Approved: January 24, 2005
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on January 20, 2006 in Room 241-N of the Capitol.

All members were present except:
Mike Kiegerl- excused
Scott Schwab- excused
Ty Masterson- excused

Committee staff present:
Norm Furse, Office of Revisor of Statutes
Renae Jefferies, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:
The Honorable Bruce E. Moore, Administrative Law Judge

Others attending:
See attached list.

The Chairman introduced the Honorable Bruce E. Moore and thanked him for appearing before the committee.

The Honorable Bruce E. Moore, Administrative Law Judge, addressed the committee on background information regarding the decision making processes in Workers Compensation proceedings, and discussed the issues of pre-existing impairment or disability, with specific reference to the ***Hanson*** decision.

Workers compensation legislation, both substantive and procedural, differs greatly from state to state. The decision-making process in Kansas has changed significantly since the first Workmen's Compensation Act.

Perhaps one of the most sweeping changes of the 1993 amendments to the Act was the abolition of the workers Compensation Second Injury Fund (See Attachment 1).

The meeting adjourned at 9:50 a.m. and the next meeting will be January 23, 2006.

COMMERCE AND LABOR COMMITTEE

DATE January 20, 2006

NAME	REPRESENTING
Wil Leiker	KS AFL-CIO
John [illegible]	KS AFL-CIO
Derek Hein	Hein Law Firm
BRIAN MALONE	KTLA
Callie [illegible] Denton	KTLA
RICHARD THOMAS	KDOL WS
JESS CASTILLO	KDOL WC

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

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January 20, 2006

Chairman Dahl and Members of the Committee:

Thank you for inviting me to appear today and address you regarding workers compensation issues. As you may recall, I am an administrative law judge, one of ten in the State of Kansas, charged with the responsibility of applying workers compensation law to decide pending claims. I am here, as I understand it, to provide you with some background information regarding the decision making processes in Workers Compensation proceedings, and to discuss the issues of pre-existing impairment or disability, with specific reference to the ***Hanson*** decision [**Hanson v. Logan U.S.D. 326, 28 Kan.App.2d 92, 11 P.3d 1184(Kan.App. 2000)**].

Workers Compensation Decision-Making, A Historical Perspective

Workers compensation legislation, both substantive and procedural, differs greatly from state to state. No two states are identical, although similarities often exist, and one state may look to another to see how unique issues have been addressed.

[The following history is drawn, in part, from a discussion of the historical development of Kansas workers compensation legislation found in the Kansas Bar Association's Workers Compensation Practice Manual, Second Edition, 1984.]

The decision-making process in Kansas has changed significantly since the first Workmen's Compensation Act. Originally, the Act envisioned a system of arbitration, through the appointment of outside arbitrators, to decide disputed claims. The arbitration statutes remained on the books until the 1974 revisions, although the practice of using arbitrators had significantly abated over the years leading up to the revisions. The Director of the Division of Workmen's compensation was originally known as the "commissioner," and it was the commissioner who decided disputed claims when those claims were not arbitrated. The commissioner was renamed the "Director" in 1961. I have been unable to determine exactly when, but sometime prior to 1961, workmen's compensation "examiners" were appointed to assist the commissioner in deciding claims. In 1980, the term "examiner" was changed to "administrative law judge (ALJ)."

The commissioner or director of Workmen's Compensation was empowered to review the decision of the examiner and, later, the ALJ, and affirm, modify or reverse an award of

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compensation previously entered. The commissioner or director was limited to the record compiled before the examiner or ALJ, but was not bound by any findings of fact or conclusions of law reached by the lower tribunal. If a party was dissatisfied with the results of an appeal to the commissioner or director (on "director's review"), an appeal would then lie to the District Court in the county in which the claim arose. In 1987, the legislature revised this procedure to require the filing of a petition for judicial review, rather than a direct appeal to the District Court. Under the revised procedure, the District Court still conducted a ***de novo*** review of the record compiled before the ALJ, making its own findings of fact and conclusions of law, either affirming, modifying or reversing the award of the lower tribunals.

