Approved: April 29, 2005
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:36 A.M. on March 9, 2005 in Room 123-S of the Capitol.

All members were present except:
Susan Wagle- excused

Committee staff present:
Susan Kannarr, Kansas Legislative Research Department
Kathie Sparks, Kansas Legislative Research Department
Helen Pedigo, Revisor of Statutes
Jackie Lunn, Committee Secretary

Conferees appearing before the committee:
Representative Jeff Jack
Douglas Hobbs, Kansas Self-Insured Association
Tom Whitaker, Kansas Motor Carriers Association
Pat Shelley, President, Teague Electric Construction
Duane Simpson, Kansas Grain & Feed Association
John Ostrowski, Kansas AFL-CIO
Greg Wright, Kansas Trial Lawyers Association

Others attending:
See attached list.

Chairperson Brownlee opened the meeting by calling on Kathie Sparks, Legislative Research, to explain **HB 2141**. She stated **HB 2141** amends the Workers Compensation Act by establishing guidelines for the determination of whether the burden of proof needed to show that the employee used, had possession of, or was impaired by alcohol or drugs while working is met. The burden of proof for denial of benefits will be met by establishing any of the following; The employer required drug testing and the policy was set in writing before the accident; the drug testing was in the normal course of medical treatment; the injured worker had given written consent for a drug or alcohol test prior to the accident requiring medical treatment but then refused testing after such accident; The testing was done as a result of federal or state law or a federal or state regulation that requires post accident testing.

Chairperson Brownlee introduced Representative Jeff Jack to give his testimony. Representative Jack offered written testimony with his amendment attached. (Attachment 1) He stated he was an attorney and practiced for ten years representing the insurance companies in Workers Compensation cases. He supports **HB 2141.** Under the current system it is difficult to get drug and alcohol testing into evidence. **HB 2141** is an attempt to address that and carry out the legislation's intent. Representative Jack presented an amendment he felt would alleviate the holes he feels the bill leaves. He explained his amendment does away with the "probable cause"requirement altogether. Any contemporaneous post-accident blood or alcohol test is admissible; if it is positive, there is a presumption that the employee was impaired, but he can present evidence, if he has any, that the test was done in error or he wasn't impaired. Representative Jack presented written testimony which included his amendment to **HB 2141.**

A discussion occurred upon the conclusion of Representative Jack's testimony with the Committee regarding "probable cause". Then the discussion moved to the removal of the word "conclusively" on line 12 on page 2, which was removed in the Jack amendment. Representative Jack stated because they are allowing all the tests in there is always a possibility of a false positive. If you say it in conclusively presumed, you have taken away any argument you could make that there was a false positive test. Representative Jack stated that this bill with his amendment makes it easier than current law to present evidence before the ALJ. There was some discussion on things which cause false positives.

Chairperson Brownlee introduced Douglas Hobbs, Kansas Self-Insured Association, to testify as a proponent for **HB 2141.** Mr. Hobbs offered written testimony (Attachment 2) Mr. Hobbs stated he was an attorney who defends workers compensation cases. Mr. Hobbs stated amendments to the Workers' Compensation Act involve balancing the interests between various groups. HB 2141 balances the interests of employers and their law abiding employees on one hand and intoxicated workers who cause their own injuries on the other.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:36 A.M. on March 9, 2005 in Room 123-S of the Capitol.

Passage of **HB 2141** would allow employers to provide a safe working environment for their law abiding employees while preventing intoxicated workers from profiting from their own injuries without infringing on the civil rights of an employee. In closing Mr. Hobbs urged the Committee to support **HB 2141.**

Chairperson Brownlee introduced Tom Whitaker, Kansas Motor Carriers Association, to give his testimony as a proponent on **HB 2141.** Mr. Whitaker offered written testimony (Attachment 3) He stated FMCSA requires motor carriers to implement drug and alcohol testing programs for all drivers of commercial vehicles. Motor carriers must preform pre-employment,.random and post-accident drug tests. **HB 2141** clarifies that a positive post-accident drug test performed in accordance with federal and state laws would be conclusive evidence of impairment. In addition, the bill eliminates proving there was "probable cause" to test the individual. Proving the motor carrier had probable cause to test a driver following an accident is very difficult for their industry due to the fact that the driver is most often on the road and a supervisor does not have the opportunity to observe the drivers's actions. In closing Mr. Whitaker urged the Committee to support **HB 2141.**

Chairperson Brownlee introduced Pat Shelley, President of Teague Electric Constriction in Lenexa to give his testimony as a proponent on **HB 2144.** Mr. Shelley offered written testimony. (Attachment 4) Mr. Shelley stated that drugs and alcohol abuse in the work place can have devastating effects. I think it is important that our laws reflect that we have no tolerance for such abuse. He stated he had personal experience in this field. When there are areas that are unclear and are subject to dispute, claims can drag on for years. When that happens, you can have a situation where employees that truly deserve benefits can't get them for a long time or you can get a situation where the employer is penalized. He stated when a work comp insurance carrier has an open claim for a long period of time it causes the premiums to increase be increased

Chairperson Brownlee introduced Duane Simpson, Kansas Grain & Feed Association to give his testimony as a proponent on **HB 2144.** Mr. Simpson offered written testimony. (Attachment 5) Mr. Simpson stated the Kansas Grain & Feed Association supports **HB 2144** without the Jack Amendment. In closing Mr. Simpson stated that making this change in the Workers Compensation program will not have a dramatic impact on the costs of workers compensation insurance. It will, however, restore an employer's right to not have to pay compensation when they are not responsible for an injury, and it will reduce the cost of litigating whether or not a chemical test should be admitted. In closing Mr. Simpson urged the Committee to support **HB 2144** without the Jack Amendment.

Chairperson Brownlee called the Committee's attention to the written testimony of Leslie Kaufman, Government Relations, Kansas Cooperative Council, a proponent on **HB 2144.** (Attachment 6)

Chairperson Brownlee introduced John Ostrowski, Kansas AFL-CIO to give his testimony as an opponent of **HB 2144.** Mr. Ostrowski offered written testimony. (Attachment 7) Mr. Ostrowski stated the AFL-CIO supports the amendment proposed by Representative Jack. They believe the Jack amendment is a fairer and more balanced approach to the perceived problem. In closing Mr. Ostrowski urged the Committee to accept the Jack amendment on HB 2144.

Chairperson Brownlee introduced Greg Wright , Kansas Trial Lawyers, to give his testimony as a opponent on **HB 2144.** Mr. Wright offered written testimony. (Attachment 8) Mr. Wright stated the Kansas Trial Lawyers have a problem with the language. He stated the Senate has the opportunity to fix HB 2141 with amendments that protect the worker but support a drug-free workplace. The Kansas Trial Lawyers request the Committee's support of the Jack amendment creating a rebuttal presumption of impairment and giving the worker the opportunity to show that he was not impaired, or that his injury was not the result of impairment.

Chairperson Brownlee stated she would keep the hearing open and would continue on Friday, March 11, 2005.

The meeting was adjourned with the next meeting scheduled for tomorrow, Thursday, March 10, 2005 at 8:00 a.m. in room 123S.

Unless specifically noted, the individual remarks recorded herein have not been transcribed verbatim. Individual remarks as reported herein have not been submitted to the individuals appearing before the committee for editing or corrections.

Senate Commerce Committee
Guest List
Date: 03-09-05

Name	Representing
Pat Bush	KSIA
Mark Desetti	KNEA
Kevin Barone	KTLA
Callie Denton	KTLA
Bart Sprague	Kensinger & Associates
Wil Leiker	Ks. AFL-CIO
John Ostrowski	" "
Steve Johnson	Kansas Gas Service
Scott Heidner	KSIA
Richard L Thomas	KDOL - WC
Andy Shaw	Goodyear Tire & Rubber Co.
Terri Roberts	KSNA
Jeff Jack	Representative
Duane Simpson	KGFA - KARA
Rebecca Rice	NE Ks Bldg & Trades

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HOUSE OF REPRESENTATIVES

COMMITTEE ASSIGNMENTS
VICE-CHAIR: JUDICIARY
MEMBER: COMMERCE AND LABOR
TRANSPORTATION

Testimony in support of HB 2141

Members of the Senate Commerce Committee:

Thank you for the opportunity to testify today in support of HB 2141.

As a legislature, we made a policy decision many years ago that an employee who suffers a workplace accident contributed to by his impairment because of drugs or alcohol would be denied workers compensation benefits. However, the current statutory scheme and legal decisions requiring "probable cause" before post-accident drug and alcohol tests can be admitted have made it almost impossible to get the results of such tests before the Administrative Law Judge for his or her consideration. It is this problem that HB 2141 seeks to fix, and I support the intent behind its offering. However, I believe HB 2141 in its current form may not be the best way to get drug and alcohol tests into evidence, and it may keep some worthy claimants from being able to use the workers compensation system. Therefore, I have prepared a balloon amendment that I think will solve the problem addressed by HB 2141 but in a way that will lead to fewer cases "falling through the cracks" and with the potential for less litigation.

As currently drafted, HB 2141 tries to solve the problem of finding "probable cause" by the creation of four new definitions of what constitutes "probable cause". Once the employer can show that one of those four conditions has been met, then the test is admitted, and if it is positive, there is a conclusive presumption that the employee was impaired. The employer has to jump through the hoops, and the employee has no opportunity to present evidence that the test was wrong, or that he wasn't impaired.

My proposal does away with the "probable cause" requirement altogether. Any contemporaneous post-accident blood or alcohol test is admissible; if it is positive, there is a presumption that the employee was impaired, but he can present evidence, if he has any, that the test was in error or that he wasn't impaired.

The advantage to my solution is that there are no "hoops" for the employer to jump through. Failure to have the employee sign the proper form or arguments about whether the test was "in the normal course of medical treatment" will be eliminated, removing an entire area of potential future litigation. And, the draconian result for employees of elimination from the workers compensation system for "false positives" or erroneous results will be reduced, because the employee will have an opportunity to try to rebut the presumption of impairment.

