Approved: 3-29-06
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 7, 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:
Senator Phil Journey
David Wilson, AARP
Dennis Phillips, Retired fire fighter
Todd King, Wichita
Doug Allen, Johnson County
Dr. Dick Geis
Maxine Catron, Delia
Daniel Paternoster, Trooper, Hiawatha
John Ostrowski, Kansas AFL-CIO
Mike Tryon, Veteran
Kevin Flory, Kansas State Firefighters Association
Terri Roberts, Kansas Coalition for Workplace Safety
Kevin Fry, Volunteer fire fighter, Burlingame
Wil Leiker, Kansas AFL-CIO
Richard Taylor, Wichita Plumbers & Pipe Fitters
Chuck Yunkers, Adjutant, American Legion

Others attending:
See attached list.

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

Senator Phillip B. Journey testified as an opponent to **SB 461.** Senator Journey stated this bill is too vague and it would increase litigation. Workers compensation should be further studied in an interim committee (Attachment 1).

David Wilson, AARP Kansas Executive Council, testified in strong opposition to **SB 461**. The major worry by the group of 45 plus years is "ageism". Sixty seven percent of all respondents said they believed that age discrimination exists in the work place. "Ageism" is exactly what **SB 461** is all about. It is discriminatory to aging workers – to those very workers who would continue to stay on their jobs to support their employers and step up to fill roles where most needed (Attachment 2).

Dennis Phillips, Lobbyist Kansas State Council of Fire Fighters, testified as an opponent to **SB 461**. This bill would have very damaging effects on Kansas Firefighters when it comes to being compensated for their injuries under workers compensation. To change how preexisting conditions are determined as contributing to their injury would be detrimental to the firefighters of Kansas (Attachment 3).

Todd King, attorney, Wichita, testified as an opponent to **SB 461**. Mr. King just wanted to rebut testimony given during a proponent's testimony given on March 6(Attachment 4).

Doug Allen, Spring Hill, testified as an opponent to **SB 461**. Mr. Allen was injured previously and believes this bill would hurt injured Kansas workers (Attachment 5).

Dick Geis, M. D., testified as an opponent to **SB 461.** There is somewhat of a double standard here.

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Physicians would be given great latitude based on personal experience and/or prejudices. Some people would call this "junk science." As a policy for the state, I am not confident that this is what the legislature should mandate. It is believed this would increase litigation because there could be such a wide variance of opinions introduced into the system (Attachment 6).

Maxine Catron, an opponent to **SB 461** testified that she was injured on the job and felt she did not receive a fair settlement or percentage of rating (Attachment 7).

Daniel Paternoster, retired Kansas Highway Patrol, Hiawatha, testified as an opponent to **SB 461**. While performing a traffic stop he slipped on an icy shoulder and wrenched his back. He was diagnosed with a torn disc in his back. The accident caused loss of finances. This bill would only add further destruction to a person's life who has sustained a life altering accident while working on the job as it reduces benefits (Attachment 8).

John M. Ostrowski appeared on behalf of the Kansas AFL-CIO opposing **SB 461**. The effect of every change in this bill would be a benefit reduction for injured workers. In the law which deals with preexisting conditions, there was no mention of the natural aging process, and no discussion of undiagnosed, asymptomatic conditions. The natural aging process language which has been variously referred to was contained in an entirely different section. In workers compensation, the measure of damages is a comparison between the worker preinjury, and the worker post injury relative to the ability to function. This is a vast expansion of what the legislature passed in 1993 (Attachment 9).

Mike Tryon, Blue Rapids, testified opposing **SB 461**. He had been in Iraq serving in the National Guard as a medic and carried a 60 pound bag daily. Under this bill there was concern that if injured on civilian duty, prior wear and tear suffered while in Iraq would be used against him to reduce his benefits. It is believed this bill is discriminatory against veterans (Attachment 10).

Kevin Flory, representing the Kansas State Firefighters Association (KSFFA), testified opposing **SB 461**. The bill reduces or eliminates benefits for firefighters in three ways. By redefining preexisting condition to mean virtually any condition a firefighter may have, including conditions that are not symptomatic, have not been diagnosed and have never limited a firefighter's ability to do his or her job. This definition includes undiagnosed conditions associated with the simple fact of aging, such as degrees of osteoporosis or arthritis. By changing the formula that determines who is eligible for work disability benefits and the amount of compensation a disabled firefighter receives, few would qualify for disability benefits and those who do would receive far lower benefits than under current law. The five year look-back period for task loss does not adequately represent the true skills and tasks a firefighter has acquired over the period of their working life. The current 15 year look-back is appropriate because it is the same standard used by Social Security for purposes of determining transferable skills (Attachment 11).

Terri Roberts, Kansas Coalition for Workplace Safety, testified as a proponent for **SB 461**. Kansas employers pay work comp insurance premiums that are far lower than both the country and regional averages. Insurance companies are profiting in Kansas. Both employers and insurance companies are benefitting from the state's current workers compensation law. The injured workers are suffering under the current laws. This bill would only add to their problems: (1) by redefining "preexisting condition" to reduce or eliminate benefits for a larger share of the workforce and (2) by virtually eliminating work disability benefits for workers who suffer career-ending injuries (Attachment 12).

Kevin Fry, volunteer firefighter, Burlingame, testifying against **SB 461** stated this would make it more difficult to recruit volunteer firefighters. Firefighting can be dangerous and there is potential for injury (Attachment 13).

Wil Leiker, representing Local 307, United Steelworkers of America, testified against **SB 461**. If this bill passes all claims would be challenged by the insured carriers. That means they would hire their attorneys, defense attorneys (who challenge by the minute) and doctors and spend those dollars which should be going to the injured worker. This is simply a benefit reduction bill (Attachment 14).

MINUTES OF THE House Commerce and Labor Committee at 9:00 A.M. on March 7, 2006 in Room 241-N of the Capitol.

Richard Taylor, Business Manager of Plumbers and Pipefitters Local 441, testified as an opponent to **SB 461**. Mr. Taylor felt this bill was unfair to all working men and women of this state regardless of occupation. Military men and women enter into our trades but are concerned if they are injured on the job at some point in the future, there would undoubtedly be some preexisting condition relating to their military service (Attachment 15).

Chuck Yunker, Adjutant, The American Legion, Department of Kansas, testified as an opponent to **SB 461**. The American Legion expressed concern about preexisting conditions. It is believed that provisions alone could and would be used to deny military veterans gainful employment for which they may otherwise be qualified (Attachment 16).

The following written testimony was distributed: John Hornbaker, veteran, (Attachment 17), David Schauner, Kansas National Education Association, (Attachment 18).

