his suggestions, but would offer my own suggested version:

(c) The employee shall not be entitled to recover for the aggravation of a pre-existing condition, except to the extent that the work-related injury causes increased ***impairment of function or*** increased disability. Any award of compensation shall be reduced by the amount of ***disability or*** functional impairment determined to be pre-existing. ***The existence of a prior impairment rating or permanent restrictions is not necessary to prove a pre-existing impairment. The trier of fact shall consider all competent medical evidence in determining whether a pre-existing functional impairment or disability has been proven.***

12/16/2003

2-4

December 3, 2003

The Honorable Karin Brownlee
State Senator
147255 South Chalet Drive
Olathe, Kansas 66062

Re: Workers Compensation Advisory Council
Subcommittee Report

Dear Senator Brownlee:

The following is a summary report of the Workers Compensation Advisory Council Subcommittee which met on December 1, 2003:

1. PREEXISTING CONDITIONS - Subcommittee members Kip Kubin and John Ostrowski will attempt to draft language to replace what is currently on Page 1 of Senate Bill 181.
2. DATE OF ACCIDENT - the subcommittee agreed to the language contained in Senate Bill 181 regarding repetitive use, cumulative trauma. However, further recommendations were made as follows:
 - a. Written claim requirement be abolished.
 - b. Application for hearing must be filed within two years from the date of accident or two years from the last payment of medical, whichever is later.
 - c. Notice of accident is extended from 10 days to 30 days, with 75 days for just cause.
3. DISABILITY RETIREMENT BENEFITS (as proposed on Page 4 of Senate Bill 181) - it is believed that this type of situation does not arise often enough to warrant a change in the statute. Most subcommittee members were not sure what was meant by "disability retirement benefits" as most often a person either retires or is put on disability.

If I can provide further information, please advise. Just as a reminder, the full Workers Compensation Advisory Council will be meeting on Tuesday, December 9, 2003, at 719 SW Van

Buren, Fire Station No. 2, Topeka, Kansas, beginning at 9:00 a.m.

Sincerely,

Paula S. Greathouse
Workers Compensation Director

Copies to:
Workers Compensation Advisory Council Members
Jim Garner, Secretary of Human Resources

**WORKERS COMPENSATION ADVISORY COUNCIL
AGENDA FOR NOVEMBER 17, 2003**

OLD BUSINESS

1. APPROVAL OF MINUTES OF FEBRUARY 28, 2003, MEETING.

NEW BUSINESS

2. UPDATE ON LEGISLATIVE INTERIM COMMERCE AND LABOR COMMITTEE.
3. OVERVIEW OF ACTION OF LEGISLATIVE INTERIM COMMERCE AND LABOR COMMITTEE.
4. REQUEST BY CHAIR PAULA GREATHOUSE TO HAVE E-MAIL ADDRESSES FOR ALL COUNCIL MEMBERS.
5. PROPOSED CHANGE TO K.S.A. 44-510f – Regarding maximum amount of compensation payable and the effect of higher weekly maximums payable.
6. PREFERRED WORKER PROGRAM.
7. SENATE BILL 181 – Subcommittee Report (Ostrowski and Kubin).
8. DATE OF ACCIDENT – Subcommittee Report; proposed language.

**WORKERS COMPENSATION ADVISORY COUNCIL
AGENDA FOR DECEMBER 9, 2003**

OLD BUSINESS

1. APPROVAL OF MINUTES OF NOVEMBER 17, 2003, MEETING.

NEW BUSINESS

2. SENATE BILL 181 – Extended Subcommittee Report (Ostrowski and Kubin).
3. SALARY OF ADMINISTRATIVE LAW JUDGES - Administrative Law Judge Bruce Moore.
4. PROPOSED CHANGE TO K.S.A. 44-510f – Regarding maximum compensation payable and the effect of higher weekly maximums - Richard Thomas.
5. PREFERRED WORKER PROGRAM. - Richard Thomas.

WORKERS COMPENSATION ADVISORY COUNCIL
REVISED AGENDA FOR FEBRUARY 23, 2004

OLD BUSINESS

1. APPROVAL OF MINUTES OF NOVEMBER 17, 2003, MEETING.
2. APPROVAL OF MINUTES OF DECEMBER 9, 2003, MEETING.
3. SALARY OF ADMINISTRATIVE LAW JUDGES - Report from Division.

NEW BUSINESS

4. NCCI PRICING - Senate Bill 181; Terri Robinson (NCCI).
5. REINSTATING THE WORKERS COMPENSATION FUND - Bill Curtis, Kansas Association of School Boards.
6. JUDICIAL RETIREMENT SYSTEM FOR WORKERS COMPENSATION BOARD MEMBERS - Duncan Whittier.
7. HOUSE BILL NO. 2757 - Richard Thomas.

FOR INFORMATION ONLY

8. EXECUTIVE REORGANIZATION ORDER NO. 31 - Name Change to Department of Labor.
9. OVERVIEW OF CURRENT BILLS - Richard Thomas.

WORKERS COMPENSATION ADVISORY COUNCIL
REVISED AGENDA FOR MARCH 9, 2004

OLD BUSINESS

1. APPROVAL OF MINUTES OF FEBRUARY 23, 2004, MEETING.
2. SALARY OF ADMINISTRATIVE LAW JUDGES - Report from Division.
3. JUDICIAL RETIREMENT SYSTEM FOR WORKERS COMPENSATION BOARD MEMBERS - Duncan Whittier.

NEW BUSINESS

4. REPORT OF SUBCOMMITTEE - Terry Leatherman and Wil Leiker.
5. SENATE BILL NO. 441

WORKERS COMPENSATION ADVISORY COUNCIL
DECEMBER 9, 2003

Present:

Anne Haught (Acting Director)	Wanda Rohel	Pat Bush	Terry Leatherman
Kip Kubin	John Ostrowski	Bill Knox	Wil Leiker
Steve Wanamaker	Jim DeHoff	Doug Stuewe	Marilyn Dobski

The meeting was called to order and Acting Director Anne Haught introduced Jim Garner, Secretary of Human Resources. Mr. Garner formerly introduced Anne Haught and indicated she has been working for the Division, primarily with the Workers Compensation Board. He appreciates Anne's willingness to step up and fill in as acting director in Paula's absence. She has good experience in this area and will do a fine job. Mr. Garner asked the council to work with Anne. He then turned the meeting over to Anne.

