Approved: 3-27-06
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 A.M. on March 6, 2006 in Room 241-N of the Capitol.

All members were present.

Committee staff present:
Jerry Ann Donaldson, Kansas Legislative Research Department
Norm Furse, Office of Revisor of Statutes
Renae Jefferies, Office of Revisor of Statutes
June Evans, Committee Secretary

Conferees appearing before the committee:
Ron Laskowski, Fisher, Patterson, Saylor and Smith
John Alstedt, Auth-Florence Corporation
Criss Mayfield, Abbott Workholding
Steve Rothrock, Whiteleys
Kari Clark, Surgical Specialists, Wichita
Gus Meyer, Rau Construction, Overland Park
Larry Karns, Kansas Self Insurers Association
Duane Simpson, Kansas Agribusiness Retailers Association
Jeff Glendening, The Kansas Chamber

Others attending:
See attached list.

The Chairman opened the hearing on **SB 461: Workers compensation; preexisting condition; permanent partial general disability; supplemental functional disability compensation.**

Staff gave a briefing on **SB 461**.

Ronald J. Laskowski, testified as a proponent to **SB 461**. **SB 461** is intended to assure that the original intent of the Workers Compensation Act is recognized by both employers and employees. The bill represents good public policy that would have a positive impact on the business climate in Kansas. The bill provides positive reform of work disability laws in Kansas (Attachment 1).

John Altstadt, Vice President of Operations for Auth-Florence, Manhattan, testified as a proponent to **SB 461**. Auth-Florence moved from the Chicago area in 2003 in the hope of finding a work environment that was more conducive to efficiency, productivity and growth. Individuals injured on the job should be compensated when an injury leads to permanent disability.

Workman's compensation laws were originally created to curb the abuses of companies who would carelessly allow their employees to work in unsafe conditions, and then not take any responsibility for care due to injuries or financial responsibility for the long term consequences of the injuries. Workman's compensation continues to serve a good purpose. Now the table has turned. It is now structured so that pre-existing conditions can continue to cost unsuspecting companies and abusers can take advantage. This bill is one step towards getting back control of the workers compensation system (Attachment 2).

Criss Mayfield, Director of Administration, Abbott Workholding Products, Manhattan, testified in support of **SB 461**. The Workers Compensation Plan was intended to provide a no-fault protection for employee and employer alike. It was to be the exclusive remedy for medical and lost-wage expense from injury or illness directly resulting from job related tasks. The question of pre-existing conditions have been one of the most frustrating elements of the system. Many employers have felt victimized by growing disregard or misinterpretation of the significance of pre-existing condition in a claim. How functional disability and impairment are defined and treated has long needed refinement. This element often results in a long, unresolved situation that is confusing and frustrating for all parties (Attachment 3).

Steve Rothrock, Whiteley's Pallet and Industrial Supply, testified as a proponent to **SB 461**. Workers Compensation and overall insurance costs have become a major expense for the company. Seven years ago the over-all insurance expense was $13,000 per year. In 2004 the insurance expense was over $26,000 a year. There have been two claims to go against our experience mod and drove up the cost of insurance very quickly. These claims affected our workman's compensation insurance premiums in a very negative manner (Attachment 4).

Kari Clark, Administrator, Wichita Surgical Specialists, Wichita, testified as a proponent to **SB 461**. The workers compensation current system is not equally fair to both the employer and employee. The system is stilted, but **SB 461** would help level out the preexisting portion while clearly continuing to protect the employee. Our attorney informed us that under Kansas law if an employee suffers aggravations of preexisting conditions caused by work activities, then those claims are compensable. **SB 461** would not change weekly payments; however, it would affect the amount of functional impairment and/or work disability amount (Attachment 5).

Gus Rau Meyer, President of Rau Construction Company, testified as a proponent to **SB 461**. Rau Construction is a family owned firm since 1870. Our Workers Compensation Premiums would be in the top 11% of vendors with $107,891 in premiums in 2005; with premiums that average slightly over $1/man hour worked. We work hard to control all costs including Workers Compensation Premiums. Accidents do happen and we never deny an employee treatment. It is believed this bill would stop one of the major abuses (Attachment 6)

Larry G. Karns, Attorney, Kansas Self-Insurers Association, testified in support of **SB 461**. A major change in the Kansas Workers Compensation law was intended by the 1993 overhaul of the Kansas Works Compensation Act. The 1993 amendments to K.S.A. 501c stipulate 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 1993 changes also eliminated the Kansas Workers Compensation Fund. Physicians often testify that a claimant's preexisting arthritis or degenerative condition was the cause of the resulting impairment. If that preexisting condition is not rateable under the AMA Guides 4th Edition, the employer pays the entire cost of the claim.

The payment of medical expenses incurred by the aggravation of a preexisting condition due to an on the job injury would not be affected by the proposed amendment. If an employee suffers an injury as defined by the Act, the employer is required to provide "reasonable and necessary medical treatment to the employee to treat the effects of the injury." As the definition of accidental injury includes the aggravation of a preexisting condition, the employer's duty to provide medical treatment in such cases is unchanged. The proposed bill only addresses the amount of money the employee is to be paid for permanent impairment. The employee would not be paid for that portion of permanent impairment contributed to by the preexisting condition (Attachment 7).

Duane Simpson, Vice President of Government Affairs of the Kansas Grain and Feed Association (KGFA) testified as a proponent to **SB 461.**

Starting in 2000 agribusiness in Kansas began to see their work comp rates increase dramatically. In 2005 rates began to flatten out and there was an actual reduction in 2006. Rates for a grain elevator employee in 2000 was $6.59 per $100 of salary for the average company. By 2004, that rate had hit $17.92; an increase of 172% in only four years. The rates have dropped in the past year to $12.62 per $100 of salary which is still an increase of 91.5% since 2000. Since 2000 farm machinery employee rates are up 63.8%, feed mill employee rates are up 92.7%, and refined fuels/LP employee rates are up 32.7%.

SB 461 restores the original intent of the 1993 workers compensation reform bill with respect to preexisting conditions. It's important to note that if **SB 461** becomes law an employer would still pay all medical bills for work related injuries, whether or not there is a preexisting condition. The bill reforms the way Kansas pays for work disability and attempts to bring it into line with other states. Kansas is the only state with a 15-year rule that determines what the extent of the disability is. This rule causes an employer who hires someone to

pay for physical capabilities that may have been lost after a work place accident at another employer, or perhaps even to pay for the effects of aging (Attachment 8).

Jeff Glendening, Vice President of Political Affairs, The Kansas Chamber, testified in support of **SB 461**. Workers compensation has been a growing concern to may Chamber members. Although insurance rate costs have been lower than surrounding states, there has recently been a price surge. In many cases, Kansas was much higher than surrounding states when factoring all components of the work comp system.
Recent trends suggest that Kansas is becoming a safer place to work. Even so, NCCI indicates that average work comp costs in Kansas continue to increase. This bill is intended to restore the original legislative intent of the 1993 workers compensation reform bill as it relates to pre-existing condition. Unfortunately, recent court rulings have undermined the current system making it nearly impossible for an employer to receive credit for an employees preexisting condition. This bill would reduce workers compensation rates for employers. Currently, they must pay 100% of the indemnity for injuries unrelated to the workplace and this measure would exempt that practice. The award was reduced by the percentage of lost use that existed prior to the workplace injury based on the opinion of the physician. There is opposition to this bill from the trial lawyers because it reduces the portion of the award they are eligible to receive contingency fees on (Attachment 9).

The following written testimony was distributed in support of **SB 461:** Jeffery R. Brewer, Powell, Brewer & Reddick, Wichita (Attachment 10); Natalie Bright, Wichita Independent Business Association (Attachment 11); and Wes Ashton, Overland Park Chamber of Commerce (Attachment 12), Doug Hobbs, Kansas Self-Insurers Association (Attachment 13).

The meeting adjourned at 10:57 a.m. The next meeting will be March 7, 2006.

COMMERCE AND LABOR COMMITTEE

Date March 6, 2006

NAME	AGENCY
Scott Heidner	KSIA
Wes Ashton	Overland Park Chamber of Commerce
Gus Meyer	Rau Construction Co
Doug Hollandsworth	Stately KS
John Altstadt	Auth Florence
CRISS MAYFIELD	ABBOTT WORKHOLDING
Brian Mline	KTLA
Wil Leiker	KS AFL-CIO
Dennis Phillips	KSCFF
Ed Redmon	KSCFF
Jim McHaff	KS AFL-CIO
Derek Hein	Hein Law Firm
RICHARD THENT	IKDCL-WC
Doug Allen	worker
Duane Simpson	KGFA - KARA
John Ostrowski	KSAFL-CIO
Kari Clark	Wichita Surgical Specialists
Tom Tolen	CITIZEN
Timothy A. Short	Attorney
Steve Rothrock	Whiteley's
JEFF GLENDENNING	KS CHAMBER
Eric Stafford	AGC of KS
Pat Lehman	KFSA
Jeff Hudson	Ks State Assn of Fire Chiefs
ART BROWN	M. L. A
KEN DANKE	KSSMALLBIZ.com
Jeff Cooper	KTLA

COMMERCE AND LABOR COMMITTEE

Date March 6, 2006

NAME	AGENCY
Roger [illegible]	none – Voter
DANIEL MAGILL	KAIA
LARRY MAGILL	KAA.