Jeff Jack
State Representative, 7th District

Senate Commerce
3-9-05

Attachment 1-1

HOUSE BILL No. 2141

By Committee on Commerce and Labor

1-24

AN ACT concerning workers compensation; relating to burden of proof for admission of chemical test result into evidence; amending K.S.A. 44-501 and repealing the existing section.

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

Section 1. K.S.A. 44-501 is hereby amended to read as follows: 44-501. (a) If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act. In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

(b) Except as provided in the workers compensation act, no employer, or other employee of such employer, shall be liable for any injury for which compensation is recoverable under the workers compensation act nor shall an employer be liable to any third party for any injury or death of an employee which was caused under circumstances creating a legal liability against a third party and for which workers compensation is payable by such employer.

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

(d) (1) If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

(2) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the em-

Senate Commerce Committee
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ployee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens. In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months. It shall be ~~conclusively~~ presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite 1	15
Cocaine metabolite 2	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine4	10 ng/ml
Phencyclidine	25
Amphetamines:	
Amphetamine	500
Methamphetamine 3	500

1 Delta-9-tetrahydrocannabinol-9-carboxylic acid.
2 Benzoylecgonine.
3 Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.
4 Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

An employee's refusal to submit to a chemical test shall ~~not~~ be admissible evidence to prove impairment ~~unless there was probable cause to believe that the employee used, possessed or was impaired by a drug or alcohol while working~~. The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) ~~There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working;~~ The

~~(B) the~~ test sample was collected at a time contemporaneous with the events ~~establishing probable cause;~~ causing the injury

~~(C)~~ (B) the collecting and labeling of the test sample was performed by

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or under the supervision of a licensed health care professional; (C)

[(D)] the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies; (D)

[(E)] the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and (E)

[(F)] the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee.

[(3) ~~For purposes of satisfying the probable cause requirement of sub~~*section (d)(2)(A) of this section, the employer shall be deemed to have met their burden of proof on this issue by establishing any of the following circumstances:*

(A) The testing was done as a result of an employer mandated drug testing policy, in place in writing prior to the date of accident, requiring any worker to submit to testing for drugs or alcohol if they are involved in an accident which requires medical attention;

(B) the testing was done in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and was not at the direction of the employer; however, the request for GCMS testing for purposes of confirmation, required by subsection (d)(2)(E) of this section, may have been at the employer's request;

(C) the worker, prior to the date and time of the accident, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident requiring the worker to obtain medical treatment for the injuries suffered. If after suffering an accident requiring medical treatment, the worker refuses to submit to a chemical test for drugs or alcohol, this refusal shall be considered evidence of impairment, however, there must be evidence that the presumed impairment contributed to the accident as required by this section; or

(D) the testing was done as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post accident testing program and such required program was properly ~~implemented at the time of testing.~~]

(e) Compensation shall not be paid in case of coronary or coronary artery disease or cerebrovascular injury unless it is shown that the exertion of the work necessary to precipitate the disability was more than the employee's usual work in the course of the employee's regular employment.

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(f) Except as provided in the workers compensation act, no construction design professional who is retained to perform professional services on a construction project or any employee of a construction design professional who is assisting or representing the construction design professional in the performance of professional services on the site of the construction project, shall be liable for any injury resulting from the employer's failure to comply with safety standards on the construction project for which compensation is recoverable under the workers compensation act, unless responsibility for safety practices is specifically assumed by contract. The immunity provided by this subsection to any construction design professional shall not apply to the negligent preparation of design plans or specifications.

(g) It is the intent of the legislature that the workers compensation act shall be liberally construed for the purpose of bringing employers and employees within the provisions of the act to provide the protections of the workers compensation act to both. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.

(h) If the employee is receiving retirement benefits under the federal social security act or retirement benefits from any other retirement system, program or plan which is provided by the employer against which the claim is being made, any compensation benefit payments which the employee is eligible to receive under the workers compensation act for such claim shall be reduced by the weekly equivalent amount of the total amount of all such retirement benefits, less any portion of any such retirement benefit, other than retirement benefits under the federal social security act, that is attributable to payments or contributions made by the employee, but in no event shall the workers compensation benefit be less than the workers compensation benefit payable for the employee's percentage of functional impairment.

Sec. 2. K.S.A. 44-501 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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3-9-05
Attachment 1-5

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TESTIMONY BEFORE THE SENATE COMMERCE COMMITTEE ON HB 2141

Douglas C. Hobbs
Wallace, Saunders, Austin, Brown & Enochs, Chtd.

March 9, 2005

Co-chairs Nick Jordan and Karin Brownlee and members of the committee, thank you for allowing me to appear before you in support of HB 2141. I am testifying as a member of and on behalf of the Kansas Self-Insurers Association (KSIA), a not-for-profit organization comprised of more than one hundred firms, businesses, corporations, group-funded pools and other private and public entities who operate as self-insurers in Kansas. House Bill 2141 proposes to amend K.S.A. 44-501 to make it easier for employers to utilize the so-called "intoxication defense" in the workers compensation statutes which bars recovery to employees who are injured on the job when their own intoxication or illegal drug use contributed to their injuries.

Under the current statutory framework set forth in K.S.A. 44-501(d)(2), the employer (respondent) has the burden of proof to establish that the claimant's injury, disability or death "was contributed to by the employee's use or consumption of alcohol and/or drugs." In order for the employer to successfully utilize this defense it must prove two elements: that the injured worker was under the influence of alcohol AND that there was a nexus between the drug use and the accident. Intoxication is most commonly proven through drug tests. K.S.A. 44-501(d)(2) provides, "[i]t shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that at the time of the injury the employee had an alcohol concentration of

.04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above levels shown on the following chart for the drugs of abuse listed" (see chart located in K.S.A. 44-501(d)(2)). There are several statutory requirements for the admissibility of chemical drug testing to prove impairment:

a. There was probable cause to believe the employee used, had possession of, or was impaired by the drug or alcohol while working;

b. [T]he test samples collected at a time contemporaneous with the events establishing probable cause;

c. [T]he collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;

d. [T]he test was performed by a laboratory approved by the United States Department of Health and Human Services or licensed by the Department of Health and Environment, except that a blood sample may be tested for alcohol content by a laboratory, only used for that purpose by state law enforcement agencies;

e. [T]he test was confirmed by gas chromatography - mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and

f. [T]he foundation evidence must establish, beyond a reasonable doubt, that the tests were from the sample taken from the employee.

Judicial interpretation of K.S.A. 44-501(d)(2) has made the requirements of the introduction into evidence of intoxication tests so onerous that the intoxication defense has been rendered essentially useless. In the Kansas Court of Appeals case of *Evans v. Frakes Trucking*, 31 Kan. App. 2d 211 (2002), the Kansas Court of Appeals ruled that blood alcohol testing showing an alcohol concentration of .05% was inadmissable as the respondent did not have probable cause for taking of the blood test. The deceased worker, a commercial truck driver, drove his truck off

the road for no apparent reason. Federal law mandates drug testing when a commercial driver is involved in a fatal accident. The drug sample, collected by the coroner, was taken pursuant to Federal law, and not as a result of any type of probable cause. As a result, the blood sample was excluded from evidence, and the claimant's dependents were awarded benefits.

Amazingly, the standard for admission of intoxication testing in workers compensation cases is even more stringent than for criminal cases, such as DUI or other related offenses. In *Foos v. Terminix*, 277 Kan 687 (2004), the Kansas Supreme Court agreed to review the lower court's decision which recognized a "normal course of medical treatment" exception to the admissibility of blood alcohol testing. The claimant in this case, who suffered injuries from a single car accident, had consumed nine alcoholic beverages in the hours prior to the accident. The claimant's blood sample which was taken at the hospital, showed his blood contained opiates and an alcohol concentration of .13%, far in excess of the conclusive presumption of 0.04%. The Kansas Court of Appeals relied on cases interpreting the probable cause requirements for admission of intoxication testing in DUI cases, which held that if the blood sample was taken in the ordinary course of medical treatment, test results would be admissible. The Appeals Court held that the same standard applied to the admission of drug tests in workers compensation cases. The Appeals Court found that if blood samples were taken in the ordinary course of medical treatment of a workers compensation claimant's injuries, rather than at the request of an officer, they would be admitted into evidence.

The Kansas Supreme Court, however, overturned the lower court's decision relying on the premise that "the Workers Compensation Act is the legislature's creation of an adequate

substitute remedy for the legislatively abolished common-law rights of employees to sue employers for injuries. Accordingly, the Workers Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete and exclusive, and we must look to the procedure of the act for the methods of its administration" (see *Foos*). Despite the obvious intoxication of the claimant while performing work for the employer, the court noted that the employer could not rely on the "normal course of medical treatment exception to the admissibility of the blood tests since such an exception was not written into K.S.A. 44-501(d)(2)." The Supreme Court noted **"any such exception to the legislature's scheme must come from the legislature, not the court."** (see *Foos*).

HB 2141 attempts to align the probable cause requirements in the Workers Compensation Act with the law in criminal cases. Moreover, it attempts to correct the situation where employers cannot use the intoxication defense if they are subject to mandatory drug testing or have a voluntary drug testing policy in place. Employers have attempted to create safe work environments for all workers by having policies in place which drug test injured workers. In such situations where an employer either is subject to mandatory drug testing (as seen in the *Evans* case) or drug tests after every workers compensation accident, the probable cause element of the statute cannot be met. In those situations, employees know they will not be denied benefits for their alcohol or illegal drug use while on the job. The affect of the court's current interpretation of K.S.A. 44-501(d)(2) is to punish employers for attempting to maintain a drug-free, safe workplace, and rewarding workers compensation claimants who come to work under the influence of drugs or alcohol. Kansans deserve the safety and security of working in an

atmosphere free from drugs and alcohol. New legislation should condemn, rather than encourage, drug use in the workplace.