1. **Old Business Item #1, Approval of the Minutes of November 17, 2003, Meeting.** Member Wil Leiker suggested deferring approval of the minutes since the members had not had a chance to review them. Such suggestion was agreeable with all other council members.
Approval of minutes deferred until a later meeting.

2. **New Business Item #2, Senate Bill 181 - Extended Subcommittee Report (Ostrowski and Kubin).**

Ms. Haught asked Members John Ostrowski and Kip Kubin to make the report. Member Ostrowski explained that the "super" subcommittee (consisting of Doug Stuewe, Wil Leiker, John Ostrowski, Kip Kubin, Terry Leatherman, Pat Bush, Senator Karin Brownlee, Representative Candy Ruff, attorney Jeff King, attorney Carlton Kennard, and Administrative Law Judge Bruce Moore) had met for several hours on December 1. Here are the items voted on by the subcommittee:

- a. The subcommittee voted to **exclude** any reference to offsetting "disability retirement benefits" as set out on Page 4 of Senate Bill 181. It was decided that any cases this amendment would affect would be few and far between, and therefore, does not warrant a change in the statute.
- b. Date of accident - there was general consensus that the subcommittee could probably not improve on the language contained on Page 9 of SB 181 but with the modifications contained in the subcommittee report which was faxed under date of November 13, 2003. Those modifications include (1) written claim is abolished; (2) application for hearing must be filed within two years from the date of accident or two years from the last payment of medical; and (3) notice is extended from 10 days to 30 days, with 75 days for just cause.

- c. Preexisting disability - previous discussions included about reinstating the Workers Compensation Fund, but this is a complex issue. The subcommittee then focused on the original intent of the 1993 amendments as regards preexisting conditions. Senator Brownlee asked Member Ostrowski to draft language, which he did and which is contained in his letter dated December 5, 2003.

Member Kip Kubin explained that the preexisting disability amendment is a very difficult issue to deal with due to differing interpretations and when read with the remainder of the Workers Compensation Act. The proposed language does not encompass all the issues. Member Kubin believes that Senator Brownlee gave the subcommittee a rather narrow charge to attempt to work with the language. He believes the language works for cases involving only functional disability or in cases dealing with scheduled injuries; it probably will not work as well with work disability situations. Member Kubin does not believe the AMA guides issue can be adequately addressed the way the act is currently written. When the words "functional impairment" are used, you have to keep in mind that the statute defining functional impairment specifically mentions the AMA guides, making it problematic when dealing with injuries that occurred before the guides were enforced. It causes problems when trying to assign an AMA guides rating based upon past medical records. Member Kubin believes that the proposed language will be subject to litigation in regard to permanent v. temporary aggravation.

Representative Candy Ruff asked for an explanation between work disability and functional disability. Member Kubin explained that "functional impairment" is the amount of impairment that a physician prescribes under the AMA guides. For example, a person with a low back condition, under the AMA guides may have a 10 percent "functional impairment" rating assigned. That same 10 percent "functional impairment" may impact a person's ability to lift/carry and if those are requirements of his/her job, then the "work disability" test kicks in. This test takes into account the percentage of lost duties that a worker could perform over the past 15 years of working and takes into account the percentage loss of ability/capacity to earn wages. Those two items are averaged together, which is the percentage of work disability. The "work disability" is not necessarily tied to any amount of "functional impairment." As an example, a physician looks at an injured hand, compares it to an uninjured hand, and gives a "functional impairment" rating. "Work disability" is an attempt to measure how that injury impacts the individual's ability to perform work. Member Ostrowski explained that the debate over the AMA guidelines is that the guidelines change periodically and a functional disability in the 3rd edition may measure differently in the 4th edition.

Members Kubin and Ostrowski both agreed that this proposed language does not address the "larger" issues and that that will take further discussion. It is preferable to have language come from this council or the Legislature rather than through court intervention. The intent should be to fairly compensate injured workers without allowing "double dipping."

Member Wil Leiker made a motion to accept and recommend to the Legislature the three recommendations of the "super" subcommittee. Motion seconded by Member Ostrowski.

Member Terry Leatherman asked for clarification: (1) no recommendation on retirement offset; (2) that preexisting condition is as drafted in Member Ostrowski's letter of December 5, 2003, and (3) the date of accident recommendation was to adopt the language contained on Page 9 of SB 181 with the three modifications which are contained in subcommittee's report of November 13, 2003. Member Kubin indicated he is not adverse to discussing the three modifications in a package, but his recollection was that the vote was simply for the language contained in SB 181. Member Pat Bush indicated he agreed with Member Kubin's recollection. Member Leatherman indicated the council should work toward an ultimate package to submit to the Legislature, rather than a piecemeal recommendation, and for that reason would vote against this recommendation. Member Leiker thought that this recommendation would be only a part of a total package to be submitted to the Legislature. Member Leatherman indicated he would still vote no. He appreciates the work of the subcommittee and Member Ostrowski's proposed language. However, he has problems with the modifications, especially extending notice from 10 days to 30 days and feels there is still work to do regarding preexisting conditions. He votes against the motion.

Member Kubin asked for further discussion on the subject before taking a vote. Administrative Law Judge Bruce Moore, who attended the subcommittee meeting had just arrived and Kubin asked him to address the council regarding proposed language. Judge Moore, although he did not have his precise proposed language, indicated his proposal was "in the event that an employee has an aggravation of a preexisting condition, any award of compensation shall be reduced by the amount of preexisting impairment. Impairment ratings or restrictions are not necessary to prove the functional impairment." He also recommended a "reduction for preexisting disability." Therefore, if an individual had a preexisting work disability, sustains another injury to the same area, a reduction would be taken into account for additional task loss and a reduction in disability. Judge Moore felt that Member Ostrowski feels that a reduction in "disability" should be dealt with by the credit statute. He feels this section should address both preexisting impairment and preexisting disability.