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Summary of Testimony in Support of Senate Bill 461 Presented to House Committee on Commerce on March 6, 2006.

I. INTRODUCTION:

Senate Bill 461 is positive workers' compensation reform designed to resolve inequities in existing workers' compensation law regarding an employer's responsibility for preexisting conditions and injuries resulting in loss of employment. Senate Bill 461 is intended to assure that the original intent of the Workers Compensation Act is recognized by both employers and employees. Senate Bill 461 represents good public policy that will have a positive impact on the business climate in Kansas.

A. Amendment to Clarify and Enforce Credit for Preexisting Conditions:

1. History and Current Status of Law:

Prior to 1993 employers and insurance carriers could seek recovery from the Kansas Workers' Compensation Second Injury Fund if an injury was either caused or contributed to by a preexisting physical or mental condition. Prior to 1993 a worker who aggravated a preexisting condition was entitled to compensation for the total resultant disability caused by the aggravation. The employer, however, had recourse against the Second Injury Fund. The employer, by statute, was also entitled to a credit for prior permanent disability. In 1993 K.S.A 44-501(c) was passed by the Kansas Legislature. K.S.A. 44-501(c) reads in part:

> "(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."

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The legislative history, although somewhat scant on this statute, reflects that the intent of this statute was to allow reduction of awards by the amount of any physical functional impairment determined to pre-exist the work injury. With the creation of this new statute, the Kansas Worker's Compensation Second Injury Fund was for all practical purposes abolished as it related to preexisting conditions. All seemed well and good at the end of the 1993 legislative session. It did not take long, however, for judicial interpretation of K.S.A. 44-501(c) to cut the heart out of this statute leaving employers and insurance carriers with substantially less than the reform intended by the 1993 legislature.

2. Post 1993 Judicial Interpretation of K.S.A. 44-501(c):

Unfortunately for Kansas employers' credit for preexisting functional impairment as intended did not become reality. As a result of judicial interpretation, Kansas employers are now faced with the following hurdles if they expect to receive a credit for preexisting impairment:

1. The employer has the burden of proving that the claimant has preexisting functional impairment. (See *Hanson vs. Logan U.S.D. 326*, 28 KanApp. 2d, 92 (2000).

2. Preexisting functional impairment percentages reached as part of a prior settlement agreement are essentially meaningless under K.S.A. 44-501(c).

3. For all practical purposes the employer must prove that a prior rating had been assigned by a physician to the exact same body part affected by the work injury.

4. If an impairment rating exists, the employer must prove that the rating was determined using the same rating system in effect at the time of the most recent injury for which credit is sought.

5. The employer must prove that the claimant was symptomatic with respect to the same body part immediately prior to the most recent injury for which credit is sought.

6. The employer must prove that the preexisting condition limited the worker's abilities or activities.

7. The employer has the burden of obtaining testimony from any physicians who may have rated claimant prior to the most recent injury for which credit is sought in order to establish the basis for any rating that was assigned.

As demonstrated above, K.S.A. 44-501(c) as it is currently constructed and interpreted by well intentioned case law, has been rendered essentially meaningless. Many employers and insurance carriers recognizing it will cost more than it is worth to try and prove a credit have elected to forego litigating this issue.

The following illustrates in laymen's terms how this statute currently fails its intended purpose:

Assume for example that Employer X hires John Doe who, unbeknownst to them, has a significant preexisting knee condition with a joint that is essentially bone-on-bone. After working for a week, John Doe claims that he turns wrong aggravating his knee. Claimant is advised by his treating physician that he needs a knee replacement. Despite the fact that his knee is completely shot, John Doe denies having any significant prior symptoms. Employer X, despite a vigorous search, is unable to locate medical records establishing that claimant had previously received an impairment rating under the same system in effect at the time of the most recent injury. Employer X finds a few medical records confirming that claimant had arthritic knees several years prior to the most recent injury but no recent treatment records. Claimant later develops low back symptoms associated with his knee injury and claims a work disability. Under the current interpretation of K.S.A. 44-501(c), despite the fact that claimant had an obvious preexisting physical impairment, the probabilities are significant that the employer would receive no credit for preexisting functional impairment against any award claimant would receive.

3. Senate Bill 461 Corrects and Simplifies Law Regarding Preexisting Condition:

The interpretation of K.S.A. 44-501(c) by Administrative Law Judges, the Board of Appeals, and Appellate Courts, has become so narrow that it is virtually impossible for an employer to receive credit for an employees preexisting condition. The language in Senate Bill 461 is intended to bring the rulings of the courts back to the original intent of the law as passed by the Kansas Legislature in 1993. Under the proposed amendment, the employer will still pay all medical expenses associated with the work related injury and the preexisting condition if one is determined, however, an employer will not be required to pay the total indemnity award if a preexisting condition is determined by the court.

Senate Bill 461 is not intended to reduce workers' compensation benefits that workers were intended to receive under the 1993 amendments. Senate Bill 461 simply reinforces the general intent of the Workers Compensation Act that employees are to be compensated for the portion of the injury actually caused by the work activity or work accident. It is anticipated that the following positive changes would occur if Senate Bill 461 is passed:

1. Employers will receive credit for preexisting conditions as intended by the 1993 legislative changes.

2. Litigation will be reduced and streamlined by allowing credit for preexisting condition in the absence of an actual prior permanent impairment rating but rather based upon common sense medical principals.

A cursory review of appellate decisions regarding K.S.A. 44-501(c) leads to the inescapable conclusion that this statute needs to be fixed. Currently, employers are faced with nearly impossible evidentiary burdens and extensive litigation costs if they expect credit for a preexisting condition. Sure, there are some cases where a minimal credit has been allowed after extensive litigation. Most of those cases occurred shortly after the 1993 amendments were passed. For the most part, however, employers know that in the absence of: (1) a preexisting impairment rating using the exact system in effect at the time of the most recent injury; (2) a claimant who will admit that they were symptomatic at the time of the most recent injury; (3) involvement of the exact body part as the most recent injury, they can simply expect no credit. Senate Bill 461 corrects this inequity and should be passed.

B. Reform Regarding the Definition of "Work Disability:

1. Current Status of Work Disability Definition:

The current definition of work disability is found at K.S.A. 44-510(e) which provides as follows:

> "(a) . . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed at any substantial gainful employment during the fifteen year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. . . ."

Unfortunately, the legislative history of this statute is somewhat sketchy and it is very difficult to determine the rationale for this work disability test. From all indication, the final work disability definition from the 1993 legislature was a creature of compromise. Under this definition, doctors were to provide medical opinions as to what percentage of the work tasks which the claimant had performed in the previous fifteen years of employment, could no longer be performed because of the work injury and subsequent permanent restrictions. In addition, claimant's current post-injury employment status was examined to determine his or her actual wage loss and then compute such loss on a percentage basis.

The 1993 definition of work disability placed the burden of determining task loss on a physician. It was soon learned that physicians either did not have the time or did not want to spend an inordinate amount of time reviewing task lists. Consequently, vocational experts were called upon

to prepare task lists and to determine claimant's loss of ability to perform essential job tasks. Physicians then perform a cursory review of the vocational report before providing an opinion. Under the current system claimant's essentially prove wage loss by providing testimony regarding the extent of their job search and current income.

2. <u>Senate Bill 461 Provides Positive Reform of Work Disability Laws in Kansas:</u>

Review of work disability cases over the last twelve and a half years establishes that the current system of determining work disability can and should be improved. Problems with the current system of defining work disability include the following:

1. Physicians who are often disinterested or too busy are asked to play a pivotal role in defining an injured worker's level of work disability.

2. Physicians having no expertise in the area of task loss are often times reluctant to offer opinions regarding job tasks or offer opinions without proper consideration.

3. The burden of proof is unfairly weighted in favor the claimant. Claimant is, often times, the only person available to determine the essential job tasks that he or she performed during the last fifteen years prior to the work related injury. Knowledge of the claimant's actual employment history as well as the specific essential job tasks and physical demands is most often exclusively known only by the claimant.

4. The requirement of a fifteen year essential job task history determined from all of the claimant's prior jobs creates a situation where a claimant is likely to exaggerate physical aspects of the essential job tasks to increase work disability.

5. The employers face a difficult and cumberson burden in attempting to determine the truth of the claimant's representations regarding their fifteen year work history. Neither claimant, respondent, or vocational counselors often agree on what the definition of a work task is.

6. Awarding work disability based upon claimant's work that was performed many years prior to the injury creates a situation where awards are based on inaccurate and incomplete information.

7. Current work disability definitions unfairly compensates workers who are separated from post-injury employment for reasons totally unrelated to the work injury.

Senate Bill 461 will improve the method for determining work disability. Under Senate Bill 461:

1. The task loss prong of the work disability test is focused on the five year period preceding the claimant's date of injury as opposed to his or her remote work history. This focused time period will eliminate determination of work disability based upon subjective, irrelevant, and unreliable information.

2. The refined time period will more fairly compensate injured workers for the impact a work injury has on their current physical abilities.

3. The refined time period will also allow for a more equitable and accurate determination of task loss as information regarding claimant's work history will be more readily available and accessible to the employee and employer.