The Chairman said that time had run out for today and asked the remaining opponents if they could appear Thursday for continuation of the hearing on **SB 461.** The hearing will be continued on March 9.

The meeting adjourned at 10:57 a.m. The next meeting will be March 8, 2006.

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COMMERCE AND LABOR COMMITTEE

Date March 7, 2006

NAME	AGENCY
Wil Leiker	KS. AFL-CIO
Dennis Phillips	KSCFF
Ed Redmon	KSCFF
Alex Kotoyantz	P. I. A.
John Ostrowski	KS AFL-CIO
Scott Heidner	KSIA
Kevin Flory	KSFFA
Jim DeHoff	KS AFL-CIO
Carol Cast	Dept of Labor
Doug Allen	Worker
Eric Stafford	AGC of KS
[illegible]	
Marline Cathow	
Kevin Fry	Burlingame Fire Dist #6
Greg Bryant	IBEW LU 226
Jim Grunewald	IBEW LU 226
Chuck Conyed	NTEU
Richard Simmons	Kearney & Assoc.
Mike Brink	Ironworkers Lo. 10
Paul Garrett	Carpenters District Council
Roger Mills	Voter
Charles M Yunker	Kansas Am. Legion
Jeff Glendening	KS CHAMBER
Lew Ebert	✓
Duane Simpson	KGFA & KARA

STATE OF KANSAS

SENATOR PHILLIP B. JOURNEY
STATE SENATOR, 26TH DISTRICT
P.O. BOX 471
HAYSVILLE, KS 67060

STATE CAPITOL—221-E
300 S.W. 10TH AVENUE
TOPEKA, KANSAS 66612-1504
(785) 296-7367
E-mail: journey@senate. state.ks.us

TOPEKA

SENATE CHAMBER

COMMITTEE ASSIGNMENTS
MEMBER: SPECIAL CLAIMS AGAINST THE STATE (JOINT), CHAIR .
HEALTH CARE STRATEGIES
JUDICIARY
PUBLIC HEALTH AND WELFARE
TRANSPORTATION

CORRECTIONS AND JUVENILE JUSTICE OVERSIGHT (JOINT)

SOUTH CENTRAL DELEGATION, CHAIR

Testimony Before the Kansas House of Representatives
Commerce and Labor Committee
On March 7th, 2006, in Opposition to Senate Bill #461

Thank you Mr. Chairman, members of the Committee in allowing me the opportunity to discuss this very important piece of legislation. I'm sure by the end of today's hearings you will be as perplexed as many were on the Senate floor regarding the claims of the proponents and opponents to Senate Bill #461. Many of the claims made by individuals on both sides are what some might see as mutually exclusive. Some started pointing fingers and calling opponents liars, not the best for a deliberative process. How can both be true when they are so different? I believe the two radically different interpretations of Senate Bill #461 comes directly from the overly vague drafting of the legislation.

The two main operative sections of Senate Bill #461 in my humble opinion need further revision and clarification so that the effect of this legislation can be reliably determined should it be enacted. I had proposed two amendments on the Senate floor which did not gain sufficient votes to be put on the bill dealing with the main operative sections of Senate Bill #461.

Senate Bill #461 amends K.S.A. 44-510 e and 2005 Supplement of K.S.A. 44-501. In Section 1 of Senate Bill #461 at Line 39 beginning with Section 2, the consideration of the topic of preexisting condition requiring proof by the opinion of a physician. It fails to make the normal and rational standard of a foundational issue of the quality of testimony by a physician a prerequisite. The circumstances under which preexisting conditions which are undiagnosed and asymptomatic prior to the work-related injury. The reduction of the benefit being determined based on the opinion of a physician without the requirement of accepted foundation in science would create unjust applications particularly in cases of those most seriously injured. Injuries that end the ability to work for life such as herniated disks, are normally the accumulation of prior injuries and the straw that breaks the camels back is when the disk finally herniates. The fact that this section does not even require a normal legal foundational issue that the doctor's opinion be "based on ordinary standards of medical practice" could lead to admission into evidence before the administrative law judge or subsequent court review opinions of physicians not based on accepted medical practice or a competent medical opinion but simply the opinion of a doctor paid for by one party or the other. While some would argue that normal rules of evidence would require this prerequisite as a foundational question prior before admission of a physician's opinion in evidence, the legislative history of denying this simple amendment on the floor of the Senate could lead interpreters of our intent to other conclusions. I would urge that the Committee in the alternative to striking this section or not recommending this bill out so that it may be

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studied in the interim and clarified on this and other points that I will get to later. At least this basic amendment should be adopted so that foundational questions are not to be argued about during testimony of cases affected by this legislation. In the past I have advocated prorating these types of injuries over the employment history of the injured.

The other section I attempted to amend which I certainly would have preferred to have removed completely begins on Page 5 at Line 40 in the version of the bill as amended by the Senate Committee which states, "in the event of separation from employment for economic reasons for cause or voluntarily, the employee shall not be entitled to receive general disability compensation in excess of the percentage of functional impairment." On the floor of the Kansas Senate, I tried to remove the phrase "for economic reasons" as an amendment although I believe the inherent unfairness of this provision should cause the entire section to be stricken. This section is the opposite to current policy to encourage employment of the injured. Of all of the phrases in the section of the bill dealing with separation from employment, the reasons for termination that would prohibit the injured worker from receiving general disability compensation is termination "for economic reasons."

I believe that this section is lacking an appropriate definition of what are economic reasons. It would justify termination of an employee so that they would not receive these economic disability benefits. "For economic reasons" could mean any number of things while the proponents of the legislation on the floor of the Senate continued to describe it as exclusively an economic downturn. Had that been their intent, it should be drafted as such. I do not believe that phrase is limited to that scenario. Interpretation of "for economic reasons" is impossible in the current context without a definition. On a number of occasions, the Kansas Appellate Courts have established a standard of vagueness that would make statutes unconstitutional in both civil and criminal context. For example, in the Kansas Appellate Court case, In Re J.A.B. at 31 Kan. App 2nd, 1017, the court stated that statute was not void if it employees words judicially defined. No where in appellate cases was I successful in finding a judicial definition of "for economic reasons" searching all cases on the databases I have available. These databases include Kansas Supreme Court and Kansas Appellate cases. In City of Wichita V. Sunith at 31 Kan. App 2nd, 837, the court required that the law give fair warning to those subject to it, and that the law guards against arbitrary and discriminatory enforcement. This section of the proposed bill in lacking this definition and in the broad and general nature of possible meanings would clearly lead to arbitrary and discriminatory enforcement based upon which employers would seek justification for retaliatory termination based on "economic reasons". In the case State v Martis at 277 Kan. 267 required that statutes have "a well settled meaning in the law." There is no similar statutory provision or definition anywhere else in Kansas law that I am aware of for this phrase. In City of Wichita V. Hackett at 275 Kan. 848, the test for vagueness was whether a person of ordinary intelligence would be mislead upon reading it. Rather in State V. Seck at 274 Kan.274, leave a person guessing as to its scope and application lacking clarity and precision. There clearly is no precision in this proposed section of statutory changes. "For economic reasons" could be something as general as the stock market took a 10-point dive today, so I can't afford to maintain your employment. It could be something as direct as, well, we lost a valuable client today and since you filed a claim, you're odd man out.