(After returning to the office, this transcriptionist located Judge Moore's language):

"(c) The employee shall not be entitled to recover for the aggravation of a pre-existing condition, except to the extent that the work-related injury causes increased impairment of function or increased disability. Any award of compensation shall be reduced by the amount of disability or functional impairment determined to be pre-existing. The existence of a prior impairment rating or permanent restrictions is not necessary to prove a pre-existing impairment. The trier of fact shall consider all competent medical evidence in determining whether a pre-existing functional impairment or disability has been proven."

Acting Director Haught asked for further discussion; there was none. She then asked for a vote on the motion on the floor. **Members Ostrowski, DeHoff, Stuewe, Leiker, Knox, and**

Kubin voted yea; Members Leatherman, Bush, Roehl and Dobski voted nay. Motion did not pass.

3. **New Business Item #3, Salary of Administrative Law Judges (Administrative Law Judge Bruce Moore).**

Bruce Moore introduced himself as the administrative law judge officed in Salina. He also introduced Julie Sample, Workers Compensation Board Member, and Jon Frobish, Administrative Law Judge in Wichita. Judge Moore indicated they were seeking the council's support for an increase in pay for the ten administrative law judges. The judges are located as follows: three in Wichita, three in Overland Park, two in Topeka, one in Salina, and one in Garden City. Judge Moore explained that he covers 29 counties and has had as many as 1,100 to 1,200 pending cases, which he believes is typical of each judge. He indicated he does not see a lot of these cases, but that many could potentially come before him in the courtroom. Most of the present judges have between 10, 15, or more years experience (he has 23 years). Judge Moore provided a Survey of Administrative Law Judge Salaries As of January 1, 2001, published by the National Association of Administrative Law Judges. This survey breaks down judges into various subcategories, including hearing officers and workers compensation judges. For a long time, administrative law judges were "lumped in" with unemployment hearing examiners who are part-time positions and have full-time law practices on the side. Judge Moore called the placement office both at KU School of Law and Washburn Law School to see how first-year law school graduates are fairing. The medium income of first-year law school graduates is in the neighborhood of \$55,000 to \$58,000. That is more than all but the highest paid administrative law judge. Shawnee County just announced they are adding a magistrate judge (which does not require a law degree) position for an annual salary of \$67,000.

Judge Moore feels that if you pay someone well and demonstrate that they are appreciated for what they do, the work product will ultimately be better. He indicated there is nothing he can offer in exchange for a salary increase; he cannot promise to give anything in exchange for better pay. The judges work hard and try to put out a quality product; all is subject to review by the Workers Compensation Board. There is no hope of promotion; step increases are subject to the state budget. He believes the judges do what they do because they love doing it and are committed to the job.

Judge Moore testified that there has been some mention about changing the classification of administrative law judges to a four-year appointment akin to the members of the Workers Compensation Board. The judges would have no objection to this change, if at the end of the four-year term, their performance is evaluated based upon the work done.

Judge Moore made a recommendation that administrative law judges should be paid 80 percent of the salary of members of the Workers Compensation Board, who are paid the same as District Court judges, or approximately \$80,000. Judge Moore could not make a recommendation as to a salary range or whether new judges should be paid less.

Member Terry Leatherman indicated this subject had been brought up before the council previously and it was his recollection that for the purpose of accountability of the judges, a proposal for higher wages was made in exchange for terms of office similar to the Board. Judge Moore made it clear that the judges were not opposed to terms if, at the end of that term, they are fairly judged. One concern of Member Leatherman is the expansion of the Division since the 1993 changes. Member Leatherman asked for a recommendation from the Division and believes that since the expansion of the Division after the 1993 amendments, it would be proper to account for how the money is being spent; he wants accountability for the growth of the Division.

Member Kip Kubin indicated he felt we should get back on track as to the request before the council, that being salaries of the administrative law judges. He thinks it is a travesty that legal advisors are paid more than our administrative law judges. If it were left to him, he would pay the judges 90 percent of what board members are paid. Vice Chair Steve Wanamaker pointed out that since the mid-point of pay for the judges presently is about \$50,000 and the proposal is to raise it to \$80,000, that would equate to an increase of approximately \$200,000 to \$300,000 for all ten judges. Member John Ostrowski reiterated the problem of getting quality people appointed as judges and/or how to remove them.

Acting Director Haught asked for a motion. **Member Jim DeHoff made a motion to accept the proposal of increasing administrative law judges' salary to within 80 percent of what Workers Compensation Board members make; seconded by Member Kubin.**

Member Leatherman indicated he would vote no on the motion, even though he is not necessarily against the motion. He would like for the Division to make a recommendation to the council regarding this item. He would like to know if there is something within the Division that could be removed to help soften the cost impact of this proposal. It was pointed out that judges salaries are not set by statute. Judge Moore explained that he was informed by administration that something would need to come out of this council before anything could happen, but that nothing ever comes out of this council. He is not trying to point fingers, but he feels that with a two percent increase in three years, they are falling further and further behind their peers. The judges approached the Department of Administration to seek a reclassification recommendation to the Governor. The Department of Administration will not make a recommendation to the Governor without undertaking a study; a study will not be conducted until there is at least a 25 percent turnover rate in the position. That would mean three judges would have to leave in the same year, which is unlikely. He feels that this council may have a "pipeline" to the Governor and can make an expressed recommendation to the Governor and/or the Legislature. Member Leatherman expressed that the motion on the table is not to recommend a change in legislation, just simply a recommendation to the Legislature. Acting Director Haught explained that since these are classified positions, it would be up to the Department of Administration to make any salary changes. Member Ostrowski believes that rather than leaving this up to the Department of Administration, the council should propose legislation to accomplish it. Member Kubin asked if the administrative law judges are willing for the council to recommend legislation if it cannot be done through the Department of Administration. Bryce Benedict (judge from Topeka) indicated

he is opposed to going through the Department of Administration because as classified employees the judges will be tied to the civil service pay schedule. On the present pay schedule, a judge at the top of the pay range would max out at approximately \$67,000.

Members Kubin and Ostrowski indicated they would be happy to draft language to take to the Legislature. Member DeHoff withdrew is earlier motion; Member Kubin withdrew his second.