4. Limiting the task loss period to five years will significantly reduce the time and effort physicians will need to devote to analyzing and determining task loss. Physicians will be free to spend more of their time treating patients.

5. Limiting the task loss period will reduce litigation costs for injured employees.

6. Prevents unwarranted work disability awards when separation from employment is due to reasons totally unrelated to the work injury, i.e. economic downturn, voluntary quit, and termination for cause.

7. Represents good public policy by encouraging workers to return to work and earn a maximum wage.

3. <u>Senate Bill 461 Will Not Adversely Affect Volunteer Firefighters or Other Volunteer Law Enforcement Officers:</u>

Under Senate Bill 461, 100% of medical costs for volunteer firefighters and volunteer law enforcement officers are covered regardless of whether or not a pre-existing condition exists. State law requires that workers' compensation benefits for volunteer firefighters and other volunteer law enforcement officers be calculated based upon 112.5% of the state's average weekly wage. Senate Bill 461 makes no change to state law regarding volunteer firefighters and duly authorized law enforcement officers.

Under Senate Bill 461, if a volunteer firefighter or law enforcement officer aggravates a pre-existing condition, he or she would be subject to the same credit for pre-existing condition as other workers. As indicated above, Senate Bill 461 simply restores the legislative intent of earlier workers' compensation pre-existing condition reforms that have been eroded by judicial interpretation.

II. CONCLUSION:

Senate Bill 461 represents positive reform for Kansas employers and workers. Senate Bill 461 is consistent with the theory of Kansas workers' compensation, which requires an equitable adjustment for injuries under a system intended largely to eliminate controversies and litigation. Senate Bill 461 is worthy of strong consideration and should be passed by this committee.

Respectfully Submitted,

Ronald J. Laskowski
Fisher, Patterson, Sayler & Smith

Good morning. My name is John Altstadt. I am the Vice President of Operations for Auth-Florence. Auth-Florence is a manufacturer of commercial mail boxes, located in Manhattan Kansas. We are a privately held business generating about $70,000,000 in sales. We employ approximately 450 people.

We moved our manufacturing operation from the Chicago area in 2003, in the hope of finding a work environment that was more conducive to efficiency, productivity and growth here in Kansas.

I would like to start by saying that I am an advocate of the workers compensation system. I think it is important that there are laws that govern what happens when an individual is injured on the job, and that he/she is fairly compensated when that injury leads to a permanent disability.

The workman's compensation laws were originally created to curb the abuses of companies who would carelessly allow their employees to work in unsafe conditions, and then not take any responsibility for care due to injuries, or taking some financial responsibility for the long term consequences of the injuries. It did, and continues to serve a good purpose. But now the table has turned. Now it is structured so that pre-existing conditions can continue to cost unsuspecting companies, and abusers can take advantage.

I am sure that it would not be a surprise to anyone here to realize that there are people who deliberately, with forethought and understanding, take advantage of the worker's compensation system. In my 30 years in manufacturing I have seen many abuses, such as:

> The lady who broke her arm at home over the weekend, came to work on a Monday morning, and claimed that she injured herself at work. We proved that she had indeed lied to us and injured her arm at home, and when confronted with the truth, she indicated that she did not want to pay the insurance deductibles, and felt that the company was wealthy enough to take care of the problem, when she was not.
>
> Or the gentleman who claimed to injure his back during his first week of employment with us. As it turned out, this gentleman was a professional abuser of the system. He had a track record of moving from one company to the next, claiming injuries, usually claming soft tissue damages, that were difficult to detect. He would stay on disability as long as he could, wait for a settlement, and then move on to the next company. We tracked his history through 3 employers prior to us, where he had done exactly the same thing.
>
> Or the employee who had injured himself playing sports in college and was constantly re-injuring himself on the job, because he was not informing his employer of his limitations when he was hired.

I could go on for hours citing known abuses that I have seen that ended up costing the companies I have worked for hundreds and thousands of dollars on an annual basis. **I can tell you that one of the factors that made us move out of Illinois was the tolerance for the abuses that were built into the workman's compensation laws in that state.**

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This is not big business coming down on the rights of the individual. We are not big business. We are a family owned company, trying to survive in a very competitive environment. We do everything we can to create a good healthy safe work environment. We spend hundreds of thousands of dollars to insure that our equipment is properly safeguarded. We have safety programs, we educate and train. We are proactive. Despite all of our best efforts, however, people have accidents. And when someone has an accident, which most often is caused by the employee's carelessness, the company pays for health care and any indemnity. Should we have to pay for a previously existing condition as well?

What many people don't realize is that most of the workers compensation costs comes from the many small claims not the big sensational claims. Most of the accidents that we see are cuts, sprains, muscle pulls, back injuries, and repetitive motion injuries. The majority of these are caused when someone does something they are trained not to do, but for convenience or lack of attention, they do it anyway. The claim, legitimate or not, leads to paid time off, doctor's visits, rehabilitation, and often some indemnity payment. A little injury can quickly balloon into $20,000 – 30,000. It doesn't take too many of these to start costing big money. Each one is too small by itself to cause an insurance company to want to spend a whole lot of time on it, but cumulatively they can have a big impact on our premium costs. So someone may ask, well why is it a big deal to worry about a few dollars on indemnity costs to deal with pre-existing conditions. Because each little cost adds up to big ones over time. We need some control, we need some help!

The reality, ladies and gentlemen is that if we don't begin to curb the abuses and excess costs that exist within many of these advocacy programs within the United States, more and more companies will be picking up and going to China, Mexico, and South America. If it is not hard enough for us to compete in this country with labor costs that can average $15.00 in this country, vs $1.50 in developing companies, it becomes impossible when overburdened with overhead costs that include dealing with insurance premiums that support excesses, fraud and abuse.

This bill is one step towards getting back control of the workers compensation system. I believe that it is very reasonable to adjust the final indemnity payment to account for a pre-existing condition. How could anyone not think that is reasonable?

Frankly, I am shouting loudly that this had better be just the first step in many to help get control of a system that is broken. We need a system to protect the injured and impaired. We do not need a system that fosters abuses and criminal activity.

I strongly urge you to pass bill SB 461. It is reasonable, appropriate, and needed. Thank you for your time.

To: Kansas House of Representatives, Commerce and Labor Committee
Testimony For SB461 March 6, 2006

By: Criss Mayfield
Director of Administration
Abbott Workholding Products, Manhattan, Kansas

My background is industrial, and military. My current position encompasses Human Resources, benefits and insurance, safety, and community relations. I serve on various committees and boards associated with our Industry, with Human Resource matters, and with Workforce Development in our state and community.

These committee activities allow me to interact frequently with peers from many other companies. A common and recurring expression of frustration with some elements of our Worker's Compensation system compels me to appear here today.

The Worker's Compensation Insurance Plan was intended to provide a no-fault protection for employee and employer alike. It was to be the exclusive remedy for medical and lost-wage expenses from injury or illness directly resulting from your job related tasks.

Misapplication of this specific insurance in recent years has introduced certain illogical and unfair elements into the program. Applying additional financial responsibility to Employers for conditions unrelated to their work site is wrong, and was never intended. There is now a critical need for clarification and reform. SB461 is a step in the right direction.

The question of **pre-existing conditions** has been one of the most frustrating elements of the system. Many of us have felt victimized by growing disregard or misinterpretation of the significance of pre-existing condition in a claim. Many employers can testify to their own painful examples of this situation. I certainly could add some of our own experiences of unnecessarily expensive claims. We're all at a loss as to how we can defend against this "unknown".

I would rather use my time today to express my concern with the overall impact on personnel management. This imbalance fosters an attitude of suspicion and contention, and negatively effects all manpower decisions. We need to improve on that. Employers understand their obligation to provide a safe working environment - but they cannot protect you from previous unrevealed activities or lifestyle choices.

How **Functional Disability and Impairment** are defined and treated has long needed refinement. This element often results in a long, unresolved situation that is confusing and frustrating for all parties. Unrealistic criteria - such as a 15-year work experience period - need to be changed. The refined definitions proposed in SB461 will provide needed clarity, and would improve the possibility of effective closure in these claims.

Through this testimony I wish to urge the members of the Commerce and Labor Committee to approve the needed reforms that are contained in Senate Bill 461. Clarifying the treatment of pre-existing conditions on claims and refining the definitions of impairment and disability will be a notable improvement of our Workers Compensation system.

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March 6, 2006

Testimony before the House Commerce and Labor Committee

By Steve Rothrock
Vice President
Whiteley's Inc.
211 NW Norris
Topeka, KS 66608

I am Steve Rothrock of Whiteley's Pallet and Industrial Supply. Whiteley's Pallet and Blocking is a small pallet company located in North Topeka. Whiteley's employs anywhere from four to eight people, depending on the work load.

Worker's Comp and overall insurance costs have become a major expense for our company. Seven years ago when I purchased the business, the over-all insurance expense was $13,000 per year. In 2004, our insurance expense is now over $26,000 a year. Seven years ago, we were charging $5.65 each for a 48X40 #1 pallet. Today, that exact same pallet is bringing $5.15 each to the same company. With the rise in insurance costs, it was becoming very difficult to maintain profitability.