The other default in this section is, or course, the termination for cause does not require good faith. Or, that a voluntary termination was not precipitated by a harassing or hostile work environment. I believe this bill is constitutionally doomed upon court review in its current form. My suggestion would be that the Committee not pass the bill out and that it be requested for interim study so that further clarification of the issues involved in this legislation could be reviewed in a more deliberative process than is available during the legislative session. Thank you very much for the Committee's time and consideration. I stand for questions.

Respectfully submitted,

Senator Phillip B. Journey
26th District

March 7, 2006
Representative Dahl, Chair
House Commerce and Labor Committee
SB 461

Good morning Chairman Dahl and Members of the House Commerce and Labor Committee. My name is David Wilson and I am a member of the AARP Kansas Executive Council. AARP Kansas represents the views of more than 350,000 AARP members in the state of Kansas. Thank you for this opportunity to express comments and strong opposition to SB 461 which changes per-existing conditions and work disability.

More than forty five percent of our 35 million AARP members nationwide work full or part time. In Kansas that equates to approximately 157,500 members. That number will increase as the workforce grows older. In a 2005 survey, "AARP's State Profiles of Workers 45 +" Kansas ranks number 10 for employment of workers 45 plus years of age. A statistic that Kansas should be proud of.

By 2010 there will be a serious labor shortage as baby boomers begin to retire and fewer younger workers are available because of slow population growth between 1985 and 1996. Unless we can keep older, productive people working, labor tightness will slow down the economy.

Our research tells us that older workers will continue to have a prominent and increasing role in the labor force in coming decades. They will step up and fill those vacancies that are most likely to need workers.

In today's competitive global market, can employers afford to ignore this demographic as a viable solution to labor force needs? Sixty nine percent of boomers surveyed in a recent AARP study indicated their plans to remain in the workforce past traditional retirement age – perhaps into their 70s or 80s. The modern work environment has transformed requiring more "brain" power than "brawn" power. This makes remaining in the workforce longer a more realistic proposition and good news for employers who will need to keep them. Given the many productive advantages of 50+ workers, they are more cost-effective than many employers suspect and a viable solution.

In a 2003 study by AARP, "Staying Ahead of the Curve-The AARP Work and Career Study", the top 3 reasons listed that kept workers who were 45 plus years of age on the job were the need for money, enjoyment of working and the need to be productive. The survey also showed that loyalty to employers was very strong. The average worker 45 plus had been with his/her employer 15.5 years and seventy eight percent said that they will remain until they retire. The major worry by this group was ageism. Sixty seven percent of all respondents said that they believe that age discrimination exists in the work place today.

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | 785-232-4070 | 785-232-8259 fax
Marie Smith, President | William D. Novelli, Executive Director and CEO | www.aarp.org

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Ageism is exactly what SB 461 is about. It is discriminatory to aging workers – to those very workers who will continue to stay on their jobs to support their employers and step up to fill roles where most needed.

Extensive research has found no relationship between age and job performance. Americans age 55 and above take fewer sick days, adapt to new technologies successfully, and are more loyal to their employer than those in their 30s.

As part of our national employment policy, AARP is strongly committed to expanding employment opportunities and promoting job security and benefits for workers of all ages. AARP Foundation Legal Advocacy is one of the few national organizations that defends and expands the rights of older Americans across the nation. It focuses on widespread practice or policies of industry, business, or government that are unfavorable to Americans over 50 and addresses legal issues that affect the daily lives of older persons, age and discrimination in employment; pensions and other retiree benefits.

We believe that policies should help both workers and employers. They should provide employers with access to a skilled and dedicated workforce in the future. They should enable our members and all workers to maintain themselves and their families at a decent standard of living, enhance individual dignity, and help shore up economic activity throughout society. They should not treat older workers as a disposable commodity.

Therefore, AARP strongly opposes SB 461. Workers who suffer an occupational injury or illness should be eligible for unreduced workers' compensation regardless of age. Such a change would have a seriously harmful impact on older workers in particular, but workers of any age could find their financial/legal remedies reduced under the proposed definition of pre-existing conditions.

AARP believes that there is no worker compensation crisis in Kansas. Weekly benefits for injured workers in Kansas are among the lowest in the nation and the lowest in the surrounding five-state region. Business decisions about whether to locate in Kansas are definitely not going to hinge on the cost of a program that is among the country's worst.

Thank you for this opportunity to present our comments and strong opposition to SB 461 and the changes it makes to both preexisting condition requirements and work disability.

Therefore, we respectfully request that you oppose SB 461. Thank you.

"PROGRESS THROUGH UNITY"

KANSAS STATE COUNCIL OF FIRE FIGHTERS

Affiliated With

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS • KANSAS AFL-CIO • CENTRAL LABOR BODIES

Chairman Dahl and Members of the Commerce and Labor Committee

The Kansas State Council of Firefighters oppose S.B. 461. This bill would have very damaging effects on Kansas Firefighters when it comes to being compensated for their injuries under work comp.

The work firefighters are asked to perform is done under the most difficult of conditions. These conditions can range from temperatures of below zero of upward to several hundred degrees inside a structure fire. Their visibility when fighting a fire can range from poor at best to none. While doing this they will have to wear up to 70lbs of safety gear and equipment.

Working under these conditions firefighters have suffered many injuries over the years that are never reported but may lead to a more serious injury. Under S.B. 461, this could be held against them as a preexisting condition that has been caused by their work.

To change how preexisting conditions are determined to contribute to their injury would be detrimental to the Firefighters of Kansas. To have a persons age or what their occupation has done to their body over years of service to their community should not be held against them.

The Kansas State Council of Fire Fighters would ask you to oppose this bill and work toward improving the worker comp benefits for Kansans, for we have some of the lowest benefits in the United States.

Thank you for this opportunity to address our concerns about this bill.