Member DeHoff made a motion to have this proposal studied by the "super" subcommittee. Member Kubin indicated that perhaps, before sending this item to the subcommittee, the first thing to be done is to meet with the judges and draft some language. He indicated he and Ostrowski would be glad to sit down with the judges to see about drafting something everyone would be "happy" with. Judge Moore suggested going in both directions, making a recommendation to the Department of Administration and drafting language for possible legislative changes.

Member Kubin made a motion that the council make a recommendation to the Department of Administration to perform a study on the salaries of administrative law judges with an eye toward raising those salaries. Member DeHoff withdrew his second motion. Member DeHoff indicated he believes if a recommendation is taken to the Department of Administration, because of budget restraints, we will have major problems. Judge Moore reiterated that he still wishes to make a salary study recommendation to the Department of Administration and draft possible legislative changes. Member DeHoff seconded Member Kubin's motion. Members DeHoff, Ostrowski, Leiker, Stuewe, Knox and Kubin vote yea; members Leatherman, Roehl, Bush and Dobski vote nay. Motion not passed.

Member Leatherman made a motion that the council receive a recommendation from the Division of Workers Compensation proscribing the salary and work system of the administrative law judges. In essence, he would like the Division to make the proposal of what the council should do, either statutorily, administratively, or both. Besides the salary consideration, he would like recommendations of the work systems, serve for a term, be full-time employees, etc. At the same time, he would like an accounting on dollars spent and the number of employees employed by the Division. Motion seconded by Member Marilyn Dobski.

Member Leatherman explained that, if the salaries of the judges are raised, he would like to know if there is any excess spending the Division may currently have to help offset the cost. Member Ostrowski indicated we are looking at ten people and he does not believe those ten people need to be studied in conjunction with the medical fee schedule, Dr. Tracy's salary, the ombudsmen's salaries, etc. It was explained that since the Division is fee-funded and the judges are employees of the Division, their salaries are part of the fee-fund budget. Member Ostrowski does not want to "bog" down this discussion while a study is done; it has been "bogged" down for several years already.

Member Ostrowski made a substitute motion that a subcommittee from the council

be appointed to write statutory legislation to "fix the gross underpayment" of the administrative law judges and that statutory language be brought back to the council for recommendation. Substitute motion seconded by Member Wil Leiker. There was further discussion about the various motions that had been made. Member Leatherman reiterated that his motion was to have the Division, who employs the judges, make a recommendation as to their salary. He explained that he is supposed to make a decision on whether employers should eventually pay more to administrative law judges when he cannot even get an answer as to how much money is spent today and whether that amount is more than it was a year ago. Member Ostrowski does not believe the council has ever asked the Division for information relative to whether the Division is spending more or less. He feels that if the council has reached a consensus that these ten people are underpaid, then this should be fixed statutorily and/or by asking the Department of Administration to look at it; then after receiving a recommendation, figure out if the budget is there somewhere.

Member Leatherman expressed an interest to set the record straight: the substitute motion is that this item be referred to the subcommittee; that for some reason Member Ostrowski does not want the Division to make a recommendation to the council, such that he is offering a substitute motion. Member Leatherman votes against the substitute motion because he feels it is fair and appropriate to ask the Division to make a recommendation instead of putting this item to the subcommittee. Member Ostrowski explained that his recommendation is that the salaries of the administrative law judges be fixed statutorily and that a subcommittee be appointed to bring that statutory language to the council. Member Leatherman feels that putting something before a subcommittee is not a fast track to approval of anything before this council; he thinks we have a better shot of seeing something proposed by the administration.

A vote was called for on the substitute motion. Members Ostrowski, DeHoff, Stuewe, and Leiker, yea; members Kubin, Leatherman, Bush, Roehl and Dobski, nay. Substitute motion not passed.

A vote on the original motion (to have the Division make recommendations on a salary for administrative law judges and to provide the council with a cost accounting) was called for; five votes yea (Ostrowski, DeHoff, Stuewe and Leiker); five votes nay (Kubin, Leatherman, Bush, Roehl and Dobski). Motion did not pass.

A further discussion, off the record, was held.

Member Wil Leiker made a motion that the Division make a recommendation to the council only as to what the Division thinks the salary of administrative law judges should be; seconded by Member Jim DeHoff. Member Leatherman asked to also include terms of office into the motion. Member Leiker amended his motion to include that item. All members voted yea; motion passed unanimously.

4. New Business Item #4, Proposed Change to K.S.A. 44-510f, Maximum compensation payable and effect of higher weekly maximums (Richard Thomas).

Richard Thomas explained that if the maximum weekly benefit level is increased by at least \$5.00 next year, the cap of \$100,000 for permanent partial disability set out in K.S.A. 44-510f could be exceeded for certain types of injuries. For the last 11 years, the average increase in maximum weekly benefits has been \$11.50. He also suggested increasing the cap for permanent total.

Acting Director Haught asked for recommendation, motions or comments. Member Wanda Roehl opined that the council should not take any action until this becomes an actual problem. She has not had any occasions where this would have been a problem. Member John Ostrowski indicated, as an example, this may affect severe burn cases where the employee returns to work, but that this probably does not occur frequently, especially with the accelerated benefit formula. Terri Robinson, NCCI, indicated she has requested data to see how changing these amounts may affect premium rates. Member Ostrowski feels that the \$50,000 functional impairment cap no longer "catches" the problems it was geared to catch because of the accelerated payment formula. He does not know how NCCI could have requested a price analysis since there are no recommended cap amounts. Historically, the caps have been raised by \$25,000 each time this issue is brought up.

Member Ostrowski made a motion that K.S.A. 44-510f be amended to show the cap for permanent total be set at \$250,000; the cap for temporary total be set at \$150,000; and the cap for permanent partial be set at \$125,000; and that the provision relating to the \$50,000 functional only cap be stricken; and that funeral benefits should be raised to \$8,000.

Member Leatherman made a motion to table that motion until the council receives a pricing analysis from NCCI. That motion was seconded by Member Wanda Roehl. Motion to table was passed unanimously.