My company has two experiences in dealing with pre-existing conditions with Worker's Comp. Number one was an employee who came to work for us after being laid off from a concrete contractor. While working for the concrete contractor, this employee had medical treatment, paid by the contractor, on both of his wrists. The damage to his wrists was caused by tying steel together. After two to three months of employment for us, he complained of the same problem with his wrists. We sent him to the doctor, and he was told that he had carpel tunnel syndrome. Since we were the last employer, we were responsible to pay to have both wrists repaired. Then, he was rated and our insurance company had to pay for his disability rating. In two months, there in no way we were the sole cause of his wrist damage.

Employee number two last year stepped on a pallet and twisted his knee. After the x-ray, it was determined there was a partial tear and the scope-type surgery would repair the damage. After the scope was done, it was determined that the patient had extreme arthritis in his knee. He was told that he would probably need a total knee replacement in the future. The employee didn't work very hard on rehab, and his attorney fought and won through the courts to make our company pay for a total knee replacement. The arthritis was caused from a car accident he was in years prior to employment with our company. This was an extreme case of a pre-existing condition that my company in no way caused to happen. We are now responsible to pay for two surgeries and a disability rating for arthritis that we didn't cause.

These two claims go against our experience mod and drive up the cost of our insurance very quickly. With such a small company and limited payroll, claims like these affect our Worker's Comp insurance premiums in a very negative manner.

I would ask this committee to please consider changing the pre-existing conditions part in the Worker's Comp laws to help small and large businesses survive. I also feel we should only pay for the injuries that occur at our work places and to the extent of damage that we cause, not damages that are already existing.

Thank you for your time and consideration in this matter. I hope you will join me in supporting this important measure.

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Administrator
Kari Clark

Hearing for Senate Bill No. 461
Committee on Commerce
Monday, March 6, 2006
Proponent Testimony
By Kari Clark

Dear Committee members, thank you for giving me this opportunity to testify in support of **Senate Bill 461**. My name is Kari Clark and I am the administrator for Wichita Surgical Specialists, P.A. Please understand that I am not an owner of our group, I am an employee and I am here to represent my employer in favor of **Senate Bill 461.**

Our group, Wichita Surgical Specialists, is a surgical group/office in Wichita consisting of 30 surgeons and 75 staff members. We take pride in providing excellent surgical care by having the best, dedicated staff in the city of Wichita. It is important to us that we are compliant with every regulation including workers' compensation and ergonomics. We want our employees to be safe.

In favor of Senate Bill 461: In the last year and half I have learned more about the Kansas workers' compensation laws, particularly regarding preexisting conditions. I have been told repeatedly by attorneys, insurance carriers, case managers and lobbyists the "work comp laws and system are so complicated and difficult" and I do agree. But what I have been able to unravel in the work comp complexities is that the current system is not equally fair to both the employer and employee. The system is tilted, but **Senate Bill 461** would help level out the preexisting portion while clearly continuing to protect the employee.

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Preexisting Case: I would like to share with you today, a preexisting claim that our organization has been involved with since May of 2004. We hired a staff person for our medical records department in November of 2002. Upon her date of hiring, she indicated she would have no problems performing her work after she reviewed the job description, including physical requirements (keep in mind that we are not allowed to ask her if she has preexisting conditions). She started to have absences after one month of commencing employment for various reasons: flu, fever, brakes out on her car, went to ER, hemorrhaging, snow, son ill, headache, dog got hit by car, pink eye, toothache, daughter ill, neck pain, stomach pain, overslept, lost glasses, throwing up in parking lot, son broke thumb, no energy, kidney stones, yeast infection, back problem, ovarian cyst, chicken pox, pinched nerve, ran out of gas on the way to work, hurt ankle fell in backyard, crying in parking lot and went home, URI, son got kicked out of school, car overheating and multiple just "sick". Obviously, this person had an attendance problem, but we wanted to work with her. Please keep in mind that through all of her absences, she never told us that her job duties aggravated any current medical conditions or ever caused her medical conditions. After one and a half years of employment, one day she came into work limping. She could not explain what happened only that it did not happen at work. Therefore, we sent her home and told her that she had to get a work release before she could return to work. A few days later we received notification by a work comp attorney requesting this claimant receive benefits for degenerative back problems aggravated by repetitive work activities. We were informed by our work comp attorney that under Kansas law if an employee suffers aggravations of preexisting conditions caused by work activities, then those claims are compensable.

It has been almost 2 years since the preexisting claim and it has not closed for various reasons or another. We had a hearing a few months after the claim was filed, but we were not allowed to tell "our story," only answer questions; in fact, I could not even go into the court room. The Work Comp Judge ruled in favor of the Claimant and she was granted medical treatment. The Claimant had two surgeries and was non compliant with her treatment; i.e.: missing doctor appointments or not informing the case manager when she has changed an appointment. In addition to seeking treatment from a neurosurgeon, she had been seeing a psychologist who stated there were major issues in her

background; i.e. abuse and alcohol. He also stated that the claimant has no incentive to improve. In addition, the claimant was granted the ability to seek pain management and was seeing a pain management physician who eventually terminated the patient/doctor relationship due to the claimant's non compliance and for misusing her narcotic medication. In addition, the claimant also had requested a wheelchair and was put under surveillance, but was never seen using the wheelchair. And the list goes on and on.

As I stand before you today, the claim is still open and amounting to $362,000, in addition to $350 weekly payment since May of 2004. **Senate Bill 461** would not change those payments; however, it will affect the amount of functional impairment and/or work disability amount. Currently, the claimant has received a 20% permanent impairment rating and the treating physician recommends that the Claimant be entitled to future medical (keep the medical open). Since the Claimant has recently been released with restrictions, we were advised to offer her a job that would meet these restrictions which we have. Our case is not settled and our attorney anticipates that this will continue until she gets a higher permanent impairment rating. I have asked our attorney many questions such as: "but what about her previous pattern of accidents outside of work?" I am told "that is the law," but "what about her being non compliant," I am told "that is the law," but "why can't we defend ourselves?" I am told "that is the law," but "why do we have to just do everything she requests?", "that is the law," etc.... The only justice that we have received from this claim is that we were allowed to tell her "no" when she requested a King size bed. We have never been able to "defend" ourselves and prove our innocence. It does not matter that the Claimant had an absenteeism problem, she did not get injured at work, she was unstable or NEVER complained that her job aggravated a preexisting 13 year degenerative back problem, nor that she was non compliant with her medical care under the work comp system. In fact, it is unknown as to whether her job did aggravate her preexisting condition especially since she had many accidents outside of work (as the absenteeism record shows). The Kansas Work Comp Act does not protect or allow justice for an employer for preexisting conditions and is very generous in allocation of employee benefits.

Senate Bill 461 recognizes that the current preexisting laws and benefits need reform by providing more of a balance to both the employer and employee.

I realize that this is just one example of a preexisting claim. So I ask you, any of you, if you have preexisting medical conditions such as: back problems, migraines, ulcers, shoulder pain, etc.... Does walking up and down the stairs aggravate your preexisting back problem? Does arguing a bill aggravate your migraine headaches? Does your workload aggravate your ulcers? If you answered yes, then you are entitled to file a work comp claim.

WORK COMP REFORM: In support of Senate Bill 461, I encourage you to continue to reform the work comp system so that it will be equally fair to all (employers, employees and constituents).

I truly thank you for listening to me today. This is first time that I have been allowed to tell "our story".

Testimony Before The
House Commerce Committee
In Support of
Substitute to SB 461

March 6, 2006

Mr. Chairman and Committee Members

I am Gus Rau Meyer, President of Rau Construction Company located in Overland Park, Kansas. We are a mid-sized General Contractor, which has been family owned for 5 generations since our founding in 1870. We employee between 45 and 55 people, depending on the season. Our construction workers are members of local trade unions, and employees of Rau Construction work a little over 100,000 hours a year. If we look at our vendor list, our carrier for Workers Compensation Premiums would be in the top 11% of vendors with $107,891 in premiums in 2005 with premiums that average slightly over $1/man hour worked.

We work very hard to control all our costs, this includes Workers Compensation Premiums. Part of this is a very successful safety program. We are one of a handful of contractors in the two state region that have been accepted into the Builders Build Safe Partnership with OSHA. Our safety practices from pre-employment training to a focus on safety from top management on down has given us a "zero lost time" incident rate in 11of the past 17 years.

Accidents do happen, and we never deny an employee treatment. We treat them as family, and support them when they are injured and make a just Workers Compensation Claim. But sometimes there are abuses. I believe this bill will stop one of the major abuses.

I would like to tell you our abuse story. In 1997 we had a recent hire that reported to his supervisor he had injured himself by tripping while walking across a construction site. Unfortunately, he violated company policy (which he had recently acknowledged when he was hired after his initial training) by informing us the day after he had been "injured". He was promptly sent for medical treatment. At this time, he was given a drug and alcohol test, which was also company policy for any injury requiring treatment. His test came back very positive for drug use. Since he had not informed his supervisor until the next day, the positive test could not be used as a factor to reduce or eliminate the claim that was to come.

He initially was given treatment and therapy. After not responding, he was diagnosed with a back injury that would require surgery. As part of the workers compensation investigation, several additional disturbing facts were discovered. First was that he had made errors in his employment application and not informed us of a previous back injury that had resulted in significant time away from the job. We also discovered that he had been seriously injured in a motorcycle accident. Both of these were definitely pre-existing conditions; and contributing factors, if not the major factors, in his claim against us.