SUMMARY

1. Drug testing without probable cause is the norm:

a. Most insurance companies required post-accident drug testing;

b. Federal contractors (Davis-Bacon) subject to mandatory drug policies per federal statute;

c. DOT requires drug testing of commercial drivers after every accident;

d. Across-the-board drug testing eliminates potential for discriminatory testing;

2. HB 2141 only applies to positive drug tests

   a. Employer still must prove a causal connection between intoxication and accident.

3. Most accidents involving intoxication usually involve:

   a. Serious injuries

      1. Motor vehicle accidents
      2. Heavy equipment operation
      3. Use of power tools

         a. Repetitive injuries (carpel tunnel syndrome, etc.), back strains will **not** be effected because no causal connection between intoxication and injury.

   b. Greater potential for injuries to others.

4. HB 2141 still will provide adequate safeguards for employees.

   a. The proposed amendments to K.S.A. 44-501 are merely exceptions to the establishment of probable cause. The statute continues to require respondent to prove the sample was collected by a health care professional or someone under the supervision of such professional; the test was performed by a laboratory approved by the United States Department of Health and Human Services or

licensed by the Department of Health and Environment; the test was GCMS confirmed; and chain of custody must still be proven beyond a reasonable doubt.

5. Amendments to the Workers' Compensation Act involve balancing the interests between various groups. HB 4121 balances the interests of employers and their law abiding employees on one hand and intoxicated workers who cause their own injuries on the other. Passage of HB 4121 would allow employers to provide a safe working environment for their law abiding employees while preventing intoxicated workers from profiting from their own injuries without infringing on the civil rights of any employee. For these reasons, the Kansas Self-Insurers Association urges you to vote favorably on HB 2141.

Again, thank you for patience, time, and consideration in this matter.

WSABEWI0 424946v1

KANSAS MOTOR CARRIERS ASSOCIATION

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TOM WHITAKER
Executive Director

Legislative Testimony
before the
Senate Commerce Committee
Sen. Karin Brownlee, Co-Chairman
Sen. Nick Jordan, Co-Chairman
Wednesday, March 9, 2005

In Support of House Bill No. 2141

MADAM CHAIRMAN, MR. CHAIRMAN AND MEMBERS OF THE SENATE COMMERCE COMMITTEE:

I am Tom Whitaker, executive director of the Kansas Motor Carriers Association. I appear here this morning representing our 1,200 member companies in support of House Bill No. 2141.

In 1998, KMCA appeared before the Workers Compensation Advisory Council to request their support to include certain drug concentration levels under the conclusive presumption of employee impairment in the workers compensation statutes. The Advisory Council approved our request and the 1999 Legislature approved Senate Bill No. 219 which included the drug concentration levels which are the same as those found in the Federal Motor Carrier Safety Administration's (FMCSA) drug testing regulation 49 CFR Part 40.87 and the regulations adopted by the Kansas Corporation Commission which are found in K.A.R. 82-4-3.

Since December of 1989, FMCSA has required motor carriers to implement drug and alcohol testing programs for all drivers of commercial vehicles. Motor carriers must perform pre-employment, random and post-accident drug tests. The positive test rate for the trucking industry is 1.5% of those tested.

HB 2141 clarifies that a positive post-accident drug test performed in accordance with federal and state laws would be conclusive evidence of impairment. In addition, the bill eliminates proving there was "probable cause" to test the individual. Proving the motor carrier had probable cause to test a driver following an accident is very difficult for our industry due to the fact that the driver is most often on the road and a supervisor does not have the opportunity to observe the driver's actions.

The Kansas Motor Carriers Association supports mandatory drug and alcohol testing for truck drivers and we support HB 2141. We thank you for the opportunity to appear before you today and would be pleased to respond to any questions you may have.

Senate Commerce Committee
3-9-05

Attachment 3-1

SENATE COMMERCE COMMITTEE

Thank you for allowing me the opportunity to address you today.

My name is Pat Shelley, I am President of Teague Electric Construction in Lenexa – we are electrical contractors and we have about 170 employees.

I am here today to speak in support of HB 2141 – an act relating to workers compensation and chemical testing.

Unfortunately, I have personal experience dealing with the provisions of this bill.

A couple of years ago we had an employee injured on one of our jobs wiring a new home. Our company has had a substance abuse program for years, so when this employee went for medical treatment, a drug screen was automatically part if the procedure. He tested positive – so based on the provisions of our substance abuse policy, he was terminated and based on their understanding of Kansas law, our insurance carrier denied all benefits. Attorneys got involved, on both sides, and it is still unresolved.

When you read this statute, I think it's pretty clear to all of us what the original intent was – but its specific wording says – The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

(A) There was probable cause to believe that the employee used, had possession of, or was impaired by the drug or alcohol while working.

No employer, in his right mind, would allow an employee on a job using power tools if he had reason to believe that employee was impaired by drugs or alcohol. Yet, I'm told that the courts have ruled that for this provision to apply as it is now written, that is pretty much what would have to happen.

We probably have very little chance of prevailing in our situation - even though our long standing substance abuse policy required the drug test and it was positive.
This is a perfect example of why the changes contained in this bill are necessary.

Drugs and alcohol abuse in the work place can have devastating effects – I think it is important that our laws reflect that we have no tolerance for such abuse.

I would also like to express to you the importance of passing this revised language for implementation as soon as possible. We need to do everything we can to clarify our

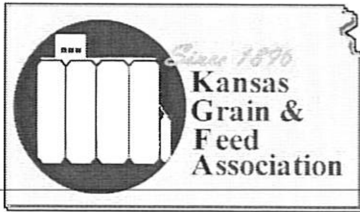
work comp laws so that claims can be resolved in a timely manner.

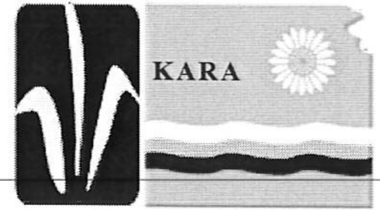
When there are areas that are unclear and are subject to dispute – claims can drag on for years. When that happens, you can have a situation where employees that truly deserve benefits can't get them for a long time or you can get a situation like I was talking about today, where the employer is penalized.

You might say – if the benefits aren't being paid out, what do you care?

When a work comp insurance carrier has an open claim, they analyze the situation and they calculate a 'worst case scenario' for medical, legal and compensation – then they maintain a reserve fund equal to that 'worst case' amount. When a case remains open for a long period of time, that reserve shows up on our claims history just like a closed and paid claim. Then, when I renew our work comp insurance every year, our premiums are based on an experience modification factor that reflects a reserve amount that may never be paid out.

It doesn't seem fair, but that's how the system works. All the more reason to clarify the intent of the statute.





STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS AGRIBUSINESS RETAILERS ASSOCIATION

SUBMITTED TO THE

SENATE COMMERCE COMMITTEE

IN SUPPORT OF HOUSE BILL 2141

SEN. KARIN BROWNLEE, CHAIR

MARCH 9, 2005

KGFA & KARA MEMBERS ADVOCATE PUBLIC POLICIES THAT ADVANCE A SOUND ECONOMIC CLIMATE FOR AGRIBUSINESS TO GROW AND PROSPER SO THEY MAY CONTINUE THEIR INTEGRAL ROLE IN PROVIDING KANSANS AND THE WORLD THE SAFEST, MOST ABUNDANT FOOD SUPPLY.

816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax:

Senate Commerce Committee
3-9-05
Attachment 5-1

Thank you Madam Chair, members of the Senate Commerce Committee, I am Duane Simpson testifying on behalf of the Kansas Grain and Feed Association (KGFA) and the Kansas Agribusiness Retailers Association (KARA). The KGFA is a voluntary state association with a membership encompassing the entire spectrum of the grain receiving, storage, processing and shipping industry in the state of Kansas. KGFA's membership includes over 950 Kansas business locations and represents 99% of the commercially licensed grain storage in the state. KARA's membership includes over 700 agribusiness firms that are primarily retail facilities that supply fertilizers, crop protection chemicals, seed, petroleum products and agronomic expertise to Kansas farmers. KARA's membership base also includes ag-chemical and equipment manufacturing firms, distribution firms and various other businesses associated with the retail crop production industry. On behalf of these organizations, I am testifying in support of House Bill 2141.

Between 2001 and 2004, agribusiness has seen work comp increases ranging from 17% to 105%. In order to keep their doors open, our members have had to lay off workers. One of the big cost drivers of work comp in Kansas is the cost of litigation. Make no mistake about it, House Bill 2141 will <u>not</u> solve the work comp problems our industry faces, but it will be a small step in the right direction and restore some common sense to the system.

All House Bill 2141 does is lower the legal hurdle to establish probable cause when testing employees for the use of alcohol or drugs when they have workplace related injuries.

Opponents to the bill have stressed the simple fact an injury occurred on the job does not rise to the level of 'probable cause' to test that employee. Some will even argue if those tests show intoxication, they should not be admitted as evidence and the employer should still have to pay workers compensation benefits. Is that fair to the employer? The fact that a workplace accident occurred should be probable cause to test for chemicals. House Bill 2141 provides that mechanism if certain criteria are met. Once those factors are satisfied, the test results should be fully admissible. What is the purpose of requiring probable cause before testing? Although the idea may be well intentioned, it is clearly being misapplied under current law allowing some intoxicated employees to make it through the system and receive benefits to which they are not entitled.

Opponents have argued that this simple change in the law will cause work comp benefits to be denied to injured workers who are not really intoxicated, but test positive due to cold medicine, poppy seed muffins or even second-hand marijuana smoke from a Rolling Stones Concert. Remember, there is still the legal hurdle to prove that the intoxication contributed to the accident. In the case of cold medicine, workers have a choice of which product to use. If

you are going to work, you don't take a product that contains alcohol and is intended as a sleep aid. Again, should an employer have to pay first dollar medical coverage for an employee who ignores the warning labels on medication and is injured as a result?