In 1993, there were significant revisions to the Workers Compensation Act, both substantively and procedurally. In lieu of appealing decisions of the administrative law judges to the director, a new appellate body was created, the Workers Compensation Appeals Board (WCAB), to hear those appeals. The WCAB stood essentially in the shoes of the director and the District Court under the prior system, conducting a "trial ***de novo***" on the record compiled before the ALJ. The WCAB is limited to the record compiled before the ALJ (the transcripts of depositions and court hearings, and documents or other exhibits admitted in those proceedings) but can make its own findings of fact and conclusions of law. If either party is dissatisfied with the review by the WCAB, an appeal may now be made directly to the Court of Appeals. The District Court has thus been excluded from the workers compensation decision-making process since 1993, other than to enforce judgments for compensation previously awarded but not paid.

The WCAB has limited jurisdiction to hear appeals from preliminary hearings, primarily limited to jurisdictional issues or issues dispositive of the claim, e.g., whether there was an accident that arose out of and in the course of employment, whether timely notice was given or written claim was made, or whether the claim is barred by an affirmative defense. The WCAB does not have jurisdiction to review the granting of medical treatment or temporary total disability benefits, or the amount of those benefits, unless tied to one of those jurisdictional issues or affirmative defenses.
The WCAB has unlimited jurisdiction to review cases appealed after an award has been entered. If either party has appealed a final award of an ALJ, virtually any issue may be reconsidered by the WCAB and decided differently from the decision of the lower tribunal.

Pre-existing Impairment and the *Hanson* Decision

Perhaps one of the most sweeping changes of the 1993 amendments to the Act was the abolition of the Workers Compensation Second Injury Fund. Prior to 1993, to encourage employers to hire and retain previously-injured and handicapped workers, the Second Injury Fund was created and maintained, to pay all or a portion of compensation payable to an injured worker who had a pre-existing disability or handicap. Under this system, if a worker had a prior back injury, and his current employer hired or retained him with knowledge of that back injury and potential for future injury or disability, and the worker re-injured his back, the Second Injury Fund would pay the medical, temporary total disability

and permanent partial disability benefits due the worker, if the subsequent injury or disability was caused or contributed to by the pre-existing disability or handicap.

The Second Injury Fund was abolished by the 1993 amendments, and instead, **K.S.A. 44-501(c)** was amended to provide that,

> "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."

The stated purpose of the amendment was to charge the current employer with the liability for only the medical costs of treating a new injury, temporary total disability benefits during rehabilitation and recovery, and only the enhanced impairment or disability caused by the new injury. A worker is not to recover the full amount of disability or impairment suffered, if the worker has a pre-existing impairment or disability; the worker is only to recover the additional impairment or disability suffered because of a new injury.

For example, consider a worker who has a prior back injury and has a pre-existing 5% functional impairment. If that worker suffers a new injury, and now has a 10% impairment, the worker may only recover the additional 5% functional impairment suffered by reason of the new accident. Prior to the 1993 amendments, the worker would have been able to recover the 5% impairment for the first accident, and 10% from the second accident, even though previously compensated for the first 5% of impairment. If there was a third injury, and the impairment determined to be 15%, under the 1993 amendments, the worker would receive for the third accident only the 5% additional impairment caused by the third accident . Prior to the 1993 amendments, the worker would have recovered 5% for the first accident, 10% from the second accident, and 15% for the third accident (15% vs. 30% total recovery). Prior to the 1993 amendments, the Workers Compensation Second Injury Fund would have borne all or a significant portion of the benefits payable for the second and third injuries.

In **Hanson v. Logan U.S.D. 326, 28 Kan.App.2d 92, 11 P.3d 1184(Kan.App. 2000)**, represented the first occasion for the Court of Appeals to interpret the language of **K.S.A. 44-501(c)**. Kenneth Hanson was a track coach for U.S.D. 326. In 1989, he had undergone arthroscopic surgery on his right knee, and was found to have bone-on-bone contact. He had experienced a number of prior injuries to, and surgeries involving, his right knee. In 1989, he was advised that he would need a knee replacement at some unspecified time in the future. He had no recorded medical care thereafter until 1995, following an incident at work where he "tweaked" his knee alighting from a bus at a track meet. His orthopaedic surgeon opined that the 1995 injury "might have" accelerated the need for knee replacement surgery. Another physician, retained by the employer and insurance carrier, found no aggravation from the work-related event. As the ALJ before whom the case was pending, I referred Hanson for a neutral examination with Dr. Kenneth Hansson, a noted knee specialist. Dr. Hanson opined that the 1995 incident contributed

"perhaps 1%" to the need for treatment. While I initially denied the request for knee replacement surgery, relying upon the apparent insignificant contribution of the 1995 event, the WCAB reversed and ordered treatment, including knee replacement surgery, at the employer's and insurance carrier's expense.