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After surgery and additional therapy, the insurance company had to negotiate with him and make a partial disability payment. Ultimately, our insurance company incurred costs in excess of $200,000 for the surgery, therapy, and disability payment they had to make.

Many would say, "this is why you have insurance". To a point, this is true, but with the structure of Workers Compensation Insurance, a claim like this will directly cost the employer in excess of the premiums he or she has already paid prior to the accident. This incident did cost Rau Construction a significant sum of money. In 2006, almost 9 years after the incident, our modification factor is finally down close to its normal low level. The run up in our modification factor, due to this incident, cost us over $80,000 in additional Workers Compensation premiums.

The insurance company, through the laws and regulations that govern Workers Compensation Insurance, have the ability to recoup some of their $200,000 loss by modifying our Experience Modification Factor. With this claim totaling roughly twice our total annual premiums, adjustments were made that took several years to work through our history, resulting in raising our insurance rates through the modification factor. $80,000 is a lot of money to a business our size. It is over one years Net Income.

If we could have been informed of these previous injuries, our employment decision for this person probably would have been effected. If there were limits as to our responsibility to treat and provide disability payments for this employee due to limits for pre-existing conditions, there would be a significantly smaller impact on our insurance carrier, which would be passed on to our company, Rau Construction.

I do not believe our story is "one of a kind". I believe there are many others like this in Kansas. I also do not believe that good employers are unwilling to shoulder their responsibility to take care of employees that are injured on the job. What we are asking for is that we do not have to pay for injuries that are not sustained on the job, but are made part of a claim for a job related injury.

I believe there are many improvements that can be made to the Workers Compensation laws in our great State. This is a good step forward. I urge your support for businesses around the State by passing this the bill out of your Committee and to the full House for approval.

Thank you for your patience in reviewing my testimony, and for your support of Senate Bill 461.

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Larry G. Karns, Attorney

Testimony in Support of S.B. 461

Chairman Dahl, members of the committee, thank you for the opportunity to be here today as a proponent of SB 461.

Preexisting Condition

A major change in the Kansas Workers Compensation law was intended by the 1993 overhaul of the Kansas Workers Compensation Act. The 1993 amendments to K.S.A. 501(c) provide:

> "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 1993 revisions also eliminated the Kansas Workers Compensation Fund. The Fund had previously paid the portion of a workers disability contributed to by a preexisting condition. The combination of the enactment of 44-501(c) and the elimination of the Workers Compensation Fund's payment for preexisting conditions reflected the intention of the legislature not to pay disability for preexisting conditions. Unfortunately, as case law has developed over the years, that has not been the result.

K.S.A. 44-501(c) speaks to reduction of awards in cases with preexisting conditions "by the amount of functional impairment determined to be preexisting." Case law has held, including *Hanson v. Logan USD 326*, 28 K.A.2d 92, it is the employer's burden to prove the extent of impairment present from a preexisting condition. This burden is problematic for several reasons.

First, it requires that the employee be forthright about the limitations presented by a preexisting condition while knowing that a preexisting condition will reduce their award of benefits. Often an injured worker will minimize or deny any previous impairment or symptoms from a preexisting condition which medically would be expected to have been symptomatic.

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Second, case law has developed, *Hanson v. Logan USD 326*, that requires a preexisting condition to have been symptomatic and to have limited the employee's activities in order to be a rateable impairment under the AMA Guides 4th Edition. Unless a preexisting condition is a rateable impairment under the Guides, the courts have held that no reduction or credit for the preexisting condition is appropriate. If a claimant states that their preexisting condition did not bother them, the employer may be required to pay an award for which includes both the effect of the work injury and the preexisting condition.

Third, physicians often testify that a claimant's preexisting arthritis or degenerative condition was the cause of the resulting impairment. If that preexisting condition is not rateable under the AMA Guides 4th Edition, the employer pays the entire cost of the claim.

Prior to 1993, when the Workers Compensation Fund existed, physicians testified and stated their opinions regarding the percentage a preexisting condition, rateable or not, contributed to the disability or impairment resulting from a work injury. The current bill would continue to utilize the AMA Guides for rating impairments following a work injury. The bill would allow the physicians to testify as they did prior to 1993 regarding the percentage the preexisting condition "contributed to" the resulting impairment.

The payment of medical expenses incurred by the aggravation of a preexisting condition due to an on the job injury would not be affected by the proposed amendment. If an employee suffers an injury as defined by the Act, the employer is required to provide "reasonable and necessary medical treatment to the employee to treat the effects of the injury." As the definition of accidental injury includes the aggravation of a preexisting condition, the employer's duty to provide medical treatment in such cases is unchanged. The proposed bill only addresses the amount of money the employee is to be paid for permanent impairment. The employee would not be paid for that portion of permanent impairment contributed to by the preexisting condition.

STATEMENT OF THE

KANSAS GRAIN & FEED ASSOCIATION

AND THE

KANSAS AGRIBUSINESS RETAILERS ASSOCIATION

SUBMITTED TO THE

HOUSE COMMERCE AND LABOR COMMITTEE

IN SUPPORT OF SENATE BILL 461

REP. DON DAHL, CHAIR

MARCH 6, 2006

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.

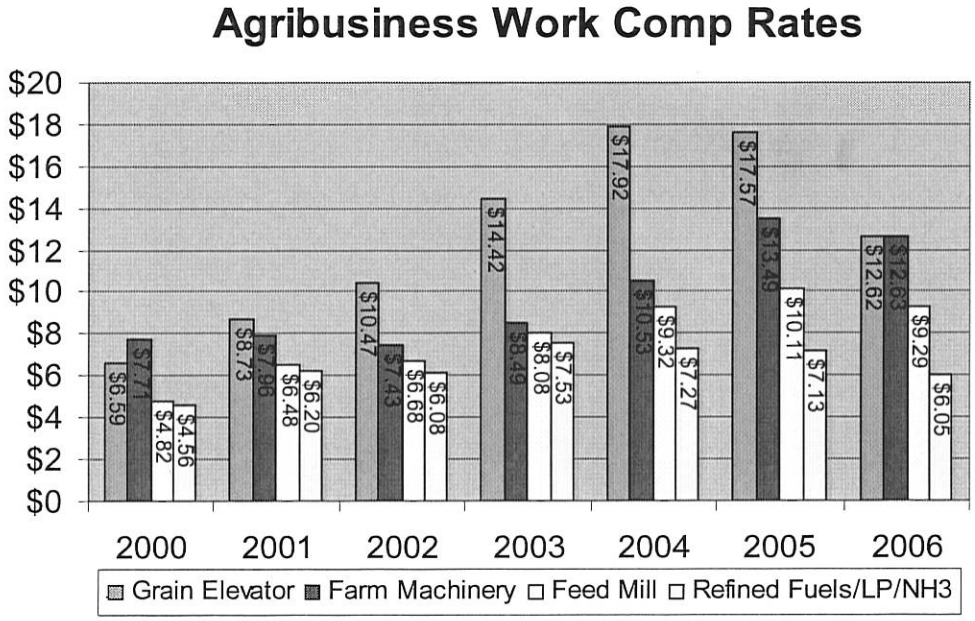
816 SW Tyler, Topeka KS 66612 – 785-234-0461 - Fax: 785-234-2930

Comm & Labor
3-6-06
Atch # 8

Thank you Chairman Dahl, members of the House Commerce and Labor Committee, I am Duane Simpson, Vice President of Government Affairs 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 which 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 Senate Bill 461.

Starting in 2000, agribusiness in Kansas began to see their work comp rates increase dramatically. In 2005, rates began to flatten out and I'm proud to say we have seen an actual reduction for 2006. If you look at the attached chart, you will see that work comp rates for a grain elevator employee in 2000 were $6.59 per $100 of salary for the average company. By 2004, that rate had hit $17.92, an increase of 172% in only four years. As I noted earlier, the rates have dropped in the past year to $12.62 per $100 of salary, which is still an increase of 91.5% since 2000.

Similar trends have occurred in other agribusiness categories. Since 2000, farm machinery employee rates are up 63.8%, feed mill employees are up 92.7%, and refined fuels/LP employees are up 32.7%.



Unfortunately, fewer and fewer companies even offer work comp insurance to agribusiness, reducing competition and making it difficult to lower rates. In 2000, there were 13 insurance companies offering work comp insurance to agribusinesses -- today there are only 6. Our members have been forced to take higher and higher deductibles just to find an insurance provider willing to carry the insurance. To make matters worse, the 6 companies that provide work comp insurance to Kansas agribusinesses all have lost cost multipliers above 1.3. That means that the actual work comp premium paid for the insurance is at least 30% higher than the NCCI rate. The $12.62 per $100 salary rate is actually a premium of $16.41 per $100 of salary. That makes the total premium for a $30,000 grain elevator employee $4922 per year.

SB 461 is designed to address some of the causes of high work comp costs for Kansas employers. Specifically, this bill addresses the high indemnity costs that Kansas employers must pay in three ways.

First, it restores the original intent of the 1993 workers compensation reform bill with respect to preexisting conditions. It's important to note, that if SB 461 becomes law, an employer will still pay all medical bills for work related injuries, whether or not there is a preexisting condition. This legislation only applies to the percentage of functional impairment that was not caused by a workplace injury.