Opponents also argue that this is a public policy decision the Legislature will have to make. Either the employer will pay for the injured worker or the state will have to pick up the tab. We agree that this is a public policy decision that must be answered by this Legislature. We disagree on the question. Is Workers Compensation a system to pay compensation to injured workers arising out of the course of employment, or is it a welfare system to provide benefits to people that injure themselves while intoxicated? Business does not disagree with our responsibility to pay for on the job accidents in most cases. We do not believe we should ever be required to pay when an intoxicated employee is injured due to their intoxication. That is how the statute actually reads, unfortunately, the probable cause hurdle has become a haven for trial attorneys to force employers to pay benefits to intoxicated employees.

Making this minor change in the Workers Compensation program will not have a dramatic impact on the costs of workers compensation insurance. It will, however, restore an employer's right to not have to pay compensation when they are not responsible for an injury, and it will reduce the cost of litigating whether or not a chemical test should be admitted.

We urge the committee to support HB 2141. Thank you for your time and I will stand for questions.

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Senate Commerce Committee

March 9, 2005
Topeka, Kansas

HB 2141 – probable cause for admissibility of drug test results on an injured employee in a work comp case.

Chairs Brownlee and Jordan and members of the Committee, thank you for the opportunity to share comments on behalf of the Kansas Cooperative Council in support of HB 2141. I am Leslie Kaufman and I serve the Council as Government Relations Director. The Kansas Cooperative Council includes more 223 cooperative business members. Together, they have a combined membership of nearly 200,000 Kansans.

Many members of our association can benefit from the changes proposed in HB 2141, but probably none more than our grain storage and agribusiness supply members. Increasing workers' compensation rates in the agribusiness sector have been a serious concern to the Council's members. The Kansas Cooperative Council will support efforts to slow the increase or reduce these costs to agribusinesses and reduce fraud and abuse of the worker's comp system. Additionally, we support efforts to encourage business development and promote growth in the Kansas economy. The change proposed in HB 2141 is a tool we hope will help achieve these goals.

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HB 2141 will help ensure that in work comp cases relevant evidence as to an injured worker's drug/alcohol use is put before the tryer of fact. Then, it can be evaluated along with, and in light of, other evidence.

As such, we respectfully encourage this committee to act favorably on HB 2141.

Thank you.

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Kansas AFL-CIO

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Shawn Lietz
Pam Pearson
Dave Peterson
Emil Ramirez
Steve Rooney
Debbie Snow
Richard Taylor
Wilma Ventura
Betty Vines
Dan Woodard

SENATE COMMERCE AND INDUSTRY
HB 2141
KANSAS AFL-CIO
JOHN OSTROWSKI
MARCH 9, 2005

Thank you for this opportunity to speak regarding HB 2141. My name is John Ostrowski, and I appear on behalf of the Kansas AFL-CIO. The Kansas AFL-CIO **OPPOSES** HB 2141 in its present form; but **SUPPORTS** the amendment proposed by Rep. Jeff Jack. The Kansas AFL-CIO believes that the amendment proposed by Rep. Jack is a fairer and more balanced approach to the perceived problem.

Everyone is in agreement that workplace safety is a high priority. Both employers and employees need a safe workplace. Since 1911, Kansas has restricted workers compensation benefits to workers who have caused their own injuries through intoxication or impairment. Not every situation involving drugs or alcohol should be treated the same. There is a significant difference between:

* the executive who has a glass of red wine with lunch;
* the construction worker who has some beer while watching Monday night football at home and reports to work on Tuesday with a low level of alcohol;
* the school bus driver using cocaine; and
* the secretary who slips on a highly waxed floor following a drink with her boss and co-workers to celebrate a tough but successful day at the office.

Should each of these individuals be treated identically under the law? Does it matter how the accident occurred? Should there be safeguards on the admission of evidence?

Under current law, the balance is:

probable cause to do testing
and
an exceedingly low level of impairment
which establishes a conclusive presumption of impairment
and
contribution to the accident from the impairment.

There is a long "history" of how the current law came to be. Attached is our testimony presented in the House Commerce and Labor hearing. In May of 2004, the Kansas Supreme Court decided the *Foos* case. It is clear that the *Foos* case interpreted the statute more favorably for employers (again, see our testimony given in the House).

The Kansas AFL-CIO agrees that current law is not "perfect." The issue of probable cause can be problematical. The most glaring example is a truck driver involved in a single vehicle accident and it is later determined that the driver was impaired. If the employer had reason to suspect impairment, they would not have permitted the driver to operate the vehicle. While the law is presently not "perfect," it does make an attempt at being balanced.

The bill intends to remove, or at least substantially "water down", the requirement of probable cause. To maintain the balance, it should not be conclusively presumed that anyone who reaches the low level of impairments set forth in the statute are impaired. Most of us are familiar with alcohol, and therefore, we will use alcohol as an example. Is it appropriate that it be conclusively presumed someone is impaired by alcohol at .04, i.e. half the legal limit to operate a motor vehicle? (Recall that .08 found in the statute has been consistently lowered over the years to its present level for driving.)

Other drugs contained in the statute have similarly low levels of presumption for conclusive impairment. In fact, everyone agrees that there is no correlation between the levels set forth in the statute, and impairment. Furthermore, the statute also refers to legal drugs, such as codeine, morphine, and prescription drugs. Traces of marijuana can be in someone's system, without having used the drug illicitly.

All the amendment proposed by Rep. Jack does is allow any individual to attempt to prove that they were not impaired at the time of the work related injury–while still retaining a presumption of impairment. The garbage collector, or secretary, or lobbyist, can attempt to show that at .05 they were not impaired.

Strictly in the alternative, the Kansas AFL-CIO would propose a hybrid approach to the statute. That is, separate out alcohol and "licit drugs used illicitly." For illegal drugs, the conclusive presumption could be maintained. The Kansas AFL-CIO would be willing to draft language for such a hybrid approach.

Either approach would produce a more balanced law.

I will stand for questions.

TESTIMONY OF KANSAS AFL-CIO IN OPPOSITION TO HB 2141

by

JOHN M. OSTROWSKI
February 1, 2005

Thank you Mr. Chairman for this opportunity to present testimony on behalf of the Kansas AFL-CIO. My name is John M. Ostrowski, and I do appear today on behalf of the Kansas AFL-CIO in opposition to HB 2141. HB 2141, in essence, removes the requirement that "probable cause" be part of admitting alcohol/drug results into evidence in workers compensation cases. The proposed changes will create "suspicionless" or "random" testing of individuals.

No one supports the use of drugs or alcohol in the workplace. Everyone also agrees that when a worker causes his own injury through intoxication or impairment, generally speaking, he should not be compensated, or should be compensated at a reduced level.[1]

As with most laws, however, the "devil is in the details." The law should attempt to balance the employer's interests, the employee's interest, and the social goals of workers compensation. The legislature in its efforts to "balance" competing interests must consider, among other things: constitutional issues, an individual's right to privacy, society's desires relative to impairment/intoxication, the evils of "warrantless" searches or searches based on suspicion, the chilling effect of legitimate workers compensation claims, the employee's presumed loss of employment, medical care which will be shifted from the employer to society as a whole if compensation is denied, the admissibility of evidence, burden of proof requirements, and the list goes on and on.

Consider, for example:

* the executive who has a glass of red wine with lunch;

* the construction worker who has some beer while watching Monday night football at home and reports to work on Tuesday with a low level of alcohol;

* the bus driver using cocaine; and

* the secretary who trips following a "nightcap" with her boss and co-workers to celebrate a tough but successful day at work.

---

[1] Many states simply reduce the amount of compensation received by an injured worker, and this is true in Missouri, North Carolina, and other states.

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Should each of these individuals be treated identically under the law? Do they possess any privacy rights? Does it matter how the accident occurred? Should there be safeguards on the admission of evidence?

As stated, HB 2141 eliminates, for all intents and purposes, the necessity of probable cause to introduce drug testing into evidence. The issue is whether or not this is fair, and represents a balance, considering the ENTIRETY of the intoxication/impairment defense.

The Kansas Legislature last visited this issue in 1993, and modified the intoxication/impairment defense at the urging of the Kansas Chamber of Commerce and Industry. In short, the employer's defense was strengthened, and the employee's rights severely curtailed because: a) for an injury to be deemed not compensable, the impairment merely had to "contribute" to the accident, and b) extremely low impairment levels were written into the law which produced an irrebuttable presumption of impairment.[2]

The evolution of this balancing act was discussed by our Supreme Court in the *Foos* case (copy attached). Specifically, at page 8 of the handout, the Court stated as follows:

> The Kansas Legislature passed its first workers compensation laws in 1911. From the very beginning, the employee's intoxication was a defense to his or her claim of compensation. "[I]f it is proved that the injury to the workman *results...from his intoxication,* any compensation in respect to that injury shall be disallowed." (Emphasis added.) L. 1911, ch. 218, sec. 1.
>
> In 1967, the legislature raised the employer's standard of proof: "[I]f it is proved that the injury to the workman results...*solely* from his intoxication, any compensation in respect to that injury shall be disallowed." (Emphasis added.) L. 1967, ch. 280, sec. 1.
>
> **In 1974, however, the legislature retreated and diluted the employer's standard of proof** when it changed the work "solely" to "substantially": [I]f it is proved that the injury to the workman results...*substantially* from his intoxication, any compensation in respect to that injury shall be disallowed...." (Emphasis added.) L. 1974, ch. 203, sec. 1.

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[2] For example, alcohol is .04 which is one-half the legal limit for driving an automobile and other levels of presumed impairment are simply the "cutoff standards" where there is sufficient trace of an illegal substance to require further testing. Everyone agrees that, with exception of alcohol, there is no correlation between the level of intoxication and the amount of drugs disclosed by the testing.