When the case came on for trial and an award of permanent partial impairment or disability, I was confronted with application of **K.S.A. 44-501(c).** All of the doctors who testified acknowledged that Hanson had a pre-existing condition in his knee, and a likely pre-existing impairment, but there was an absence of testimony as to the precise amount of pre-existing impairment. As the 1989 injury was not work-related, no doctor had assigned an impairment rating at the time. Prior to 1993, the workers compensation act prescribed no formula or standard for assigning impairment. With the 1993 amendments, impairment ratings were to be based upon the AMA ***Guides to the Evaluation of Permanent Impairment***, 3rd Edition, Revised, which had not been in existence in 1989. There was thus a question of how to determine the amount of pre-existing impairment. I made a finding of pre-existing impairment, using the average of opinions offered by the testifying physicians, and deducted that impairment from the ultimate impairment found to exist after knee replacement surgery. On appeal, the WCAB and, later, the Court of Appeals, differed with my analysis.

In its published decision, the Court of Appeals observed that no impairment rating had been given in 1989. It also noted that Hanson had testified that his activities had not been restricted before 1995:

> There is no evidence of the amount of Hanson's preexisting disability, and there is some evidence that Hanson had no impairment prior to the May 19, 1995, injury. Hanson had not sought treatment for his knee from Dr. Harbin since the 1989 surgery, and Hanson testified his activities were not restricted because of his knee until after the May 1995 injury. There was no amount of impairment for the Board to deduct from the total impairment to ensure that respondent was excused from covering the preexisting portion.

28 Kan.App.2d at 96.

In concluding that there was "no amount of impairment for the Board [WCAB] to deduct," the Court of Appeals overlooked or rejected the consensus of medical opinions that Hanson had a pre-existing degenerative condition in his knee that had already prompted a recommendation for knee replacement surgery, long before the 1995 accident. The difficulty, from the physicians' standpoint, was how to measure a 1989 impairment by a 1993 yardstick. In my view, the Court of Appeals misinterpreted this dilemma for a dispute as to *whether* an impairment pre-existed. The Court of Appeals' decision in ***Hanson*** was immediately hailed as authority for the proposition that unless an impairment rating had previously been *actually* assigned, there could be no deduction for a pre-existing impairment. Under this reasoning, since impairment ratings are not routinely assigned

except in workers compensation claims, someone whose legs had been amputated in a non-work-related accident would have no impairment or disability.

The initial readings of ***Hanson*** were far too broad. Subsequent decisions, both by the WCAB and the Court of Appeals, have clarified that a doctor may assign a pre-existing impairment based on objective facts shown to have existed before a work-related injury. Since the ***Guides*** provide an objective "yardstick' with which to measure the residuals of an injury, that same yardstick can be applied to a previous injury, if medical records from the prior injury or condition exist and contain the objective indicia determinative of a rating.

The ***Hanson*** decision is now cited, not for the proposition that no pre-existing impairment can exist without a prior rating, but rather for the proposition that the employer has the duty to come forward with evidence as to the *specific* amount of impairment alleged to be pre-existing. **Keeting v. Baker Concrete Const., ____ Kan.App.2d ____ ,104 P.3d 1024 (Kan.App. 2005)**. Similarly, the WCAB has held:

> The pre-existing impairment must be established by competent medical evidence. The Act does not require that the pre-existing functional impairment was indicated by a doctor or actually rated by a doctor before the subject matter accident. Nor does the Act require that the workers had been given restrictions for the pre-existing condition. Nonetheless, the Act does require that the pre-existing condition must have actually constituted a functional impairment under the Guides (if included therein). And previous settlement agreements and previous functional impairment ratings are not necessarily determinative.

Robles v. Carpet Express, Docket No. 1,002,378 (WCAB, January, 2004).

In summary, the employer has the obligation to come forward with some evidence as to the amount of impairment alleged to be pre-existing, relying upon objective facts and the AMA ***Guides***. If that evidence is presented and otherwise credible, the amount of the pre-existing impairment so established would be deducted from the amount of impairment or disability found to exist after a work related accident, such that the employer would be responsible for the increase in impairment or disability caused by the work-related accident.

Thank you for the opportunity to address this committee.