Respectfully yours

Dennis Phillips

Dennis Phillips, Lobbyist Kansas State Council of Fire Fighters

Hearing for Senate Bill No. 461
Committee on Commerce
Tuesday, March 7th, 2006
Opponent Testimony
By R. Todd King

Dear Members of the Committee, my name is Todd King. I am an attorney in Wichita, Kansas. For the past nine years I have practiced almost exclusively in the area of workers compensation, having represented both Respondents and Claimants. It is my honest belief, having represented both parties under workers compensation law, that the Respondent has the legislative advantage as the law currently stands. The rights of the injured worker have eroded consistently since the inception of the Kansas Workers Compensation Act and the original bargained-for benefits are no longer available to the workers as they were originally intended.

I am here to offer rebuttal testimony against the statements of Ms. Kari Clark, who testified recently, providing antidotal evidence in support of Senate Bill No. 461. I don't know Ms. Clark. To my knowledge we have never met. I will not suggest or imply that Ms. Clark is crazy, drug addicted or a person of poor personal character, as she did my client. However, I must openly and emphatically challenge Ms. Clark's statement and her motivation.

If Ms. Clark intended to provide this Committee her personal opinion, she did so with hurtful, derogatory statements about a worker that she obviously doesn't like, with whom she has an ax to grind and with subjective foundation. So be it. If Ms. Clark intended to provide this Committee with relevant factual evidence, she failed you and the constituents you represent. Ms. Clark's testimony was false on key points presented to this Committee, either by having been misinformed herself, or in an overt attempt to misinform the Committee. This Committee should not rely upon a false, or grossly exaggerated isolated antidotal example from a misinformed witness. I am the attorney handling the case cited by Ms. Clark and am here to set the record straight.

When I learned of and was informed by client of the statements being made about her, she wanted nothing more that to be here to defend herself from false accusation and misrepresentation that cast doubt on her credibility and character. She has had two back surgeries and remains restricted under active pain management. There are a number of other activities of daily life that we all take for granted, that she is unable perform. She cannot take care of her home and she cannot play with her kids. When required to be mobile for longer periods of time, she must use a wheelchair. This lady is in the prime of her life and held a job that she enjoyed. To suggest that she would "fake" a claim and seek out prolonged litigation to obtain two unnecessary invasive back surgeries, submit herself to reduced ambulation, a lifetime of pain management, the stigma of "disability" and, as she is currently, sit at home without wages, or work comp benefits, all for the sake of taking a shot at Wichita Surgery Specialists, or to get a few lortab tablets, is ridiculous and insulting.

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I intend on addressing Ms. Clark's comments and showing the Committee, that the facts were presented and with flawed, but with strategic intent.

Senate Bill No. 461 intends to address a problem that does not exist. The current status and application of the law is rather simple and equitable on the issue of pre-existing injuries and conditions. I will attempt very briefly to educate the Committee by explaining that the law does recognize that pre-existing conditions that become aggravated or exacerbated by work accidents or activities are compensable. A temporary aggravation entitles the worker to temporary benefits of treatment and in some cases temporary off work benefits. A permanent aggravation may entitle the worker to benefits for permanent disability.

The Current Law of Pre-Existing Injuries

The logic behind recognizing the compensability of work induced aggravations is sound. Envision a worker with a prior injury who, after treatment, has achieved a level of health sufficient for returned to the workforce. Thereafter they suffer an injury in the workplace that changes the level of health previously attained, requires treatment and in this hypothetical, permanently changes their condition. The current law recognizes that the work injury has changed the worker from a pre-accident condition to a post-accident condition and attempts to provide benefits for this unfortunate event to protect the worker's interest. The current statute provides the perfect protection for the Respondent employer in this scenario by providing an apportionment of the workers overall post-accident condition relative to the pre-existing condition, based on a common standard.

The statute requires that the injured worker's impairment of function be expressed pursuant to the *Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment.* The intent of the statute's mandated use of these guidelines is evident. Impairment opinions should not be stated without some common standard among medical experts. If our hypothetical worker had a bulging disc in the past and returns to the labor market in a workable state and thereafter herniates his disc in a work accident requiring surgery and work restrictions, the aggravation is evident. As an example, if the worker receives a 25% impairment following his recovery from a spinal fusion, consideration of apportionment of his total impairment would be warranted. The current law would contemplate that medical experts consider how much of the total impairment existed prior to the aggravating work event, again attempting to identify that condition through medical records, history and work restrictions, under the *Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment.* If the Administrative Law Judge determines from the various opinions, a 10% prior impairment, the statute grants the employer a credit or set-off from the total impairment, appropriately leaving them responsible for the 15% increased disability caused by the aggravating event. The employer's liability for compensation is accordingly apportioned.

The current status of the law grants both parties equal opportunity to define the extent of pre-existing impairment, using the same standard under the *AMA Guides*, and grants both

parties equal access to present that evidence to the Administrative Law Judge for determination. For this system to remain equitable, it is imperative that the mandated use of the *AMA Guides* for rating purposes be utilized in any claim for set-off.

Rebuttal to Ms. Clark's Antidotal Testimony

The case of which Ms. Clark spoke is a case currently pending before the Administrative Law Judge, in which I represent the injured worker. I agree with Ms. Clark on only one point: the case does present to the Committee one sample of a case involving pre-existing injury. Otherwise, Ms. Clark's testimony is false and exaggerated, perhaps due to gross misinformation, or perhaps due to her employer's apparent frustration in being responsible at all for a claim they still openly dispute. Ms. Clark's testimony amounts to a complaint that they should not have lost the hearing that addressed the compensability issue and very little on the issue of how the statute handles pre-existing injuries as the apportionment issue has not yet been addressed in the case. This Committee should not and cannot contemplate legislative changes that will impact thousands of injured workers based on isolated cases giving rise to "sour grapes" from an employer that did not like the ruling from the court. Respectfully, the employer could not have overcome the evidence in the case.

Ms. Clark states that the employer was prohibited by law from asking the worker of any pre-existing injuries or conditions at the time of hire. Upon a review of the job description, the worker believed she was capable of performing the work and she was hired. The rights of both the worker and the employer are protected on this issue under the Americans with Disability Act and the Kansas Act Against Discrimination. Ms. Clark and her employer had opportunities, rights and options under these statutes to make "conditional offers of employment" and to inquire into pre-existing disabilities after hiring, without suffering any liability. The employer's argument that it is unfair that they hired a worker with a prior back injury is irrelevant to the issue before this Committee.

Before this matter ever went to Preliminary Hearing, the injured worker gave notice of injuries, asked for medical treatment and advised Wichita Surgical Specialist, that she was beginning treatment, giving them doctors notes periodically. The only reason she sought counsel to file a workers compensation claim was because her employer was not responding to her requests for treatment.