5. **New Business Item #5, Preferred Worker Program (Richard Thomas).**

Richard Thomas explained that this idea came about after Director Paula Greathouse received a letter from Jill Nelson (included in agenda packets). He explained the Ticket to Work Incentive program of Medicare. Under this program, disabled workers who return to work are covered for medical expenses under Medicare for 8 ½ years after returning to work. Ms. Nelson feels that if workers compensation were to be changed to coincide with this program, it could open doors to employment and give employers incentives to hire workers with disabilities. Mr. Thomas pointed out, however, that Medicare would not pay for any job-related medical expenses since workers compensation would be considered first payer. Mr. Thomas provided the council with information from the Oregon Preferred Worker Program. Under that program, employers are not charged premiums for a preferred worker for up to three years from the date the worker starts work; protects employers from costs of new, accepted workers compensation claims by preferred workers during the premium exemption period; and provides a 50 percent wage reimbursement to employers for six months. There are also other incentives. The program is funded by assessments to employers/carriers and self-insureds.

Member Kip Kubin indicated he is all for getting injured workers back to work, but believes that the old Second Injury Fund was advantageous over this preferred worker program.

Member Kip Kubin made a motion to not recommend this program; no second on this motion. Member John Ostrowski made a motion to adopt the program; seconded by Member Jim DeHoff. Four members voted yea; five members voted nay. Motion did not pass.

Acting Director Anne Haught asked if there was any interest in having another meeting before Director Greathouse returns from leave (which she thought would be around the end of January). Member Kip Kubin made an informal request that the Division coordinate with all council members for the next meeting date.

Member Terry Leatherman made a motion to adjourn; seconded by Member Kip Kubin. Motion passed unanimously. Meeting adjourned.

DRAFT

WORKERS COMPENSATION ADVISORY COUNCIL
FEBRUARY 23, 2004

Present:

Paula Greathouse	Wanda Roehl	Marilyn Dobski	Kip Kubin
Terry Leatherman	Wil Leiker	Kenneth Clark	John Ostrowski
Jim DeHoff	Bill Knox	Steve Wanamaker	

Pat Bush was not available for this meeting.

Chair Paula Greathouse called the meeting to order and thanked KTLA for allowing us the use of the room.

1. **Old Business Item #1, Approval of Minutes of November 17, 2003 Meeting.**

Chair Paula Greathouse called for a motion to approve these minutes; Member Terry Leatherman made a motion to approve the minutes of the November 17, 2003, meeting; seconded by Member Jim DeHoff. **Motion approved unanimously.**

2. **Old Business Item #2, Approval of Minutes of December 9, 2003 Meeting.**

Chair Paula Greathouse called for a motion to approve; Member Leatherman made a motion to approve the minutes of December 9, 2003; seconded by Jim DeHoff. **Motion approved unanimously.**

3. **Old Business Item #3, Salary of Administrative Law Judges.**

Chair Paula Greathouse explained the attachments in the packets and noted that the Division wrote a letter to the Department of Administration (DOA) dated January 12, 2004, requesting a salary review of the classification of administrative law judge. The response, dated January 16, 2004, is included. Chair Greathouse noted there is on-going communication between the Division and the DOA who indicated they would be willing to look at the issue if the Division can provide additional information. She then introduced Bruce Moore, administrative law judge from Salina.

Judge Moore distributed packets and explained the various items. The first is a survey by the National Association of Administrative Law Judges (NAALJ) which was conducted in January, 2001. Other items attached include a survey by the International Association of Industrial Accident Boards and Commissions (IAIABC) and other correspondence between various states describing their workers compensation judges and the manner of compensating them. The last page of Judge Moore's handout attempts to pull all the information together. The bolded states are border states. He feels that the problem with the salary survey from the DOA does not give a lot of information and does not indicate what numbers they relied on to arrive at

their opinion that the judges are overpaid. Bryce Benedict, Topeka administrative law judge, sat down with individuals at the DOA and determined that their analysis was limited to the fact that Kansas administrative law judges fall within a certain classification **number**; then they look at that same classification **number** in the other central states salary survey, which was the basis for their comparison. They do not look at the duties of administrative law judges for workers compensation in Kansas as compared to the other states. Judge Moore attempted to pull together descriptions of the judicial functions of the judges in several states for comparison. He further explained that workers compensation is not a typical court system, but is fairly similar from state to state. Every state's statutes are different; therefore, you cannot say that what a judge in Kansas does under workers compensation is exactly like what they do in Oklahoma or Idaho, or whichever state is used as a comparison. The actual job descriptions and functions performed should be looked at. Judge Moore believes that Kansas workers compensation judges are real judges; a law license is required and must be admitted to the Kansas bar. Missouri referees, which the DOA utilized in their comparison, are not required to be lawyers and only need one year of experience as a referee. Judge Moore also included in the packet of information a job description of a Missouri workers compensation judge, which is vastly different than a referee. He explained that Kansas workers compensation courts have a court reporter present, witnesses are sworn, testimony is heard, both sides are usually represented by counsel, and the matters are either fully litigated or a done be summary proceeding. All kinds of issues of fact and law must be considered. All this should be considered when looking at or comparing salaries.

Chair Greathouse asked council members for questions of Judge Moore. Member Jim DeHoff asked why the council is getting involved; Judge Moore explained that he came before the council in December, 2003, asking for support or legislation on workers compensation that might result in a review and/or an increase in administrative law judge salaries. At that time, it was his understanding that the council requested a formal opinion from the Division; the Division, in turn, asked the DOA to review the issue and respond. That response is attached, and the matter is back before the council. Judge Moore explained that he feels the DOA's response is over-simplified and inaccurate. He feels the council needs the additional information he provided in deciding whether to recommend or support legislation to address this issue. Chair Greathouse explained that, as a state agency, the Division is required to work through the DOA regarding the pay matrix for classified employees. The Division has contacted the DOA asking for an audit of the judges' salaries; their response was that they did not feel a review was necessary because of a central states survey which found that our judges were at 102 percent of corresponding states. Judge Moore believes the DOA did not compare apples to apples; it was more of an apples to oranges comparison. Chair Greathouse believes that if the Division provides the DOA with this additional information, they may consider taking another look. The other option is to have a statutorily mandated salary, much like the Workers Compensation Board members.