For example, let's assume a worker aggravates a high school football knee injury. According to the doctor, 40% of the damage to the knee existed prior to the injury. The doctor recommends a full knee replacement surgery at a cost of $36,000. Under current law and under SB 461, the full $36,000 is paid for by the employer. Let's assume that due to reduced use of the knee, the worker is also entitled to $25,000 in indemnity payments. Under current law, the employer must pay the full $25,000, even though the knee was already damaged. If you pass SB 461, the employer would pay $15,000 in indemnity. Total cost under current law - $61,000, total cost under SB 461 - $51,000. That reduced cost will save individual businesses from having their lost cost ratios increase for indemnity payments they shouldn't have to make. It will, according to NCCI, also reduce premiums by about 2%.

Second, the bill reforms the way Kansas pays for work disability to bring it into line with other states. Kansas is the only state with a 15-year rule that determines what the extent of the disability is. This rule causes an employer who hires someone to pay for physical capabilities that may have been lost after a work place accident at another employer, or perhaps even to pay for the effects of aging. How many of us sitting in this room today are physically capable of everything we were capable of 15 years ago? Senate Bill 461 reduces that time period to a more reasonable 5-year rule. It should be noted that the original bill would have eliminated the rule altogether and this is a compromise that was made during hearings in the Senate Commerce Committee.

Finally, the bill stops the abuse of work comp in cases where unemployment compensation is the more appropriate remedy. For example, suppose an injured worker settles a claim and is able to go back to work. Six years later, that worker is laid off. Under current law, they are capable of reopening their work comp claim and receiving 100% disability because they are no longer working. Clearly, this individual is capable of working and they would simply rather receive the more generous work comp benefits instead of unemployment compensation.

The original bill also would have made dramatic changes to the work disability formula. Although those changes would have saved our industry and all Kansas businesses, in the spirit of compromise, we agreed to remove those provisions.

Opponents to SB 461 have argued that there is no need to change the law because work comp rates in Kansas are low. As I have already demonstrated for agribusiness, there is a difference between work comp rates and work comp premiums. So, while it is true that work comp rates are low, work comp costs for Kansas businesses are high. Current loss cost multipliers in Kansas range from .965 to 2.156. That means the actual premium being offered by the insurance company is anywhere from a 3.5% discount from NCCI's rate to a 115.6% add-on. As you can see, the NCCI rate is just part of the formula used to determine work comp premiums. A good analogy would be to compare the BSAPP to the total state aid per pupil. As we learned last year, changing one number does not necessarily change the other. Just like with school finance, citing the NCCI work comp rate and implying that is the actual cost to Kansas employers is a misleading statistic.

Opponents also argue that the real culprit for work comp costs is high health care costs and insurance companies making too much in profits. I certainly agree that the increasing cost of health care is driving up work comp rates, but the Kansas Legislature is not in a position to change the nation's health care trends. As for insurance companies making too much in profits, we know it's not true in agribusiness. Less than half of the companies that wrote work comp insurance for agribusiness in 2000 are offering it in Kansas today. Typically companies don't stop doing business in states where they are making high profits. As for the entire industry, for the past decade, work comp premiums have not kept up with claims paid. That means that the insurance industry has had to pay claims from their investment portfolios. Their profits obviously come from their investments as well since they are losing money on their premiums.

Opponents will point out that SB 461 takes away the requirement for the preexisting condition to be rated according to AMA guides and that the injury no longer must not be diagnosed, symptomatic or limit the employee's ability to work prior to the injury. Of course the bill does that. That's the problem with ALJs' interpretation of current law. In order to meet the rating requirements of ALJs, the injury almost always has to have been a previous work comp injury. Even then, the employer has a good chance of not receiving a credit. Whether or not an injury was previously diagnosed has no bearing on whether or not it exists. My ankles swell up whenever I play sports, but I've never seen a doctor. If I injure my ankle at work, it wouldn't surprise me if I had a preexisting

condition. Whether or not an injury is symptomatic depends on whether or not the employee *claims* it is symptomatic. When given a financial incentive to not tell their boss about their symptoms, it shouldn't surprise us if most employees claim not to have been symptomatic. As for whether or not the condition limited their work prior to the accident, that should be irrelevant. The question is *did* the preexisting condition contribute to the disability? If so, how much? If the employee did not have a previous condition, would their disability be lower? Should the employer have to pay for an increased disability because of the employee's previous condition?

Opponents are making some rather imaginative claims as well. They say SB 461's definition of preexisting condition could include such things as diabetes. They imply that a knee injury could be reduced due to high blood pressure. Let me quote from the bill: "by the percentage that the preexisting condition affecting the portion of the body injured in the accident." It would take one really bad claimant's lawyer, a very bold insurance company, a physician with very questionable ethics and an incompetent ALJ for such a case to actually occur. That's not even considering the fact that the worker can have a second doctor's opinion, at the employer's expense. That second opinion would also be evidence in the case.

Opponents also oppose the restrictions to prohibit new disability claims when an employee leaves their employment. They wave the flag and point out that an injured employee who has returned to work might voluntarily leave because her husband, who is a soldier, is transferred. Again, should that employee who is clearly capable of working be paid disability because she chooses to leave her job? Whether the choice is to move with a transferred spouse (military or not), or to be a stay-at-home mom, the ability of that employee to work post-injury has been established. She's not disabled and her employer should not have to pay disability. That type of abuse is the reason we're debating this bill today. Work comp insurance is supposed to compensate employees for work place injuries, not life decisions or unemployment.

Opponents have argued that this bill will target the elderly. Current state law specifically exempts employers from having to pay for the effects of aging. That state law is being abused today because of the preexisting condition rules. Their objection is more proof that work comp insurance is becoming social insurance.

Finally, opponents have shielded themselves behind Iraq war veterans and volunteer firefighters. They claim that war injuries will be denied work comp coverage when they are aggravated on the job. First of all, war injuries are the responsibility of the federal government, not the veteran's new employer. Second, all medical costs associated with a work place aggravation of a war injury are paid for by the employer. Disability would have to come from the Veteran's Administration, as it should. As for volunteer firefighters, they have one of the best deals in the entire work comp system. They are paid 112.5% of the state's average weekly wage. This bill makes no change to that law. Just like the veteran, disability for injuries sustained while fighting fires should not be paid for by the firefighter's other employer. They qualify for work comp benefits as a firefighter and if they aggravate a firefighting injury on their other job, they will receive

100% of their medical bills and whatever percentage of indemnity that their employer "caused."

The Kansas Legislature can help lower work comp costs for our industry and for all businesses by passing SB 461. According to NCCI, this bill will save approximately $10 million per year in premiums. The average grain elevator employee's annual work comp premium will drop by at least $100. Our industry has been doing its part by working hard to reduce accidents. We have voluntarily signed an agreement with OSHA to provide workplace safety training. Our association offers numerous training programs to improve safety among our members. In fact, more than 1/3 of our staff is dedicated solely to offering various training programs to our membership. A cottage industry of agribusiness safety companies has sprung up in the past couple of years to help curb the cost of workers compensation. In addition, minor reforms by the Legislature have helped reduce litigation costs, therefore reducing rates. Throughout this decade, our actual accident history has declined, but our costs for the most part have increased.

Agribusiness in Kansas has seen dramatic increases in work comp rates in the past few years. Combined with high energy prices, drought conditions in much of the state, government proposals to idle productive land, and doubling of the state franchise tax, it is a wonder that our members are able to keep their doors open at all. Unfortunately, many of them have not survived, and the ones that have, have done so by reducing the size of their work force. Senate Bill 461 is absolutely necessary to keep jobs and businesses in rural Kansas. I urge you to support this bill.

Legislative Testimony

SB 461

March 6, 2006

Testimony before the Kansas House Commerce and Labor Committee
By Jeff Glendening, Vice President of Political Affairs

THE KANSAS CHAMBER

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Thank you Mr. Chairman and members of the Committee for allowing me to appear before you today as a proponent of SB 461. My name is Jeff Glendening and I am here on behalf of the Kansas Chamber and our over 10,000 member businesses.

The area of workers compensation is a growing concern to many of our members. Although insurance rate costs have been lower than surrounding states, there has recently been a price surge. In many cases, Kansas is much higher than surrounding states when factoring all components of the work comp system.

Recent trends suggest that Kansas is becoming a safer place to work. Even so, NCCI indicates that average work comp costs in Kansas continue to increase.

One of our members which employs over 3,500 people in Kansas has indicated that while 10% of their workforce is in Kansas, our state represents 66% of their workers compensation costs.

This bill is intended to restore the original legislative intent of the 1993 workers compensation reform bill as it relates to pre-existing condition. Unfortunately, recent court rulings have undermined the current system making it nearly impossible for an employer to receive credit for an employees pre-existing condition.

Under current law, employers may only receive credit for a pre-existing condition if a previous workers compensation claim has been filed and a rating has been assigned for an injury on the same body part.

Employers will continue responsibility for 100% of medical bills associated with an injury regardless of whether an employee had a pre-existing condition or not. However, the employer will only be responsible for the percentage of the functional impairment from the injury that was caused by work.