To establish an entitlement to benefits, the worker must show that the injury or aggravation at issue arose out of and in the course of employment with the employer. The worker in the case that is the subject of the discussion admitted to a pre-existing back injury, both during her employment when she complained to her supervisor of increased symptoms and during opening statements at the first Preliminary Hearing. At the Preliminary Hearing, the injured worker was requesting medical treatment under the workers compensation laws for her aggravation of a pre-existing condition. Notice of this pending hearing was mailed to the employer, to its insurance carrier and to the employer's attorney. There can be no dispute that the employer was aware of this

hearing, as their attorney entered his appearance to defend the case after it was filed and prior to the hearing date. Between the filing date and the hearing date, my client waited patiently, but desperately in need of additional medical treatment.

Ms. Clark claims that the employer did not have an opportunity to "tell their story" or appear at the hearing. The employer in a worker's compensation claim has the statutory right to appear at and present evidence at a preliminary hearing. The Preliminary Hearing transcript of September 30th, 2004 confirms that the employer was present both through their attorney and through their own witness that testified on their behalf. Neither Ms. Clark, nor the employer, were denied their day in court nor their opportunity to challenge this case. The testimony that would suggest to this Committee that the respondent or employer does not have equal access to the court, or that they were in some way ambushed with the claim is blatantly false. I can assume that the attorney representing the employer may have told Ms. Clark that her testimony was not necessary, or that in light of the mountain of evidence against them, it would not have mattered. In any event it is unlikely that her attorney told her she could not appear and testify. At the Preliminary Hearing, the attorney for Wichita Surgical Specialist in fact asserted defenses, denying that the workers current condition was related to work activities and denying that the worker had, as Ms. Clark suggested, ever failed to give notice of her ongoing aggravation.

The injured worker volunteered the fact that she had a pre-existing injury and testified as to the repeated conversations that she had with her supervisor regarding the work activities that were worsening her back condition. We offered medical records as Exhibits to the hearing, containing medical opinions from independent experts – not hired by me or my office - confirming that her back condition was getting worse due to work activities. The medical records confirmed that the worker's pre-existing bulging disc had been unchanged for years prior to her employment at Wichita Surgical Specialists, but after prolonged work activity there, had herniated and was leaking fluid, as confirmed by objective image testing when compared to older tests.

The employers own witness at the hearing, the workers own immediate supervisor, admitted to conversations in which the worker complained of increased back problems due to work activities and in fact admitted not only that the employer knew about it, but had undertaken to modify the work environment to minimize the worker's injury. Ms. Clark's testimony to this Committee is flatly inconsistent with her employer's own court room testimony.

Contrary to Ms. Clark's assertions that the employer had no opportunity to state their case, or that the injury was not related, the record is clear that their attorney and their own witness were present and attempted to defend the case, but were simply overwhelmed by a mountain of clearly convincing evidence, that the worker was being injured at work and had notified the employer properly. It would seem Ms. Clark is misinformed of these events, or is attempting to misinform this Committee of these events.

After a hearing in which each side had the opportunity to present its evidence, the Administrative Law Judge ruled in the worker's favor and granted her medical treatment under the Act and granted workers compensation benefits while on off work status. The insurance carrier for the employer has been fighting this case on every issue since, challenging her need for treatment and ongoing entitlement to benefits under the continued theory that they didn't cause this injury. Medical evidence says otherwise and the employer hasn't obtained any medical opinion to the contrary.

Ms. Clark complains that the injured worker has been treated too long and is not getting better. Perhaps the Committee should be aware of the extent of the workers injury and the treatment she has suffered. In technical terms she had a "lumbar l4 to S1 (bilevel) laminectomy for decompression with lumbar L4-S1 posterolateral fusion using local autograft bone and allograft bone with lumbar L4-S1 pedicle screw fixation." This surgery was later deemed unsuccessful – a painful failed fusion - after aggressive physical therapy increased her symptoms. Six months after the first surgery, the worker was subjected to a second more aggressive surgery: "anterior lumbar interbody fusion, L4-5 and L5-S1 (bilevel) with LT cage implantation, and L4-5, L5-S1 fusion using BMP for failed L4 to S1 fusion." This worker essentially has gone through two invasive surgeries, one from the front and one from the back and has had bone, rods, wire, screws and cage hardware installed in her spine. Understandable her recovery has been slow. This worker was released from the surgeon's care with recommendations for permanent work restrictions and limitations. She was referred by the surgeon to pain management to manage her future medications.

It is anticipated that she will need medication indefinitely. The authorized surgeon is currently recommending that a pain pump be surgically installed in her body to administer medications. The employer has been frustrated by this ongoing maintenance and has made several accusations regarding the worker's compliance, however contrary to Ms. Clark implication that they remain at the whims of my client's "non-compliance", the issue was properly submitted to the Administrative Law Judge at a second Preliminary Hearing. Because of her past history for which she had visited with a psychologist about personal issues as a younger woman, Ms. Clark attempts to suggest to this Committee that my client is a drug seeking, drug abusing malcontent with alternative motives. In truth, the basis for "non-compliance" was based upon a urine analysis that suggested that she did not have enough medication in her system. From this the case nurse manager concluded, without evidence, that she must be selling her medications. The pain management doctor did not refuse to see the injured worker, but was advised that no further medication would be authorized by the insurance company. The issue was taken to another Preliminary Hearing to be hashed out by the Administrative Law Judge.

At the second Preliminary Hearing, my client advised the Court that she had not sold medication or even discontinued her medications, explaining that she would periodically taper off of her medications to avoid a dependency issue and also, so that at the time of examination, she could present in her actual condition, not in a presentation masked by the effects of pain killers. After listening to the facts and the arguments from both attorneys, the Judge determined that there was insufficient evidence to establish non-

compliance and continued medical maintenance was ordered. Contrary to Ms. Clark's statements, non-compliance was raised and was addressed by the Court. The employer's allegations lacked evidence and were dismissed. The injured worker continues her pain management at this time and the employer has made no further overtures of misconduct. Ms. Clark's statement is grossly exaggerated in an apparent attempt to sway this Committee.

Ms. Clark stated to this Committee that my client continues to treat and continues to receive workers compensation benefits. This statement is partially true at best. The insurance carrier as of yet and refused to authorized the pain medication pump recommended by the Court Ordered and authorized treating surgeon and pain management doctor, so ongoing "treatment" is pending another Preliminary Hearing for authorization.