Member Terry Leatherman explained that he had requested an accounting of administrative dollars spent to run the Division; if that amount has increased in recent years and, if so, by how much. Chair Greathouse apologized for not having that information and asked

what type of information he had requested. Member Leatherman explained that, since any increase will be borne by employers/carriers in the form of assessments, he is requesting information on (1) the recommendation of the Secretary/Division; (2) the cost impact of any proposal; and, (3) whether assessments increased in recent years.

Member Leatherman made a motion to table this matter until such time as the information he requested could be presented; motion seconded by Member Wanda Roehl.

Chair Greathouse asked for discussion of the motion. Member John Ostrowski indicated he did not feel any of the council members were opposed to raises for the administrative law judges and that this proposal has been dealt with or discussed for several years. He believes the information presented has been presented before and asked if there are mechanical problems to raising the salaries of the ten administrative law judges. The DOA requires that certain criteria be met before a review of any classified positions is undertaken; that criteria includes a substantial turnover in the positions, problems hiring qualified individuals, and the central states' survey which DOA looks at for salary levels. This particular classification does not meet the criteria. However, the DOA may be willing to look at the salaries if additional information is provided. The information in the handouts will be provided to the DOA by the Division. It was explained that all this (dealing with DOA) could be bypassed if the council accomplished this through a change in the statutes. Member DeHoff asked if this would be something that Governor Sebelius would support; Chair Greathouse explained that the matter has not been presented to the governor.

A discussion was had regarding the mechanics of making this change statutorily and whether these positions would then need to be in the unclassified service. Judge Moore explained that there have been a number discussions of how to present this, how best to get it considered, etc. There are issues of accountability, whether these positions would serve at the pleasure of the governor or be appointed for four year terms (much like the Board members), whether a transition to a four-year appointment could be done in exchange for salary reviews and increases, etc. Eight of the ten present judges are willing to accept four-year terms at a salary equal to 90 percent of district court judges if they could be grand fathered into the initial four-year term. The four-year terms would be staggered so that all ten positions would not be renewed in the same year. Chair Greathouse asked Judge Moore to submit proposed statutory language. Member Ostrowski questioned tabling this item again and feels it should be resolved now. Another factor the council should consider is whether the governor would support this study by the DOA and/or increase.

Vice Chair Steve Wanamaker indicated the insurance industry agrees that the administrative law judges are underpaid, but is also very concerned over the appointment/review methods. He believes the insurance industry would support an increase in pay coupled with a mechanism where both labor and industry had equal voice in the appointment and review.

It was decided that the council would meet again on March 9, 2004, at which time

proposed statutory language and the items Member Leatherman requested would be presented.

Motion to table this item until the next meeting was passed unanimously.

Chair Paula Greathouse indicated the first order of New Business was to introduce the newest member, Kenneth D. Clark, who replaced Doug Stuewe. Member Clark indicated he has been a business agent and/or union steward for UPS for the last 30 years; works with teachers in Topeka; and has been in labor since the age of 16.

4. New Business Item #4, NCCI Pricing.

Chair Paula Greathouse introduced Terri Robinson, National Council on Compensation Insurance (NCCI). Also present by telephone was Jim Davis, actuary for NCCI. Terri Robinson indicated they would be discussing Senate Bill 181 and the various versions of it. It was decided that Jim Davis would go through the January, 2004, Analysis of Kansas Revisions to SB 181, which was a handout Ms. Robinson distributed.

Mr. Davis indicated that the original analysis also had four components: (1) pre-existing disability, (2) methodology for determining functional disability compensation, (3) inclusion of disability retirement benefits, and, (4) definition of "accident." The next analysis contained these components: (1) re-establishing the second injury fund, (2) increasing maximum weekly benefit to 100 percent of the state's AWW, (3) abolishment of the AMA guidelines, (4) eliminating the \$50,000 cap on permanent total and the \$100,000 cap on temporary total and permanent partial, and, (5) creation of a preferred worker program. The latest version has these components: (1) clarification of pre-existing impairment, (2) methodology for determining supplemental functional disability, (3) reduction of attorney's fees, (4) date of accident.

Mr. Davis then proceeded to go through each component and explained NCCI's analysis of how that component affects the total system costs. Member John Ostrowski asked for clarification of the overall affect of changing/clarifying pre-existing disability; Mr. Davis noted it would be a reduction of up to two percent of total system costs. This was the version prepared in January, 2004 by NCCI.

Mr. Davis explained that, in the analysis prepared in November, 2003, reinstating the Second Injury Fund would be a shifting of costs from the carriers back to the fund and would most likely lead to an increase in ultimate system costs, particularly if the second injury fund staff is less efficient than carriers in handling claims. He indicated this was certainly the case in the past; he has figures from the previous second injury fund, and from 1992-1996 (fiscal years), the fund was paying out upwards of 15 percent of total payments in the entire state for workers compensation. Senate Bill 307 has the provision regarding pre-existing conditions, which Mr. Davis assumed was no coincidence that that provision went in at the time the fund was being eliminated. This would tend to reduce the costs of very serious claims. He believes this would be at least a wash and more likely would lead to an increase in ultimate system costs. Member

Ostrowski asked if Mr. Davis was aware that the new proposals regarding the second injury fund would eliminate all litigation; Mr. Davis was not aware of that fact. Mr. Davis explained that NCCI did not differentiate between claims where there was attorney involvement. If Kansas encourages, markets, and sells return-to-work programs, those employers can utilize the fund. Member Ostrowski explained that even though Kansas paid money through the second injury fund, if it was doing what it was supposed to do (that being taking employees back to work), the concept of that was a good idea. Terri Robinson explained that NCCI was not trying to take a stand, pro or con, on the issue of reinstating the second injury fund; they are just giving their best estimate of cost analysis. Member Wil Leiker pointed out that the concept of Senate Bill 307, that of the employer receiving credit for pre-existing conditions, never came to fruition. Jim Davis explained that NCCI did not look at SB307 in terms of its components, but only in terms of overall savings; there were certainly savings after passage of SB 307, and employers benefitted from that reduction in overall costs. Member Ostrowski pointed out that the various proposals regarding pre-existing disability has had several different language versions. Mr. Davis explained that even though there could be a wide range of impact on that small component or subset of claims, when spread to the whole system, it reduces the range. In summary, the overall savings of SB 181 would be approximately 0.0%–4.0%.