This measure will reduce workers compensation rates for employers. Currently, they must pay 100% of the indemnity for injuries unrelated to the workplace and this measure will exempt that practice. The award is reduced by the percentage of lost use that existed prior to the workplace injury based on the opinion of the physician.

There is opposition to this bill from the trial lawyers because it reduces the portion of the award they are eligible to receive contingency fees on. Trial lawyers do not receive these fees on the medical costs. It is also important to note NCCI has indicated that Kansas has a high rate of attorney involvement. Attached to this testimony is a graph from NCCI showing that when attorneys are involved, the cost of the claim increases more than twice as much as when attorneys are not involved.

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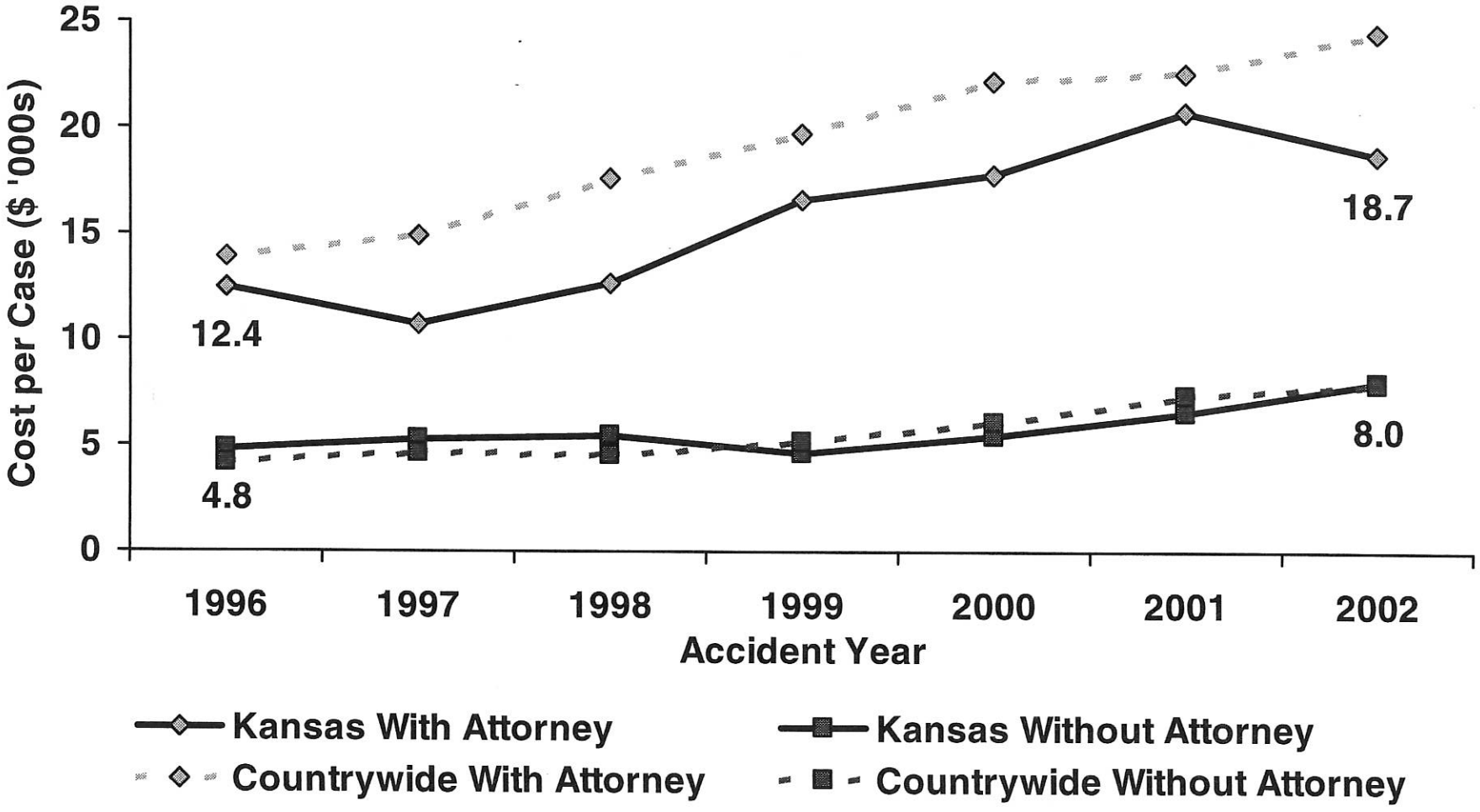
If an employee's injury prohibits them from returning to work, the current work disability formula would be used. This formula is derived from a determination of the percentage loss of job skills an employee has used over the past fifteen years and the percentage difference in the employees pre-injury and post-injury wages. These two percentages are then averaged to determine how long an injured worker will be paid disability.

The loss of job tasks over a fifteen year period prompts compensation to be paid for skills the employee may no longer need, and is a poor barometer of the physical effects of the injury. This fifteen year "look back" is completely unique to our state. SB 461 addresses this problem by scaling back the test to 5 years which is more reasonable.

We are asking you to return fairness to the workers compensation system by voting for SB 461.

The Kansas Chamber, with headquarters in Topeka, is the statewide business advocacy group moving Kansas towards becoming the best state in America to do business. The Kansas Chamber and its affiliate organization, The Kansas Chamber Federation, have more than 10,000 member businesses, including local and regional chambers of commerce and trade organizations. The Chamber represents small, medium and large employers all across Kansas.

Kansas Indemnity Average Claim Costs When an Attorney Is Involved



Based on NCCI's DCI data.

POWELL, BREWER & REDDICK, L.L.P.

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February 10, 2006

VIA FACSIMILE 494-6803 ORIGINAL WILL BE MAILED

Ms. Kari Clark
Wichita Surgical Specialist
818 N. Emporia, Suite 200
Wichita, KS 67214

Re: Senate Bill No. 461

Dear Ms. Clark:

I am a private practicing attorney who has been actively practicing full-time in workers compensation for the last 19 years. My current legal practice involves full-time representation of employers and insurance carriers in workers compensation matters.

Upon your request I have reviewed Senate Bill No. 461. After reviewing this bill, it would appear to be favorable legislation which will equitably compense injured employees for their injuries while at the same time, control the rising costs involved in workers compensation claims. All in all, I view Senate Bill No. 461 as favorable piece of legislation which should be enacted by the Kansas Legislature.

If you have any questions, please do not hesitate to call.

Very truly yours,

Jeffery R. Brewer
POWELL, BREWER & REDDICK, L.L.P.

JRB/pah

Comm. Labor
3-6-06
Atch #10

Wichita Independent Business Association

THE VOICE OF INDEPENDENT BUSINESS

HOUSE COMMERCE COMMITTEE
WRITTEN TESTIMONY FROM NATALIE BRIGHT
IN SUPPORT OF SB 461
SUBMITTED MARCH 6, 2006

Chairman Dahl and honorable committee members,

Thank you for the opportunity to submit written testimony on behalf of the 1,300 plus members of the Wichita Independent Business Association (WIBA). For several years, our members have joined efforts with other business organizations in the pursuit to bring fairness to the Kansas Workers Compensation System and we are pleased to submit testimony in favor of SB 461.

In particular, our members have focused their efforts on re-instating the intent of the 1993 Workers Compensation reforms. One such component of the 1993 reform was to deny compensation to employees for their "pre-existing conditions." In theory, the 1993 reforms allow an employee to be compensated for the degree of injury caused by his/her work, and not be awarded compensation for the portion of an injury caused by a pre-existing injury, condition or natural aging process. Unfortunately, through the years, the effectiveness of the "pre-existing condition exclusion" has been eroded and the Kansas business community is forced to once again ask the Kansas Legislature to redefine the pre-existing condition exclusion and deliver its original promise of making workers compensation responsible only for injuries suffered 'while on the job.'

WIBA members believe that every injured Kansas worker should receive the full measure of compensation for the effects caused by a workplace injury, even if the injury is an aggravation a pre-existing condition. However, our members reject a law which saddles employers with liability for the pre-existing conditions themselves, whether caused by an old college sports injury, a previous motorcycle accident, or even the cumulative effects of the natural aging process. Kansas employers cannot and should not have to shoulder the expense of compensating non-work related impairments and disabilities except to the extent—and only to the extent-- that work activities aggravate those pre-existing conditions.

Our members proudly recognize that their greatest asset is their employees and want their employees to be made whole for job related injuries. However, unfairly burdening Kansas employers with the cost of insuring pre-existing conditions is costing Kansas businesses and is the reason why our members join the efforts to pass SB 461. Please join our efforts to address and correct the current inadequacies in Kansas workers compensation laws regarding pre-existing conditions. We respectfully ask you vote favorable on SB 461.

445 N. Waco Street / Wichita, KS 67202-3719
316-267-8987 / 1-800-279-9422 / FAX 316-267-8964 / E-mail: info@wiba.org / Web Site: www.wiba.org

Comm. Labor
3-6-06
Atch # 11

OVERLAND PARK
CHAMBER OF COMMERCE

LEGISLATIVE TESTIMONY

March 6, 2006

TO: Donald Dahl, Chairman

Members, House Commerce and Labor Committee

FROM: Wes Ashton, Overland Park Chamber of Commerce

RE: SB 461- Workers' Compensation dealing with preexisting conditions

Chairman Dahl and members of the committee, thank you for the opportunity to offer written testimony on behalf of the Overland Park Chamber of Commerce in support of SB 461. SB 461 would improve workers' compensation laws in Kansas by clarifying the standards associated with preexisting conditions. The Chamber has been working in support of this bill for several years, and believes that this bill will help to improve the business climate in Kansas and emphasize the original intent of the Legislature.