In 1993, the legislature further diluted the employer's standard of proof: "The employer shall not be liable under the workers compensation act where the injury, disability or death was *contributed to by the employee's use or consumption of alcohol....*" (Emphasis added.) L. 1993, ch. 286, sec. 24.

The 1993 legislature also established specific requirements for admitting a chemical test into evidence to prove presumptive impairment, including the provision at issue in this case of whether there was probable cause contemporaneous with the test and provisions requiring proof of chain of custody, establishing testing standards, and requiring foundation for the test results. L. 1993, ch. 286, sec. 24. The legislative record reveals that these requirements ***were intended to somewhat balance the reduced burden on the employer.*** **The admission requirements were added pursuant to a proposal by the Kansas Chamber of Commerce and Industry: 'KCCI would suggest further protecting employees by including the procedures employers are responsible to follow to receive an employee misconduct ruling in the Kansas Employment Security Law.'** Minutes of the Senate Committee on Labor, Industry and Small Business, March 19, 1992, (Emphasis added.)

The key sentence for our discussion is that the requirement of probable cause was intended to "balance the reduced burden on the employer." In 1993, the KCCI suggested that this was a necessary protection to employees. Now, having been successful in securing the "reduced burden" for employers, the KCCI seeks to remove these protections which they supported previously before the legislature.

The Kansas AFL-CIO ***did not*** oppose these changes in 1993. The matter was discussed at length in the Advisory Council, and although the Kansas AFL-CIO would not have *proposed* the changes, there was some attempt at being balanced.[3]

It is clear that the Kansas Chamber of Commerce and Industry wants to "change the deal." They no longer, apparently, want to stand by the protections for the injured

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[3] The Kansas AFL-CIO does feel that the Kansas Supreme Court has further watered down or diluted the meaning of probable cause by the *Foos* decision. Certainly, the Kansas ALF-CIO would agree with the dissenting opinion written by Judge Lawton Nuss. However, that is the Supreme Court's interpretation of the law, and accordingly, "probable cause" can now include situations where probable cause is developed, not at the time of injury, but after. To the Kansas AFL-CIO, this is like arresting someone and then discovering the crime.

worker that they previously supported.[4] This "change of heart" is not prompted by some "liberal" Court decision interpreting the law. If anything, the law has been interpreted in further favor of the employers in the state to the detriment of injured workers.

While the Kansas AFL-CIO would support a return to the pre-1993 statute, if the Chamber so desires, the Kansas AFL-CIO cannot support the further diluting of injured worker's rights.

Thank you.

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[4] Kansas AFL-CIO must assume that this is the position of KCCI since opponents are being made to testify without having heard from the proponents. Similarly, this bill has never been discussed or introduced in the Advisory Council where discussion could be had.

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| Keyword | Name » SupCt - CtApp | Docket | Date | 277 Kan 687, 89 P3d 54 (2004)

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 89,239

DENNIS FOOS,

Appellee,

v.

TERMINIX and

ZURICH AMERICA INSURANCE, CO.,

Appellants.

SYLLABUS BY THE COURT

1. In a workers compensation case, whether there has been an accidental injury arising out of and in the course of employment is a question of fact, and its determination will not be disturbed by an appellate court where there is substantial evidence to sustain it.

2. Once the claimant has met his or her burden of proving a right to compensation, the burden of proving an employer's relief from that liability through K.S.A. 44-501(d)(2) is upon the employer.

3. Interpretation of a statute is a question of law. The determination of an administrative body as to questions of law is not conclusive and, while persuasive, is not binding on the courts.

4. The Workers Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete, and exclusive, and we must look to the procedure of the Act for the methods of its administration.

5. There is no normal course of medical treatment exception to the admissibility of a blood alcohol test in K.S.A. 44-501(d)(2).

6. The fundamental rule of statutory construction to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained, and when a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be.

7. Where the face of the statute leaves its construction uncertain, the court may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested.

8. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. Words and phrases that have acquired a peculiar and appropriate meaning in law are to be construed accordingly. Words which are in common usage should be given their natural and ordinary

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meaning.

9. K.S.A. 44-501(d)(2) requires that probable cause arise, exist, or occur contemporaneous with, which is interpreted as meaning during the same period of time as, the collection of the test sample in order for a test of alcohol concentration to be admitted into evidence during a workers compensation hearing.

10. Whether a test sample was collected contemporaneous with the events establishing probable cause is a question of fact, and its determination will not be disturbed on appeal where there is substantial evidence to sustain it.

Review of the judgment of the Court of Appeals in 31 Kan. App. 2d 522, 67 P.3d 173 (2003). Appeal from the Workers Compensation Board. Judgment of the Court of Appeals affirming in part and reversing in part the Board is affirmed. Judgment of the Board is affirmed in part and reversed in part. Opinion filed May 14, 2004.

Rex W. Henoch, of Dorothy & Henoch, L.L.C., of Lenexa, argued the cause and was on the briefs for appellant.

Roger D. Fincher, of Bryan, Lykins, Hejtmanek & Fincher, P.A., of Topeka, argued the cause, and *Rachel Mackey,* of Law Office of Rachel Mackey, of Topeka, was with him on the briefs for appellee.

The opinion of the court was delivered by

LUCKERT, J.: This is a workers compensation case, applying K.S.A. 1999 Supp. 44-501. The Court of Appeals affirmed the Workers Compensation Board's (Board) determination that Dennis Foos sustained personal injury by accident arising out of and in the course of his employment. However, the Court of Appeals reversed the Board's award of benefits for Dennis Foos, applying the "intoxication exception" to providing benefits under the Workers Compensation Act, 44-501(d)(2). The Court of Appeals found that the Board erred in determining that the results of a blood test were inadmissible to prove Foos was impaired by alcohol. The Board had determined that the blood test lacked probable cause and its results were inadmissible pursuant to 44-501(d)(2). We granted Foos' petition for review under K.S.A. 20-3018 (b).

Under Supreme Court Rule 8.03 (2003 Kan. Ct. R. Annot. 58), we choose to review both holdings of the Court of Appeals and consider whether: (1) Foos was acting within the course and scope of his employment at the time he incurred his injuries; and (2) Foos' blood test results were admissible to prove his alcohol impairment, which in turn contributed to his injuries.

We affirm the Court of Appeals, although as to the second holding we do so on different grounds, and reverse the Board's award of benefits to Foos.

Facts

Dennis Foos worked as a pest control technician for Terminix. His employer assigned him a vehicle to use on his route, which contained approximately 200 accounts. On Friday, May 2, 1997, Foos drove from his home in Solomon to the Terminix office in Topeka for a mandatory weekly meeting that began at 8 a.m. After the meeting, he drove to Manhattan to do work for some of his accounts. He worked at Varney's Bookstore from 10:30 to 10:45 a.m. and at the Children's Bookstore from 10:45 to 11:05 a.m.

Around 11 a.m., Foos entered a "hole-in-one" contest at the Wildcat Creek Sports Complex. He

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remembers leaving from there around noon to eat lunch at McDonald's but has no memories from that time until sometime on Sunday, May 4. Although he had planned to work at some fraternities in Manhattan the afternoon of May 2, those jobs were not performed.

Sometime between 7 and 7:30 p.m. on May 2, Foos' truck left the roadway and struck two guardrails while he was driving westbound on Interstate 70 between Junction City and Abilene. His Solomon residence is west of Abilene on the interstate. He was thrown from the truck and suffered injuries, including head trauma sufficient to cause permanent severing of his olfactory nerves. He was taken by ambulance to Geary Community Hospital in Junction City where he was stabilized and given morphine. He was then transferred by helicopter to the University of Kansas Medical Center in Kansas City (KUMC).

Foos arrived at KUMC at 11:04 p.m. KUMC medical personnel drew and tested his blood at 11:10 p.m. as part of their regular medical procedures. The tests revealed Foos' blood contained opiates and an alcohol concentration of .134.

KUMC personnel reported him to be oriented as to person, place, and time. After consenting to surgery at 12:50 a.m., as part of his preoperative history he reported to medical personnel at 1:10 a.m. that he had "cocaine 1 week ago/9 beers & shots tonight."

The Board made the following findings of fact concerning the blood test and its results:

"At that point [of the blood test] there had been no evidence or indication that claimant had used alcohol before the accident. There was no mention of alcohol or the odor of alcohol in any of the records or the odor of alcohol in any of the records or reports by law enforcement, emergency medical, nor hospital personnel. The first indication of alcohol use came at approximately 1:10 a.m. on May 3, 1997, from claimant himself upon questioning by a nurse and an anesthesiologist for the pre-operative history and physical assessment. Neither the nurse nor the anesthesiologist that questioned claimant testified, but the KUMC Pre-Operative History and Physical Assessment form indicates that claimant reported 'cocaine 1 week ago/9 beers & shots tonight.'"

The administrative law judge (ALJ) held that the test results were admissible under 44-501(d)(2) and denied Foos benefits because his alcohol use contributed to his injuries. He did not reach the parties' other arguments. The Board reversed the ALJ and awarded Foos benefits after rejecting Terminix's three main arguments. The Board first found that despite Foos' deviation from work, he had resumed that work because he was on the highway leading home at the time of the accident. It next excluded the blood test results because Terminix failed to meet the admissibility conditions of K.S.A. 1999 Supp. 44-501(d)(2). Finally, it found that without the blood test evidence, Terminix failed to prove drug or alcohol impairment which contributed to Foos' injuries.

The Court of Appeals determined the threshold issue in Foos' favor, *i.e.*, substantial competent evidence supported the Board's finding that Foos had returned from his deviation from his employment at the time of the accident. It allowed the test results, however, under a "normal course of medical treatment" theory, leading it to conclude Terminix had established that Foos was impaired by alcohol at the time of his accident, that his impairment contributed to his injuries, and that he was not entitled to benefits. It therefore did not reach the third issue, *i.e.*, whether Terminix proved alcohol impairment and its contribution to the injuries through nontest evidence.

Was Foos Acting Within the Course and Scope of His Employment

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At the Time He Incurred His Injuries?