Chair Greathouse asked about the impact on eliminating the \$50,000 cap for permanent partial benefits. Jim Davis explained there would be minimal impact because this cap is only triggered in a very limited number of instances where there is a large percentage of disability. Eliminating or increasing the \$125,000 cap on permanent total and the \$100,000 cap on temporary total and permanent partial may increase the total system costs by 1-1.5 percent, if the permanent partial cap is also increased. That range may increase to 1-2.5 percent based on some potential utilization effects, such as using the \$100,000 cap as a ceiling in claims negotiations and a potential added incentive not to return to work if there is no cap. Mr. Davis indicated he has a list of the studies the NCCI used, if anyone is interested.

Chair Greathouse indicated Representative Donald Dahl had asked that the council look at Substitute for SB 181 and specifically mentioned looking at the effect of eliminating or increasing the caps on benefits. Chair Greathouse suggested setting up a subcommittee who can report to the full council at the next meeting (set for March 9, 2004).

Member DeHoff made a motion to appoint a two-person subcommittee, one person from business and one person from labor; and suggested that Wil Leiker represent the labor side. Motion seconded by Member Leatherman. Member Kip Kubin suggested Member Leatherman represent business on this subcommittee. Motion passed unanimously. The subcommittee will present a report at the next meeting set for March 9, 2004.

Chair Paula Greathouse asked Jim Davis if he could give the council some pricing on House Bill 2757. Terri Robinson indicated they had just received this bill, but could give a rough pricing estimate. This bill would increase the maximum weekly compensation rate from 75

percent of the state's average weekly wage to 100 percent; disability payments for temporary total, permanent partial, and permanent total would be increased to 75 percent of the average weekly wage, instead of the current 66 2/3 percent. Mr. Davis reminded the council that death benefits, which are mentioned in another statute, would probably also be affected by this amendment even though they are not mentioned. NCCI's pricing estimates do not include increases in fatal benefits. He believes this amendment would have a significant impact, particularly if the potential impact of utilization is included. In 1987 Connecticut raised their maximum benefit for temporary total from 100 percent of the state's average weekly wage to 150 percent. A study was performed by the Workers Compensation Research Institute in Boston and found a 16 percent longer duration and 5 percent more claims filed after that change. NCCI's pricing was done assuming the current aggregate caps on benefits. Terri Robinson indicated the preliminary assessment would be an increase in the range of low double digit numbers.

5. **New Business Item #5, Reinstating the Workers Compensation Fund - Bill Curtis, Kansas Association of School Boards.**

Chair Paula Greathouse indicated that Representative Candy Ruff requested the council discuss the possibility of reinstating the Workers Compensation Fund. Chair Greathouse then introduced Bill Curtis from the Kansas Association of School Boards.

Mr. Curtis noted that he had testified in front of the Commerce Committee regarding reinstating the second injury fund. He indicated he would support other ideas, other than the second injury fund, if those ideas provided the same kind of relief for insurers. Mr. Curtis reminded the council that most discussions centered around the *Hanson* case. He believes that workers compensation is changing and that the system deals more and more with chronic situations, and NCCI seems to verify that we are dealing more with severity as opposed to frequency. Medical inflation is also a factor. School districts are finding themselves in situations where they are not getting credit for pre-existing impairments. Employers/carriers are not only not receiving credit, but are also being hit by higher premiums as a result of being forced to pay 100 percent of claims. While the proposal in 1993, when doing away the second injury fund, was to give employers credit for pre-existing impairments, this has not worked as anticipated. Employers are also finding that they cannot put injured workers back to work because of the disability. It is Mr. Curtis's opinion that something has to be done to give employers some kind of relief. Studies have found that medical inflation for workers compensation is 6.3 percent on an annual basis, where general medical inflation is around 4 percent. Reinsurance rates are also increasing at a rapid rate. The proposal for pre-existing conditions is to re-write K.S.A. 44-501 (h) and to clarify the fact that insureds are to receive credit for pre-existing conditions and to clarify that employees are compensated only for the aggravation. Medical evidence would have to be presented. Mr. Curtis believes that transaction costs (litigation costs) associated with a second injury fund should be eliminated, as well as resolving these types of claims is a shorter period of time. He believes this aspect should be looked at before it reaches crisis proportions. To give credit for simply a functional impairment is peanuts compared to what the medical and temporary total costs are per claim.

Chair Greathouse asked the newly appointed subcommittee to look into this problem and report to the full council at the next meeting. Member Wil Leiker pointed out that Kansas ranks in the top ten states as far as injuries. He feels that perhaps the discussions of the council should be a little broader and should also look at employee issues, not just employer issues. Chair Greathouse indicated the subcommittee should feel free to discuss any pertinent issues. Member Jim DeHoff indicated the council should have some way to deal with the health care costs, since this appears to be where most of the cost increases originate. Member Terry Leatherman stated that workers compensation has become an extremely expensive element of doing business. A lot of employers feel they are compensating for things they should not be responsible for paying. The whole idea of a social fund, which is what the second injury fund is, would spread the risk to more than just the individual employer who is determined responsible for a claim. Funding that type of fund is the real problem. Vice Chair Steve Wanamaker pointed out that prior to 1994, an employer could be found responsible for an injury that did not occur on the job of that employer and that the legislation in 1994 was intended to correct that. Senate Bill 181 attempts to clarify and answer why that intent is not working. It has been suggested to revert back to a second injury fund, which still pays for those injuries that were not caused by the duties of the current job. Vice Chair Wanamaker reiterated that it is easy to get lost in the details of trying to correct this problem, and in the process of doing so, some inequities and unfairness have to be worked out. The inequities are on both sides. It will be very difficult to come up with language to compromise and/or remedy the situation. Mr. Curtis reiterated that it is the severity of the claims and the dollar amount being paid, not the number of claims. Chronic conditions are what he is concerned about and employers have no recourse to recover medical benefits or the temporary total compensation. Terri Robinson said that NCCI would have no way of knowing if pre-existing conditions are involved as far as dollar amounts paid on claims.