Regarding the claim that my client still receives workers compensation benefits, Ms. Clark's statements are false and offered again only to exaggerate the case and seek sympathy from this Committee. When my client was released from active care to pain management in October of 2005, and given her final rating and restrictions, her entitlement to temporary workers compensation benefits ceased. The Respondent has not paid a worker's compensation check in five months. It is actually the injured worker that deserves understanding and sympathy, as she cannot receive temporary benefits after receiving her rating, but cannot receive any further payment until the matter is resolved by the Judge, or a settlement is reached. She is several months away from resolving this case and in the meantime has no income. She cannot seek work elsewhere until it is determined whether she can return to Wichita Surgical Specialists and she cannot apply for social security benefits until it is determined whether or not she is medically employable. This is the time period some Respondents will exploit and starve the injured worker into a modest settlement. For a single mother, injured with work restrictions and under active pain management, lost income is not something she would voluntarily undertake to "maximize her case." This is person who would rather be healthy, work, generate income and play with her kids.

We can only now address the apportionment issue. Of the impairment ratings offered representing her injury, the doctor's have not yet testified or written opinions regarding apportionment or off-set for pre-existing injury. Ms. Clark's complaint regarding the existing apportionment statute and her support for amendment is not even implicated in the case sample at hand.

Ms. Clark's testimony suggests to this Committee that the employer is without protection under the statute and that the antidotal case represents an example of the employer being railroaded by a statute that fails to provide remedy for the employer in cases involving pre-existing injuries. Ms. Clark and the Wichita Surgical Specialist chose poorly, in using this case as a sample for this Committee. Ms. Clark's testimony is undeniably erroneous, if not deceitful, on almost all facts and otherwise entirely irrelevant on the issues at hand. The medical evidence from the doctors and live testimony from both parties confirmed that the injured worker was working without difficulty at the time of

hire, with a bulging disc causing only periodic isolated back pain, for which no additional treatment was needed. The employer's own witness admitted that in the later part of her two year employment, the worker complained of work activities causing radiating pain down her legs. Medical records confirm that the disc, previously stable, had herniated because of work activity and was leaking fluid, which in turn ultimately lead to two invasive surgeries to the spine. The case at hand in fact is the perfect example of the kind of case in which the employer should be responsible for treatment.

SENATE BILL NO. 461 SHOULD NOT PASS. The bills would afford the respondent the opportunity to avoid liability on cases in which they aggravated a pre-existing condition. Senate Bill No. 461 could preclude injured workers, like the young lady in the case discussed, from getting treatment. Without the appropriate recognition of aggravation of pre-existing conditions, personal health insurance, if the worker even has health insurance, would increase. More workers that lose their jobs would resort to State or Federal funded programs, or fall through the cracks entirely. When the employer changes the workers condition requiring medical treatment, note previously required, it properly implicates the Act as it is currently written and as it should remain on any reasonable, ethical and moral grounds. Apportionment of ratings under the current statute requires a comparative of conditions under a common standard of the *AMA Guides*. There is no reasonable argument to support deviating from this common guideline.

TESTIMONY TO HOUSE COMMITTEE ON COMMERCE AND LABOR
RE: SB 461
March 7, 2006

Good Morning. My name is Doug Allen. I live in Spring Hill, Kansas. I am a workers' compensation victim. I am an injured worker and not an employer. I am here today to discuss my concerns with SB 461. I have reviewed SB 461 and as someone who has been through the Kansas workers compensation system, I want you to understand that this bill will hurt injured Kansas workers.

Like many other workers' compensation claimants, I live and work in Kansas. I have a family which I am raising in Kansas. My daughter goes to school in Kansas and my family goes to church in Kansas. I pay taxes in Kansas. I always assumed that if injured on the job, the laws in Kansas would protect me and my family. Then I was injured on the job and learned how a work related injury could affect me and my family.

I injured my shoulder, low back and both knees in accidents which occurred in the fall of 2004 and May 2005. My employer did not notify its workers' compensation insurance company in a timely manner but, rather, told me to go to a doctor if I absolutely needed to and charge it to my health insurance. I went to a doctor who performed surgery on one of my knees. The result has not been very good but I was supposed to have surgery on the opposite knee. Authorization has been withheld.

Although my employer finally notified its' workers' compensation insurance company of my claim eventually and medical care was provided for my back and shoulder, medical care was refused for my lower extremities. In order to obtain any relief I was forced to retain the services of an attorney. I never thought I would be forced to take this step. We have fought for treatment for over seven (7) months. I have been unable to work since May 30, 2005 and was terminated by my employer on June 17, 2005 because I could no longer do my job. I have received no compensation.

I have been to two (2) hearings. Despite having an Order for medical care, the insurance carrier has refused to provide it even though I have won both hearings ordering them to provide medical treatment. There is no penalty in the workers' compensation law if the employer/insurance carrier fails or refuses to provide medical care they have been ordered to provide. The administrative law judge said I can go to any doctor I want and the insurance company must pay and I've found an orthopedic surgeon that will review my case. The insurance company has paid for a visit to the orthopedic surgeon and for the MRIs ordered by the orthopedic surgeon, but they are now refusing to pay for the care the doctor ordered as a result of the visit and the MRIs.

My salary prior to these injuries was over $82,000.00 per year. I had fringe benefits which made my salary worth more than $100,000.00 per year. I have been unable to work, generate any income from farm work or obtain another job due to these injuries. Even if I had been receiving the maximum workers' compensation benefits for this entire time I would have received less than $13,500.00 or approximately twenty-eight percent (28%) of my normal earnings during that period. I have lost my fringe benefits such as vehicle expenses, 401k retirement and employer paid health insurance. I now pay about $800.00 monthly.

I was a management employee. I may be more fortunate than many others. I had many employees who worked for me who made only $12-$15/hr. With wages between $480 to $600/wk., if they were paid temporary total disability, they would only receive $320 to $400/wk. Could you or your family live on that? Those same employees, if they had to go through what my family and I have been through, would have lost everything they had and would be far in debt with no hope of ever recovering. If the disability was permanent and bad enough, they would have no future nor would their families. These people do not want to become wards of the state.

SB 461 is not about fairness to working Kansans. Instead, it will permit employers and insurance companies to delay or deny legitimate work related injury claims by asserting that part of the worker's injury is a "preexisting condition". SB 461 hits older workers

hardest because they have conditions that are the natural result of aging but may not be diagnosed, not symptomatic, and do not in any way interfere with the worker's job performance or everyday life activities. I believe that currently employers already try to push the envelope in asserting that an injury is a "preexisting condition". In my case, even though both my ex-employer and the insurance adjuster performed a full investigation and discovered my accidents were legitimate and compensatory, the workers compensation physician that I was sent to stated that my knee injuries were pre-existing before he even took x-rays and looked at my reports. And both my ex-employer and the insurance adjuster told me that work comp would not cover my injuries because I am just getting "old and decrepit". SB 461 will encourage this practice even more, and I believe will foreclose a lot of legitimate claims just because the injured worker is older and may have "age related" degeneration.