Before the Court of Appeals, Terminix argued as a threshold matter that the Board erred in finding Foos sustained personal injury by accident arising out of the course and scope of his employment under 44-501(a). It specifically argued that Foos had deviated from his employment after leaving the Children's Bookstore account and had not returned to his employment at the time of the accident. If Terminix is correct, the other two issues are moot. We agree, however, with the Court of Appeals' rejection of this argument.

As the court stated:

"The Act for Judicial Review and Civil Enforcement of Agency Actions, K.S.A. 77-601 *et seq.,* provides the grounds upon which relief may be granted in appeals of workers compensation awards entered on or after October 1, 1993. See K.S.A. 2001 Supp. 44-556(a).

'The court shall grant relief only if it determines any one or more of the following:

. . . .

'(4) the agency has erroneously interpreted or applied the law;

. . . .

'(7) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by evidence that is substantial when viewed in light of the record as a whole . . . .' K.S.A. 77-621(c)." 31 Kan. App. 2d at 524-25.

The court correctly observed that whether there has been an accidental injury arising out of and in the course of employment is a question of fact, and its determination will not be disturbed by an appellate court where there is substantial evidence to sustain it, citing *Harris v. Bethany Medical Center,* 21 Kan. App. 2d 804, Syl. ¶ 1, 909 P.2d 657 (1995). It also correctly observed that although there was no direct evidence as to Foos' destination at the time of the accident, it was the duty of the ALJ and Board to determine "whether Foos had returned to his employment once he was on a direct route home." 31 Kan. App. 2d at 528.

The court correctly held that substantial competent evidence existed to support the finding that, even if Foos had deviated from his employment for a substantial period of time, he had returned to his employment once he was on the direct route back to his home in Solomon because at the time of his injury Foos was "engaging in an activity contemplated by Terminix while traveling on a public interstate highway." 31 Kan. App. 2d at 528; see also *Kindel v. Ferco Rental, Inc.,* 258 Kan. 272, 899 P.2d 1058 (1995) (substantial evidence supported the Board's conclusion that claimant's death occurred in the course of his employment, despite the fact that he spent 4 hours at a strip club, when his death occurred after resuming the route home).

Were Foos' Blood Test Results Admissible to Prove His Impairment Due

to Alcohol Which in Turn Contributed to His Injuries?

Terminix argues the Court of Appeals correctly held that Foos' blood test results were admissible to prove his use or consumption of alcohol impaired him and contributed to his injuries, as provided in 44-

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501(d)(2). Foos responds that Terminix failed to meet the statute's conditions to allow admission of the test results into evidence.

Our analysis requires us to interpret the statute. As we stated in *In re Tax Appeal of Harbour Brothers Constr. Co.*, 256 Kan. 216, 221, 883 P.2d 1194 (1994):

"Interpretation of a statute is a question of law. *Todd v. Kelly*, 251 Kan. 512, 515, 837 P.2d 381 (1992). Special rules apply, however, when considering whether an administrative agency 'erroneously interpreted or applied the law':

'The interpretation of a statute by an administrative agency charged with the responsibility of enforcing that statute is entitled to judicial deference. This deference is sometimes called the doctrine of operative construction. . . . [I]f there is a rational basis for the agency's interpretation, it should be upheld on judicial review. . . . [However,] [t]he determination of an administrative body as to questions of law is not conclusive and, while persuasive, is not binding on the courts.' *State Dept. of SRS v. Public Employee Relations Board,* 249 Kan. 163, 166, 815 P.2d 66 (1991)."

See K.S.A. 77-621(c)(4).

Moreover, the party asserting the Board's action is invalid bears the burden of proving the invalidity. K.S.A. 77-621(a)(1). As a result, Terminix, as the appellant, retains the burden in this court of proving the Board erred. See *Blue Cross & Blue Shield of Kansas, Inc. v. Praeger,* 276 Kan. 232, 245, 75 P.3d 226 (2003).

We begin our analysis by reviewing some of the general tenets of workers compensation law as contained in K.S.A. 1999 Supp. 44-501. If personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the Workers Compensation Act. K.S.A. 1999 Supp. 44-501(a). The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. K.S.A. 1999 Supp. 44-501(a).

K.S.A. 1999 Supp. 44-501(d)(2), however, provides the employer relief from liability for compensation under the Act "where the injury, disability, or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals, or any other compounds or substances." This has become known as the "impairment defense" or "impairment exception." Once the claimant has met his or her burden of proving a right to compensation, the employer has the burden of proving relief from that liability through subsection (d)(2). *Cf., Evans v. Frakes Trucking,* 31 Kan. App. 2d 211, 216, 64 P.3d 440 (2002).

K.S.A. 1999 Supp. 44-501(d)(2), which provides the basis for the primary dispute in this case, states in relevant part:

"The employer shall not be liable under the workers compensation act where the injury, disability or death was *contributed* to by the employee's use or consumption of alcohol . . . . *It shall be conclusively presumed that the employee was impaired due to alcohol if it is shown that at the time of the injury that the employee had an alcohol concentration of .04 or more.* . . . The results of a chemical test shall not be admissible evidence to prove impairment unless the following conditions were met:

1. There was *probable cause to believe* that the employee used, had possession of, or was impaired by the drug or alcohol while working;

2. the test sample was collected at a time *contemporaneous* with the *events establishing probable cause*;
3. the collecting and labeling of the test sample was performed by a licensed health care professional;
4. the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
5. the test was confirmed by gas chromatography, gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample; and
6. the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee." (Emphasis added.)

When the Board interpreted the subsection, it held that the probable cause requirement in (d)(2)(A) "makes sense only if [the probable cause] is present before the testing" because "there are privacy issues at stake." It also observed that there are no exceptions in the statute to the probable cause requirement. Consequently, the Board held, since the events establishing probable cause (Foos' statements at 1:10 a.m.) occurred after the blood test (at 11:10 p.m.), the statutory requirement was not met and the results were inadmissible.

The Court of Appeals determined: "The Board's decision to exclude that [test results] evidence is contrary to the established law where blood testing is done by the hospital for the purposes of obtaining relevant medical diagnoses and treatment information." 31 Kan. App. 2d at 529. While the statute does not contain such an exception, the court found a criminal case, *State v. Hickey*, 12 Kan. App. 2d 781, 757 P.2d 735, *rev. denied* 243 Kan. 781 (1988), to be closely analogous, and determined that blood tests taken in the normal course of medical treatment are excepted from the requirements of 44-501(d)(2). We disagree.

Hickey was a criminal case involving a Fourth Amendment issue of whether hospital personnel were agents of the State when drawing a blood sample. In contrast, this case does not involve constitutional issues and requires application of the workers compensation statutes, which are a legislative creation. *Injured Workers of Kansas v. Franklin,* 262 Kan. 840, 855, 942 P.2d 591 (1997) (Workers Compensation Act is the legislature's creation of an adequate substitute remedy for the legislatively abolished common-law right of employees to sue employers for injuries). Accordingly, "[o]ur decisions are replete that Workmen's Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete, and exclusive, and we must look to the procedure of the act for the methods of its administration." *Jones v. Continental Can Co.,* 260 Kan. 547, 557, 920 P.2d 939 (1996) (citing *Bushman Construction Co. v. Schumacher,* 187 Kan. 359, 362, 356 P.2d 869 [1960]).

Since the Workers Compensation Act contains no "normal course of medical treatment" exception to the admissibility of a blood alcohol test in 44-501(d)(2), any such exception to the legislature's scheme must come from the legislature, not the court.

Thus, we review the Board's interpretation of 44-501(d)(2)(B). The Board and courts reviewing the Board's interpretation are required to apply the rules of statutory construction. As we said in another workers compensation case:

"The fundamental rule [of statutory construction] to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained, and when a statute is plain and

unambiguous, the court must give effect to the intention of the legislature as expressed rather than determine what the law should or should not be. *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998). Where the face of the statute leaves its construction uncertain, the court may look to the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute may have under the various constructions suggested." *Robinett v. The Haskell Co.,* 270 Kan. 95, 100-01, 12 P.3d 411 (2000).

The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001) (citing *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 [1998]). Words and phrases that have acquired a peculiar and appropriate meaning in law are to be construed accordingly. *Galindo v. City of Coffeyville*, 256 Kan. 455, 465, 885 P.2d 1246 (1994). Words which are in common usage should be given their natural and ordinary meaning. *Cummings v. City of Lakin,* 276 Kan. 858, 862, 80 P.3d 356 (2004).

"Probable cause" is a phrase which has acquired peculiar and appropriate meaning in the law. We have previously explained that "probable cause" refers to a quantum of evidence which would lead one to believe that something (for example, that a crime had been committed) is more than a possibility. *City of Dodge City v. Norton*, 262 Kan. 199, 203-04, 936 P.2d 1356 (1997) (quoting *State v. Clark*, 218 Kan. 726, 731, 544 P.2d 1372, *cert. denied* 426 U.S. 939 [1976]). Thus, paraphrasing 44-501(d)(2)(A) and (B), before test results can be submitted in a workers compensation hearing, there must be sufficient evidence to lead one to believe that it was more than a possibility that the employee used, had possession of, or was impaired by drugs or alcohol while working, and the test sample must have been collected at a time contemporaneous with the events establishing this belief.

"Contemporaneous" is a word of common usage. It is defined as: "Arising, existing, or occurring during the *same period of time*." (Emphasis added.) Webster's II New College Dictionary 243 (1999). The ALJ in this case applied this definition, finding: "The claimant's admission to a drinking binge establish[ed] probable cause the claimant was impaired. The blood samples were collected within *the same period of time* as claimant's admission, which the court finds satisfies the requirement of contemporaneous collection." (Emphasis added.)

In contrast, the Board's interpretation substitutes the words "subsequent to" for the words "contemporaneous with." Such a construction is contrary to the tenets of statutory construction requiring us to presume the legislature expressed its intent through the language it utilized and requiring us to apply the accepted and common meaning of words.