Member John Ostrowski indicated he disagreed with some of the things being said; that the system is unfair simply because one employer pays out less than what it was assessed and another employer pays out more than it was assessed. He does not believe the system is like grain futures where, for each dollar that someone makes, another has to lose a dollar. Member Ostrowski believes abolishing the Workers Compensation Fund in 1993 was a mistake and still believes it was a mistake. When the Fund existed, if a prior disability was found to cause or contribute to new injury, all compensation, including medical benefits, could be offset. As it stands now, only the functional or permanent disability is offset.

6. **New Business Item #6, Judicial Retirement System for Workers Compensation Board Members - Duncan Whittier, Chair of the Board.**

Chair Paula Greathouse introduced Duncan Whitter, the current chair of the Workers Compensation Board, who introduced Gary Korte, another board member.

Mr. Whittier explained that legislative changes in 1993 created the Workers Compensation Board to replace two levels of appeals from decisions of the administrative law judges; gone are Director's reviews and appeals to the district courts. He believes that the 1993

amendments, for logical reasons, ties the salaries and expense reimbursement for board members to district court judges. However, the retirement system for those judges has not been interpreted to apply for board members. The board members believe they should be covered by the same retirement system as district court judges. Senate Bill 347, which was introduced by Senator Mike Harris in 1997, would have clarified that; unfortunately Senator Harris left the state and the bill did not go anywhere. This issue has been before the council before. Mr. Whittier was appearing before the council today asking for their support and legislation similar to SB 347. Mr. Whittier pointed out that administrative law judges are required to have five years of legal experience; board members are required to have seven years, and therefore may not be able to acquire the years of service as other state employees do.

Member Terry Leatherman noted that the board members' retirement is modeled after the retirement system (Kansas Public Employees Retirement System, KPERS) for other state employees, which he believes is a very good retirement system. In 1993 when the board was established, there was discussion of establishing a pay level that would attract qualified, talented individuals. Mr. Leatherman indicated there was no discussion or consideration in 1993 as to what retirement system members should be put under. He does not believe the council needs to further "sweeten" the situation the board members have to acquire or attract quality individuals. Mr. Leatherman recommended no change whatsoever in compensation for members of the workers compensation board. His inclination was to make no recommendation and **no motion**.

No further discussion by the council; **no motion was made on this Item.**

7. New Business Item #7, House Bill No. 2757.

Chair Paula Greathouse indicated that Representative Candy Ruff also requested the council look at this bill.

Richard Thomas of the Division of Workers Compensation explained that this bill would increase the weekly payments for permanent total disability to 75 percent of the average gross weekly wage, up to a maximum of 100 percent of the state's average weekly wage; increase temporary total weekly benefits to 75 percent of the average weekly wage up to 100 percent of the state's average weekly wage. He explained that the bill does not address the issue of weekly death benefits which are covered under K.S.A. 44-510b. Under this bill, the current maximum weekly benefit of \$440 (effective 7/1/03 to 6/30/04) would be raised to \$587. There have been no hearings held and none are set concerning this bill.

The council took no action on this bill.

8 and 9. New Business Items #8 and 9, For Information Only.

Chair Paula Greathouse explained that Executive Reorganization Order No. 31 would change the name of the Department of Human Resources to the Department of Labor.

An Overview of Current Legislative Bills prepared by Richard Thomas is also attached.

Chair Paula Greathouse called for a **Motion to Adjourn**; **Member Terry Leatherman made such a motion; seconded by Member Bill Knox. Meeting adjourned.** Next week set for March 9, 2004, at 9:00 a.m.

Session of 2004

SENATE BILL No. 395

By Committee on Commerce

1-29

9 AN ACT concerning special obligation bonds; relating to sales tax revenue bonds; payment sources; amending K.S.A. 2003 Supp. 12-1774
10 and repealing the existing section.
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13 *Be it enacted by the Legislature of the State of Kansas:*

14 Section 1. K.S.A. 2003 Supp. 12-1774 is hereby amended to read as
15 follows: 12-1774. (a) (1) Any city shall have the power to issue special
16 obligation bonds in one or more series to finance the undertaking of any
17 redevelopment project in accordance with the provisions of this act. Such
18 special obligation bonds shall be made payable, both as to principal and
19 interest:

20 (A) From tax increments allocated to, and paid into a special fund of
21 the city under the provisions of K.S.A. 12-1775, and amendments thereto;

22 (B) from revenues of the city derived from or held in connection with
23 the undertaking and carrying out of any redevelopment project or projects
24 under this act including historic theater sales tax increments and environmental increments;

25 (C) from any private sources, contributions or other financial assistance from the state or federal government;

26 (D) from a pledge of a portion or all of the revenue ~~received by the~~
27 ~~city~~ from transient guest, sales and use taxes collected pursuant to K.S.A.
28 12-1696 *et seq.*, 79-3601 *et seq.*, 79-3701 *et seq.* and 12-187 *et seq.*, and
29 amendments thereto, and which are collected from taxpayers doing business within that portion of the city's redevelopment district established pursuant to K.S.A. 12-1771, and amendments thereto, occupied by a redevelopment project if there first is a finding by the secretary of commerce that based upon the feasibility study the redevelopment project will create a major tourism area for the state or if the project is the restoration of a historic theater as defined in subsection (l) of K.S.A. 12-1770a, and amendments thereto, or the project has been designated as a special bond project as defined in subsection (z) of K.S.A. 12-1770a, and amendments thereto;

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41 (E) (i) from a pledge of a portion or all increased revenue received
42 by the city from franchise fees collected from utilities and other businesses using public right-of-way within the redevelopment district; (ii)
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,provided that, with respect to a redevelopment district established prior to January 1, 2003 for which prior to January 1, 2003 the secretary of commerce found that a redevelopment project would create a major tourism area, such special obligation bonds shall be payable from transient guest, sales and use taxes collected pursuant to K.S.A. 12-1696 *et seq.*, 79-3601, *et seq.*, 79-3701 *et seq.* and 12-187 *et seq.*, and amendments thereto, from taxpayers whether or not revenues from such taxes are received by the city

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