SB 461 would provide that compensation awards would only be reduced to an injured worker beyond medical costs for the injured body part. The award is reduced by the percentage of lost use that existed prior to the workplace injury. All medical costs will still be paid by the employer for any injury that occurs in the workplace, regardless of whether a preexisting condition exists.

This bill would also help businesses across the state survive economic struggles. It provides that in the event of a separation from employment for economic reasons the employee would not receive general disability compensation in excess of the functional impairment. This change may do just enough to keep a struggling business open through a recession, saving the jobs of countless workers.

Since the City of Overland Park is located so closely to our state line, the differences in law between Kansas and neighboring states may be a determining factor in where a business chooses to locate. SB 461 would help to improve our competitive position with neighboring states, and will likely net more jobs for Kansas.

The Chamber strongly supports SB 461 because it returns fairness to the workers' compensation system. Businesses should and will pay the medical costs for an injured worker, but current law has been interpreted to go well beyond that standard. The fairness that SB 461 returns to the system will help improve our business climate, which will lead to new jobs for Kansas.

Thank you for the opportunity to offer written testimony in support of SB 461. The Chamber would request this committee pass SB 461 out favorably as currently written. Thank you.

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ACCREDITED

Comm & Labor
3-6-06
Atch # 12

KSIA KANSAS SELF-INSURERS ASSOCIATION

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TESTIMONY IN SUPPORT OF SENATE BILL 461

Chairman Dahl, members of the committee, thank you for the opportunity to be here today as a proponent of SB 461.

I. INTRODUCTION

Senate Bill 461 restores the balance between employee and employer rights intended by the sweeping legislative changes in 1993 regarding preexisting conditions and work disability. Senate Bill 461 brings fairness and judicial economy to the workers compensation process.

A. Amendment to Define Credit for Preexisting Conditions:

1. Statutory History:

The Kansas Legislature never intended for employers to bear the full financial responsibility for an employee's preexisting conditions. Prior to 1993, employers and their insurance carriers could seek recovery for preexisting conditions from the Kansas Workers Compensation Fund, also known as the Second Injury Fund, if an injury was either caused or contributed to by a preexisting physical or mental condition. Prior to 1993, the claimant received compensation for the entire resultant disability caused or contributed by an injury or aggravation. The employer, however, was able to recover a percentage of the medical, temporary total and permanent impairment paid to the claimant if it could establish it knew of the claimant's preexisting impairment, and there was a causal connection between the resultant disability and the preexisting impairment. Essentially, the employer was relieved of liability for

that percentage of the claimant's impairment or disability which was caused or contributed to by a preexisting condition. In 1993, Legislature passed an amendment to K.S.A. 44-501(c) which reads in pertinent part:

"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 above amendment was intended to place the burden of preexisting impairment on the employee. As part of the 1993 changes, the respondent and insurance carrier's ability to implead the Second Injury Fund and obtain compensation for a preexisting impairment from the Fund was abrogated. With the abolishing of the Fund, coupled with passage of K.S.A. 44-501(c), it was apparent that the Legislature intended to limit the employer's financial responsibility for aggravations of a preexisting condition only to that portion of a work-related injury which caused increased disability. The financial responsibility for the preexisting injury was to be borne by the employee.

2. <u>Post-1993 Judicial Interpretation of K.S.A. 44-501(c):</u>

Unfortunately, the patent legislative intent was thwarted by judicial interpretation. In *Hanson vs. Logan U.S.D. 326*, 28 Kan.App. 2d 92 (2000) narrowly interpreted K.S.A. 44-501(c). Now, the employer bears the burden of proof in establishing the nature and extent of the claimant's preexisting impairment. Moreover, the employer must show that the claimant's preexisting impairment was symptomatic with respect to the same body part immediately prior to

the most recent injury. The courts have also imposed an additional burden that if the preexisting disability was rated that the rating was done using the *AMA Guides to Evaluation of Permanent Impairment, Fourth Edition.*

The current interpretation of K.S.A. 44-501(c) is problematic on several levels. First, the respondent is reliant on the veracity of the claimant in determining if a preexisting condition exists, and whether it was symptomatic prior to the injury. Most claimants tend to have exceptionally poor recall regarding whether they had a preexisting impairment and commonly usually deny that they had any restrictions or limitations. Additionally, most claimants will testify, when confronted with medical records reflecting permanent limitations and/or an impairment rating, that their condition improved over time and was asymptomatic immediately prior to the instant accident.

One of the other hurdles for employers is establishing the extent of preexisting impairment under the *Fourth Edition* to the *AMA Guides*. Most prior injuries, if they are more than a few years old, were most likely rated under one of the previous additions to the *Guides*. The courts have ruled such evidence is not persuasive in determining the amount of preexisting impairment. Additionally, prior awards and settlements, wherein an impairment of function was assessed by an administrative law judge is likewise not probative of the claimant's preexisting impairment according to the Workers Compensation Board. So even if an employer is able to track down a prior rating physician or a prior disability determination, and even assuming the physician is still in practice or even alive, providing his testimony regarding the extent of the preexisting impairment is likely not going to carry the respondent's burden of proving the extent

of the preexisting impairment. The only recourse is for the respondent to hire a medical expert to review the previous doctor's ratings and provide an opinion, over the objection of claimant's counsel that the opinion calls for speculation, as to what this doctor would have rated the claimant in some prior year had he examined him and rated him under the *Fourth Edition*. Most credible physicians' medical opinion is speculative and tenuous at best.

Passage of Senate Bill 461 will provide employers with the credit for preexisting conditions intended by the Legislature in the 1993 reforms. Likewise, litigation will be reduced by allowing credit for preexisting conditions in the absence of an actual prior permanent impairment rating, and restores the inequities created by the narrow judicial determination and interpretation of K.S.A. 44-501(c).

B. Work Disability:

1. Current Status of Work Disability Definition:

Under the current statutory scheme, an employee is entitled to the greater of his functional or work disability. Functional impairment, as discussed above, is the percentage of impairment assigned by a physician pursuant to the *AMA Guides to Evaluation of Permanent Impairment, Fourth Edition*. Although the term "work disability" is not found in the Workers Compensation Statute, it is the term used to describe permanent partial general disability as defined in K.S.A. 44-510(e), which provides as follows:

". . . . The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed at any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the

difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury . . . ."

The current definition of work disability was intended to provide a measure of compensation in the situation where the employee has not returned to "comparable wage" defined as 90% of pre-injury wages. There have been several prior definitions of work disability, one of which looked at the percentage of the claimant's job at the time of injury that he could no longer perform as a result of the injuries in question. The current scheme was an apparent attempt by the Legislature to broaden the scope of the inquiry into the ability of the claimant to perform job tasks which he had performed the previous fifteen-year work history. Kansas appears to be unique in its definition of work disability or industrial compensation as some states refer to as.

2. <u>Senate Bill 461 Provides Need of Reform:</u>

Judicial interpretations of work disability have led to several inequities and problems. One of the primary inequities is that the respondent rarely has information regarding the claimant's previous work history. It is very difficult and expensive for respondent to verify the work task performed by an individual claimant over the previous fifteen years. The respondent is essentially at the mercy of the claimant to accurately and honestly identify the jobs he or she has held, and accurately describe the jobs and the job tasks involved. Many claimants are poor historians, and have little to no experience estimating physical exertions needed to perform their jobs. This is compounded by the fact that the claimant must review job tasks performed for fifteen years previously. Many claimants, especially ones in manual labor jobs,

may have had ten to fifteen jobs over the fifteen-year work history, and have difficulty identifying and describing the jobs they perform.

One of the other inequities to be corrected by the passage of Senate Bill 461 involves termination or separation from employment for economic reasons or for cause. Under the current structure, if the claimant is terminated for cause he can file for review and modification of an award and turn a functional impairment into a work disability. Additionally, if the claimant is laid off, along with other workers, for economic reasons during a downturn in the economy, the claimant can file for review and modification of his functional impairment award and receive work disability. While the claimant's termination from employment has no relationship to his work-related injury, he or she will receive a financial windfall as a result of his "changed circumstances" in employment. Additionally, an employee who is laid off can collect unemployment benefits at the same time he is applying for work disability. The ability of the employee to "double dip", receiving both unemployment and work disability benefits, is unfair to both fellow workers as well as the employer. If the employee is laid off or terminated for reasons wholly unrelated to his workers compensation injury, he should not be entitled to a financial windfall at the employer's expense.

In 1993, the Legislature passed many workers compensation reforms. As part of the negotiated compromises between labor and business, a final bill was hammered out which established a balance between labor and business. Judicial interpretation over the years, however, has created several inequities in the system. Passage of Senate Bill 461 would restore balance to the workers compensation system and remedy the inequities created by the courts. For these reasons, Senate Bill 461 should receive favorable passage by this committee.

Respectfully Submitted,

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