Additionally, the Board's interpretation shifts the focus of the statute to one of when tests may be performed as opposed to the legislature's focus, which was upon when test results will be admissible in hearings. As held by the Court of Appeals panel in *Evans,* the effect of 44-501 is to prohibit admission of results when no probable cause exists independent of the test results. 31 Kan. App. 2d at 215-16. There, the court upheld the Board's exclusion of the blood test results because they were pursuant to a blood test that was not prompted by probable cause or even a reasonable suspicion, but instead "by nothing more than [the employee's] status as a commercial driver" who was involved in a fatal accident. 31 Kan. App. 2d at 216. While Terminix argues *Evans* is distinguishable and irrelevant because there had been no probable cause found, we find it of guidance to the extent it rejected a commercial driver's "routine blood test" exception to the requirements of 44-501(d)(2). However, we agree with Terminix that *Evans* is distinguishable because in this case there was probable cause independent of the blood test.

Although the decision in *Evans* does not cite the Federal Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306 (2000), that provision mandates testing when a commercial driver, such as Evans, is involved in a fatal accident. Other federal legislation, while not mandating testing, requires

federal contractors to assure that the workplace is drug free. See Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 *et seq.* (2000). This legislation and other drug-free workplace initiatives result in random testing in the workplace.

The legislative history of 44-501, in addition to reflecting a trend of lessening the burden upon the employer to establish the impairment exception, reveals that the legislature was aware of the reality of random and mandatory testing in the workplace.

The Kansas Legislature passed its first workers compensation laws in 1911. From the very beginning, the employee's intoxication was a defense to his or her claim of compensation. "[I]f it is proved that the injury to the workman *results . . . from his intoxication*, any compensation in respect to that injury shall be disallowed." (Emphasis added.) L. 1911, ch. 218, sec. 1.

In 1967, the legislature raised the employer's standard of proof: "[I]f it is proved that the injury to the workman results . . . *solely* from his intoxication, any compensation in respect to that injury shall be disallowed." (Emphasis added.) L. 1967, ch. 280, sec. 1.

In 1974, however, the legislature retreated and diluted the employer's standard of proof when it changed the word "solely" to "substantially": "[I]f it is proved that the injury to the workman results . . . *substantially* from his intoxication, any compensation in respect to that injury shall be disallowed . . . ." (Emphasis added.) L. 1974, ch. 203, sec. 1.

In 1993, the legislature further diluted the employer's standard of proof: "The employer shall not be liable under the workers compensation act where the injury, disability or death was *contributed to by the employee's use or consumption of alcohol* . . . ." (Emphasis added.) L. 1993, ch. 286, sec. 24.

The 1993 legislature also established specific requirements for admitting a chemical test into evidence to prove presumptive impairment, including the provision at issue in this case of whether there was probable cause contemporaneous with the test and provisions requiring proof of chain of custody, establishing testing standards, and requiring foundation for the test results. L. 1993, ch. 286, sec. 24. The legislative record reveals that these requirements were intended to somewhat balance the reduced burden on the employer. The admission requirements were added pursuant to a proposal by the Kansas Chamber of Commerce and Industry: "KCCI would suggest further protecting employees by including the procedures employers are responsible to follow to receive an employee misconduct ruling in the Kansas Employment Security Law." Minutes of the Senate Committee on Labor, Industry and Small Business, March 19, 1992, Attachment 5.

It is clear that the legislature, in 1993, followed KCCI's suggestion and borrowed the language from a statute concerning chemical testing for unemployment compensation purposes, K.S.A. 1992 Supp. 44-706(b)(2), and placed those requirements into K.S.A. 44-501(d)(2) for workers compensation purposes. These unemployment compensation procedures had not been a part of 44-706 until 1991, when the legislature acted in response to this court's decision in *National Gypsum Co. v. State Employment Security Bd. of Review*, 244 Kan. 678, 772 P.2d 786 (1989). See Minutes of the House Committee on Labor and Industry, March 1, 1990, Attachment 1. There, this court had held that an employee who tested positive for marijuana during an employer's drug test did not fit within the statute disqualifying employees for unemployment compensation benefits because the employer did not meet its burden to prove that the misconduct was "connected with the employee's work" under K.S.A. 1988 Supp. 44-706 (b). In other words, the employer failed to prove that the off-the-job misconduct of marijuana use had an actual on-the-job impact. 244 Kan. at 687. The legislature reacted by creating a presumption that an employee had engaged in misconduct if impaired from alcohol or nonprescription drugs while working.

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The legislative history reveals that the intent was to allow employers to meet the requirements of the Drug-Free Workplace Act and implement drug-free workplace programs without having to pay employees benefits after they were fired for drug use revealed through drug testing. Minutes of the House Committee on Labor and Industry, March 1, 1990, Attachment 2.

Thus, the legislature, when placing these same provisions into the Workers Compensation Act, was aware that workplace drug testing would occur with or without probable cause. Because testing might be mandated, either by the government or an employer's policy, testing might occur contemporaneously with the investigation of the events causing the worker's injury. Also, as in this case, the injury might require medical treatment and, as a result, testing might occur contemporaneously with investigation.

The legislature, in 44-501(d)(2), established the level for conclusive presumption of workplace impairment at .04. L. 1993 ch. 286, sec. 24. This is the same level at which a presumption arises in proceedings to revoke a commercial driver's license (K.S.A. 8-1001[j]), but is less than the .08 threshold at which a presumption of impairment arises in criminal prosecutions for driving under the influence (K.S.A. 8-1005) or in administrative proceedings for revocation of a noncommercial driver's license (K.S.A. 8-1001[h]). At a lower level of impairment, the indicia of impairment may be different or more subtle than those typically examined in a criminal prosecution for driving under the influence. As such, an employer may not have a quantum of evidence sufficient to meet the probable cause standard before the test is performed, yet may under some circumstances be legally required to have the employee tested or, although not mandated, may test under internal policies as part of a drug-free workplace initiative. Also, especially given the low threshold, an employer may decide to test immediately rather than to have the blood alcohol level dissipate because of a delay while an investigation is undertaken. As such, testing may occur before or simultaneous with the investigation of the accident and that investigation may generate a sufficient quantum of evidence to make it more than a possibility that the employee used, possessed, or was under the influence of alcohol or drugs while working. In other words, the investigation or other events may establish a basis for probable cause independent of, but contemporaneous with, the taking of the test sample.

Having considered the meaning of the words used by the legislature, the historical background of the enactment, the circumstances attending its passage, the purpose to be accomplished, and the effect the statute would have under different constructions, we conclude that 44-501(d)(2) requires that probable cause arise, exist, or occur contemporaneous with, which we interpret as meaning during the same period of time as, the collection of the test sample in order for a test of alcohol concentration to be admitted into evidence during a workers compensation hearing.

Whether a test sample was collected contemporaneous with the events establishing probable cause is a question of fact, and its determination will not be disturbed on appeal where there is substantial evidence to sustain it. In this case, the ALJ made the finding of fact that the sample was collected during the same time period as the events establishing probable cause and, under the circumstances of this case where these events were part of an emergency room treatment for the injury, the finding is sustained by substantial evidence.

For these reasons, we hold that Foos suffered injury during the course and scope of his employment; that Foos' blood test results were admissible; that Terminix, by application of the presumption, established that Foos was impaired due to alcohol; and that substantial evidence supports the ALJ's conclusion that Foos' consumption of alcohol contributed to the injury.

The Court of Appeals is affirmed, and the Board is affirmed in part and reversed in part.

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BEIER, J., not participating.

LARSON, S.J., assigned.[1]

[1]**REPORTER'S NOTE:** Judge Edward Larson was appointed to hear case No. 89,239 vice Justice Beier pursuant to the authority vested in the Supreme Court by K.S.A. 20-2616.

NUSS, J.: dissenting. I respectfully dissent from the majority opinion for several reasons.

First, the legislative history cited by the majority reveals that while in 1993 the legislature further diluted the employer's standard of proof, it also introduced some specific standards and conditions concerning how employers could prove alcohol's "contribution" to an employee's injury. It amended the statute to provide a level for conclusive presumption of impairment (.04%) and six specific requirements for admitting a chemical test into evidence to prove that presumptive impairment. L. 1993, ch. 286, see 24. The admission requirements were added pursuant to a proposal by the Kansas Chamber of Commerce and Industry, "KCCI would suggest *further protecting employees* by including the procedures employers are responsible to follow to receive an employee misconduct ruling by the Kansas Employment Security Law." (Emphasis added.) See Minutes of the Senate Committee on Labor, Industry and Small Business, March 19, 1992, Attachment 5.

As the majority correctly points out, the 1991 legislature had reacted to *National Gypsum Co. v. State Employment Security Bd. of Review,* 244 Kan. 678, 772 P.2d 786 (1989), by amending the unemployment compensation laws to improve the employer's ability to prove misconduct connected with the work and thus disqualify a claimant from benefits. However, it also included six narrow and exclusive requirements for admitting into evidence the chemical test, *e.g.,* probable cause, which I regard as safeguards to the employee. I therefore agree with the Kansas Chamber of Commerce and Industry that in borrowing the specific requirements for chemical test admissibility (for purposes of denying benefits) from the Unemployment Compensation Act and placing them in the Workers Compensation Act (for purposes of denying benefits), the employees would be further protected. I conclude that the legislature intended this additional protection for workers compensation claimants. For example, though workers compensation is a civil proceeding, K.S.A. 1999 Supp. 44-501(d)(2)(F) requires the higher criminal law standard of "beyond a reasonable doubt" for the foundation evidence to establish that the test results were from the sample taken from the employee. Consequently, even the majority concedes "the legislative record reveals that these requirements were intended to somewhat balance the reduced burden on the employer."