SB 461 also hurts workers who depend on work disability by permitting work disability payments to be cut if the employer can claim the injured worker was fired due to "economic reasons". SB 461 just gives employers more ways to avoid paying legitimate claims instead of strengthening the laws in favor of injured workers.

I have testified in opposition to SB 461 in the Senate and have learned a lot about the political process since I've become involved. After speaking with many legislators I believe that this issue is fueled by politics instead of good public policy. I ask you to look beyond the political issues. Workers compensation claimants are not malingerers and it is a myth that employers are now paying for claims related to the aging process. Please do not allow the interest of the businesses and the insurance companies to mislead you to believe that their profits or cost are more important than the health and welfare of the people who entrusted their votes to you. Kansas injured workers are not just Republicans and Democrats but members of our families and our friends and neighbors. We should not treat our friends and neighbors this way.

I ask you to vote no on SB 461.

TESTIMONY REGARDING SB 461
HOUSE COMMERCE & LABOR COMMITTEE
MARCH 7, 2006
DICK GEIS, M.D.

Chairman Dahl and Members of the Committee:

My name is Dick Geis, M.D. I am a graduate of the University of Kansas School of Medicine. I am Board Certified by the American Board of Internal Medicine, American Board of Emergency Medicine, American Board of Preventative Medicine, and the American Board of Independent Medical Examiners. From 1988 through 2002, I was the Medical Director of Midwest Occupational Health Services, Medical Director of the Kansas Rehabilitation Hospital, Chronic Pain Management Program, and Functional Rehabilitation Program. From May of 2002 through the present I am engaged in private practice in the occupational medicine field, and providing independent medical evaluations at the requests of Administrative Law Judges, injured workers, and employers in the State of Kansas. By way of further background, I would point out that I have a great deal of experience in workers compensation. I have evaluated many claimants, I also have worked for multiple rehabilitation positions, and I have testified on behalf of employers.

It is important to understand that from a doctor's perspective, i.e. from a medical perspective, I am interested in impairment of function. Everything in workers compensation, again from the medical perspective, deals with impairment, and how the body has been affected by any on-the-job injury.

In this regard, physicians attempt to use objective measures. For example, we utilize functional capacity evaluations or FCEs, in an attempt to measure what the body can or cannot do after an injury. Similarly, we utilize the *AMA Guides*. I am not here to tell you that the *AMA Guides* are perfect, but it is at least an attempt by the medical society to be consistent from doctor to doctor.

In other words, a doctor should not give one injured worker an 80% impairment of function because that person happens to be a relative; and another doctor give a 2% impairment of function because that doctor simply does not like the person. I repeat, as doctors within this system, we are interested in impairment of function. We seek objective, standardized information and testing.

I have looked at SB 461. It is clear that there is no change in the law which indicates that a claimant, the injured worker, must show that he has an impairment of function by the *AMA Guides*. In fact, the law itself defines functional impairment to be within the 4th Edition of the *AMA Guides*. Again, I am not representing to you that the *Guides* are a perfect world, but at least it is an attempt at a uniform application from physician to physician.

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In looking at the proposed changes presented by SB 461, it is clear that the intent of the proposed changes is to specifically remove the *AMA Guides* when it addresses preexisting conditions. The proposed law says that a condition "whether or not ratable" can be used to lower benefits. By that language, the *AMA Guides* are no longer a part of the formula. It will purely be the physician's opinion as to how much a condition contributed to an impairment or disability. There will be no objective standard as to how a physician measures this, and no requirement that any uniform standard be applied. It is important to understand that the *AMA Guides* do have a methodology for determining preexisting impairments, and those of us involved in workers compensation currently use the *AMA Guides* to make that determination.

In my opinion, there is somewhat of a "double standard" here. As a physician, I will be given great latitude based on my personal experiences and/or prejudices. Some people would call this "junk science." As a policy for the state, I am not confident that this is what the legislature should mandate. Furthermore, I would think that this would increase litigation because there can be such a wide variance of opinions introduced into the system.

Finally, I would point out that there is a substantial difference between a "condition" in the body, and a "functional impairment." Generally, in workers compensation, we are concerned with a person's ability to work, or ability to function. As medical experts, we are called upon to try to measure how the injury impacts the ability to function. Stated alternatively, an individual can have multiple, multiple medical conditions which do not impact their world of work until they suffer an injury. Again, looking at the *AMA Guides*, the mere existence of a condition does not mean someone has an impairment. That is why the current state of the law is consistent in its application to injured workers.

Testimony of Maxine Catron
House Commerce & Labor Committee
SB 461
March 7, 2006

My name is Maxine Catron and I am 69 years old.

I have lived in Kansas my entire life.

I injured my right shoulder in 1997 while working for United Methodist Homes.

I was treated and released with no permanent work restrictions, and received approximately a $5,000.00 settlement. I received an impairment rating of 17% to the shoulder.

I went back to work at United Methodist Homes and worked there until the facility was closed. At that time I decided to go to work at Harrah's casino to work in housekeeping. On December 12, 2003, I suffered a new injury to my right shoulder, which was diagnosed as a tear of my rotator cuff.

After treatment, I was given permanent work restrictions by my doctors. The only work Harrah's was able to give me was work outside of my restrictions. I repeatedly asked for an accomodation to be able to do work within my permanent restrictions. Harrah's denied my requests and I was subsequently terminated.

The doctor I saw for this injury gave me an 18% rating.

The Administrative Law Judge and Appeals Board granted me a settlement of $661.26 for my new injury.

I have been told that there are people claiming that the administrative law judges do not give employers credit for pre-existing conditions and ratings.

I believe that my case demonstrates that this is not true in that I suffered a new injury for which I lost my job, and have been unable to find work since. My employer (Harrah's) was credited for the pre-existing 17% rating and I received my $661.26 for the new injury.

Luckily my lawyer waived his fees and expenses so at least I would get something for my new injury, though not much.

I really loved my job at Harrah's. It made me feel young, allowed me to interact with people on a daily basis, and that really means a whole lot to a 69 year old lady who lives alone.

I ask you to oppose any changes which negatively affect injured workers such as myself.

Thank you,

Maxine Catron

TESTIMONY BEFORE THE HOUSE COMMERCE COMMITTEE
TUESDAY, MARCH 7, 2006

Dear Chairman Dahl and Members of the Committee:

Thank you for allowing me to appear today in opposition to Senate Bill 461.