I do not find, however, a legislative intent to couple the continual express dilution of the employer's standard of proof from "injury results solely from intoxication" to mere "alcohol use or consumption contributed to injury" with another, implied dilution of the six specific, exclusive requirements for admitting test results into evidence against the employee. Yet, the majority does so when it allows probable cause to follow the testing.

Second, if probable cause is not a prerequisite for the testing, then the probable cause requirement is meaningless. In my view, the majority essentially eliminates it altogether; virtually all an employer will now be required to demonstrate is that at a certain time a chemical test was given which yielded a certain result. This result can then be extrapolated backward to show "that at the time of the injury that the employee had an alcohol concentration of .04 or more." K.S.A. 1999 Supp. 44-501(d)(2).

Yet in *Evans v. Frakes Trucking,* 31 Kan. App. 2d 211, 64 P.3d 440 (2002), as the majority points out, the Court of Appeals upheld the Board's exclusion of the blood test results because they were pursuant

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to a blood test that was not prompted by probable cause or even a reasonable suspicion but instead "by nothing more than [the employee's] status as a commercial driver" who was involved in a fatal accident. 31 Kan. App. 2d at 215-16. Similarly, Foos' blood test results should be excluded because they were also pursuant to a blood test that was not prompted by probable cause or even a reasonable suspicion, but instead by nothing more than his status as a driver who was involved in a near-fatal accident and then underwent a hospital's regular medical procedures. I agree with the *Evans* court's statement: "The statute does not permit mere serendipity to govern admission of a test result." 31 Kan. App. 2d at 215-16.

Stated another way, the majority dilutes the statutory language requiring "probable cause" and essentially converts it into "random." In the world of employee drug and alcohol testing which the majority concedes was at issue in *National Gypsum Co.* and which in turn eventually led to the creation of the present statute these phrases, along with "reasonable suspicion," have become terms of art. Random testing certainly possesses a profoundly different meaning from the other two. See *Eaton v. Iowa Employment Appeal Bd.* 602 N.W.2d 553 (Iowa 1999); *Twigg v. Hercules Corp.*, 185 W. Va. 155, 406 S.E.2d 52 (1990).

Reasonable suspicion is considered to be a lesser standard than probable cause. *State v. Pritchett,* 270 Kan. 125, Syl. ¶ 3, 11 P.3d 1125 (2000); *Twigg,* 185 W. Va. at 159. In practice, however, both these phrases mean just what their terms suggest; testing *after*, for example, a supervisor's observation of an employee exhibiting drug and alcohol symptoms. See, *e.g., Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602, 609, 103 L. Ed. 2d 639, 109 S. Ct. 1402 (1989) (testing after reasonable suspicion based upon employee's disorientation, bloodshot and watery eyes, or the detection of alcohol on an employee's breath); *Johnson v. Massachusetts Bay Transportation Authority,* 418 Mass. 783, 785, 641 N.E.2d 1308 (1994) (probable cause to test employee for drugs where at time test was requested employee's eyes had a heavy look and he appeared to be under influence of something).

Similarly, employers also use "post-accident testing," which is just as its name suggests: testing *after* an accident to determine if alcohol or illegal drugs contributed to it. See, *e.g., Skinner,* 489 U.S. at 609 (testing regulation titled "Post-Accident Toxicological Testing" which authorized testing following certain accidents).

Random testing is much different. It is a form of "suspicionless" testing. See *Vernonia School Dist. 47J v. Acton,* 515 U.S. 646, 132 L. Ed. 2d 564, 115 S. Ct. 2386 (1995) (testing of student athletes whose names are blindly drawn from a hat). See *Eaton,* 602 N.W.2d 553; *Twigg,* 185 W.Va. 155.

Accordingly, when the Board held that the probable cause requirement in K.S.A. 1999 Supp. 44-501(d)(2)(A) "makes sense only if [the probable cause] is present before the testing," its interpretation was entirely consistent with what "probable cause" has come to mean in the world of employee drug and alcohol testing. This interpretation is supported by the majority's acknowledgment that when the legislature placed the requirements in the statute it "was aware that workplace drug testing would occur with or without probable cause," and by the statutory language actually used, "probable cause," which strongly suggests the legislature deliberately rejected the results of suspicionless testing, *i.e.*, without probable cause.

Moreover, the Board's interpretation, to which the majority purports to give deference under the doctrine of operative construction, avoids the problems described above. This interpretation is also consistent with the legislative intent, particularly as expressed by the sequence of the requirements in K.S.A. 1999 Supp. 44-501(d)(2). In my view, the sequence is not coincidental, but the logical progression of the events as intended by the legislature from initial discovery of the employee's possibly impaired state through the test results' admission into evidence.

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(A) *probable cause to believe* employee was impaired by drug or alcohol;

(B) *sample collected*;

(C) *sample collecting and labeling performed* by licensed health care professional;

(D) *test performed* by an approved laboratory;

(E) *test results confirmed, i.e.*, a subsequent action, by independent test;

(F) *test results established by foundation evidence* as coming from employee's sample.

As the majority points out regarding the Court of Appeals holding, since the Workers Compensation Act contains no "normal course of medical treatment" exception to the admissibility of a blood alcohol test in K.S.A. 1999 Supp. 44-501(d)(2), any such exception to the legislature's scheme must come from the legislature, not the court. Likewise, eliminating, or at least diluting, the probable cause requirement from the statute is a job for the legislature, not this court. See *Injured Workers of Kansas v. Franklin,* 262 Kan. 840, 855, 942 P.2d 591 (1997); *Jones v. Continental Can Co.,* 260 Kan. 547, 557, 920 P.2d 939 (1996) (our decisions are replete that the Workers Compensation Act undertook to cover every phase of the right to compensation and of the procedure for obtaining it, which is substantial, complete, and exclusive, and we must look to the procedure of the act for the methods of its administration).

Finally, if the statutory requirements are not met for admitting the results of the chemical test into evidence, an employer is not without recourse. It still has the right to prove impairment and contribution through reliable admissions by the employee, testimony from eyewitnesses, expert medical testimony, and other evidence, just as employers have done since 1911 when the Workers Compensation Act and the intoxication exception/impairment defense first became law. Indeed, Terminix attempted this alternative means of meeting its burden of proof, but failed.

The Board found that Terminix failed to prove, by evidence other than the inadmissible blood test results, that Foos was impaired and that his impairment contributed to his injury. It specifically found that Foos' statements of alcohol and cocaine use were insufficient because they were of questionable reliability due to his extreme trauma and the possibility they were given under the influence of pain medications, including morphine at Geary Community Hospital. It also found that the testimony of Terminix's experts opining Foos' alcohol impairment at the time of the accident was partly based on the inadmissible test results and therefore itself inadmissible, suggesting the testimony would have been admissible and persuasive had the questions to the physicians been posed differently. It also found no evidence was introduced to show that any impairment actually contributed to Foos' accident and injury.

For these reasons, I dissent.

ALLEGRUCCI, J., joins in the foregoing dissent.

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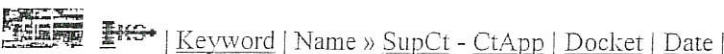
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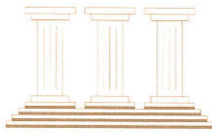

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senator Karin Brownlee and Senator Nick Jordan, Co-Chairs
Members of the Senate Committee on Commerce

From: Greg Wright on behalf of the Kansas Trial Lawyers Association

Date: March 9, 2005

Re: **HB 2141**

Co-Chairs Brownlee and Jordan and members of the Senate Committee on Commerce, I appear before you today on behalf of the Kansas Trial Lawyers Association. KTLA is a statewide, nonprofit organization of lawyers who represent consumers and advocate for the safety of families and the preservation of the civil justice system. We appreciate the opportunity to present written and oral testimony on HB 2141.

Currently, employers are not required to provide workers compensation coverage when the worker's use of drugs or alcohol contributed to the worker's injury, disability, or death. The law provides for the circumstances under which a worker is presumed to have been impaired by alcohol or drugs, and when the results of a chemical test that might show impairment may be used as evidence. Results of a drug test may only be used as evidence of impairment if there is probable cause to believe that the worker used, had possession of, or was impaired by the drug or alcohol while working. The current law provides appropriate rules for admissibility of drug tests and protects both the worker's rights to privacy and compensation under the workers compensation act and the state's interest in promoting drug-free workplaces.

HB 2141 establishes new probable cause standards under which employers may require that workers who are injured on the job submit to drug testing. KTLA members are concerned that the new probable cause standards are a significant erosion of the current probable cause standards and may unfairly jeopardize an injured worker's rights to compensation if injured on the job.

Under HB 2141, an employer may demand that a worker submit to drug testing for purposes of determining workers compensation benefits if the employer has a written policy requiring drug testing at the time of the worker's accident, and if the worker requires medical attention as a result of the accident. If the worker refuses the test under these circumstances, the refusal could be used as evidence to prove the worker's impairment and workers compensation benefits could be denied. The new standard may be met regardless of the circumstances of the accident, i.e. whether or not the worker was injured by his own actions or the actions of a coworker.

Terry Humphrey, Executive Director

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HB 2141 also permits testing of an injured worker if the worker signed a written consent for testing prior to the date of an accident requiring medical attention. If the worker refuses the test after such an accident, the refusal may be used as evidence of impairment and workers compensation benefits could be denied. Workers may not fully realize the impact of signing consent prior to an accident. If a worker feels like he or she must sign consent in order to keep their job, KTLA believes that this is abjectly unfair. And again, the new standard may be met regardless of whether or not the worker was injured by his own actions or the actions of a coworker.

The Senate has the opportunity to fix HB 2141 with amendments that protect the worker but support a drug-free workplace. We respectfully request your support of amendments advanced by Rep. Jeff Jack that strike the word "conclusively" on page 2, line 12, creating a rebuttable presumption of impairment and giving the worker the opportunity to show that he was not impaired, or that his injury was not the result of impairment. We urge that if HB 2141 is advanced, that it include such an amendment.

We urge your opposition to HB 2141 unless it is amended.