During the past 19 years I have been proudly serving the citizens of the great State of Kansas while working for the Kansas Highway Patrol. Previously I served 5 years in the Air Force. It has been a major part of my family's lives for very long time. We all must make adjustments throughout our lives. But the accident that occurred to me while performing my duties for the Kansas Highway Patrol on December 5, 2005, has caused one of the biggest adjustments in my entire life. While performing a traffic stop, I slipped on the icy shoulder and wrenched my back. After seeing several doctors, I was diagnosed with a torn disc in my back.

The accident has caused the loss of finances and placed emotional and physical challenges on my entire family. This type of debilitating injury has a major affect on your family's lives. They must endure your loses also. In my case it could change the future dreams of my daughter and two sons that I still have at home. It saddens me to think about the times that my family has had to watch me curled up in bed, trying my best to deal with the various pains associated with my work injury.

My career and life have changed forever due to the work accident. Due to the injury to my back, I have been forced to deal with major right leg and foot numbness, an on and off feeling of my foot going to sleep. I also have to endure the feeling of pins and needles almost all of the time. My back troubles have made it almost impossible for me to sit very long in one position or stand very long on my feet. Due to the nature of my problems with my back and right leg and foot, I now have to ask my wife to drive when the trip involves any long distance. This has been difficult for me since I consider myself a professional driver and have driven thousands of miles over the years.

We all must face changes in our lives. I for one have always met changes head on. But I am also one who deals with reality. It is very difficult to have to face the reality that I may not be able to fulfill the mission of the Kansas Highway Patrol in the same capacity and level that I did prior to my work accident. After 19 years of dedicated service to have to consider this is very traumatic.

During my 19 years of services with the Kansas Highway Patrol I changed flat tires, I arrested law breakers some of which I had to physically restrain, search vehicles for drugs requiring heavy lifting, bending and twisting, and drove on highways of Kansas for 8 to 10 hours at a time protecting the citizens of Kansas. During the time I was on duty I was required to wear a bullet vest and equipment weighing at least 25 pounds at all times. If this bill were applied to me, even though I had never had any back pain or symptoms of any kind until my accident, my M.R.I. and x-rays taken after the accident show the effects of the physical nature of my job as a Kansas Highway Patrol Officer.

Testimony of Daniel Paternoster, Hiawatha
SB 461
March 7, 2006

Those effects which the doctors call arthritis would be used against me to reduce what the law now entitles me to receive. I have a major problem with compensation for loss of my job being eliminated due to economic reasons. Since "economic reasons" is not defined in any way, what this bill could allow to happen, not just to me but anybody in the State is for the employer to use any excuse to get rid of injured workers. In my case gas has gone up a dollar or more a gallon and they can get rid of my job for economic reasons. I would be deprived of compensation for the loss of my career that the law currently allows.

The BILL that is before you now, would only add further destruction to a person's life who has sustained a life and possible altering accident while working on the job. I am sure that all of you present here today have dreams and goals associated with your careers. Please vote down this BILL so that the dreams and goals of the work injured at least have some chance of coming true. Please do not change or take away the few rights that the injured have left.

TESTIMONY IN OPPOSITION TO SB 461
HOUSE COMMERCE & LABOR
MARCH 7, 2006

JOHN M. OSTROWSKI
1-785-233-2323

Chairman Dahl and Members of the Committee:

My name is John Ostrowski, and as you know, I appear on behalf of the Kansas AFL-CIO.

You have heard a great deal of testimony relative to SB 461. I believe it is critically important that this Committee stay focused on the purpose of SB 461. The proponents have talked a lot about "fairness." Yet, this Bill is really about changing the rules to give an unfair advantage to insurance carriers. While workers and their families have to live by the AMA Guidelines, insurance carriers do not. While workers are charged with a "good faith effort" to return to work, the employer can discharge for "economic reasons" (not layoffs or economic downturn) and avoid work disability.

Plainly and simply, the effect of every change is benefit reduction for injured workers. I doubt seriously that any proponents of the bill would argue that we are NOT talking about additional reduction of benefits for Kansas workers and their families.

Despite the fact that Kansas has the lowest premiums in the region, proponents seek to further reduce benefits. (Premiums in the voluntary market went down again this year; there has been over a 30% reduction since 1993, etc) Despite the fact that benefits have been frozen for almost two decades, proponents seek to further reduce benefits. Despite the fact that in the Chamber's own survey members did not express concern with the compensation system, proponents seek to further reduce benefits.

The bill is not about fraud in the system. The bill is not an attempt to control spiraling medical costs. The bill is not about introducing competition in the marketplace for insurance carriers. The bill is not about improving safety. The bill is not about helping workers through vocational rehabilitation. The bill is another attempt at decreasing benefits.

I will concentrate on the preexisting conditions aspect of the bill. Mr. Cooper will deal with other provisions within the bill.

Pre 1993, the law looked like this:

10% –1974-impairment to the knee for a football injury
10% –1980--additional impairment for a work related injury
20% compensation Awarded to the claimant (with 10% paid by the Fund)

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In 1990, claimant suffers a second on the job injury. Now we have:

10% -1974-impairment to the knee for a football injury
10% -1980-additional impairment for a work related injury
10% -1990-additional impairment for an additional work related injury
30% compensation Awarded to the claimant (with 20% paid by the Fund)

Because claimant was paid 20% back in 1980, claimant's total compensation is 50% for a knee which has a 30% impairment rating.

Pre 1993, stacking of impairments encouraged employers to hire injured workers. In short, there was no penalty to an employer who hired or retained someone with a functional impairment. However, employers were not happy with the law. The complaint was that a worker, as illustrated above, was collecting 50% impairment on a knee which was rated at a 30% overall impairment. So, correctly or incorrectly, the law was changed. A sentence was added to the law which simply stated:

ANY AWARD OF COMPENSATION SHALL BE REDUCED BY THE AMOUNT OF FUNCTIONAL IMPAIRMENT DETERMINED TO BE PREEXISTING.

The sentence is easy enough to understand. There was no trickery. There was no complex legalese. Employers received exactly what they asked for when the Fund was abolished. Any previous IMPAIRMENT, work related or not, reduced the claimant's Award against the employer against whom claim was made. Now, post 1993, our equation looks like this:

10%-1974- impairment to the knee for a football injury
10%-1994- additional impairment for a work related injury
10% compensation to the claimant (with 10% excluded)

Another work comp injury occurs

10%-1974- impairment to the knee for a football injury
10%-1994- additional impairment for a work related injury
10%-2004- additional impairment for an additional work related injury
10% compensation to the claimant (with 20% excluded)

In essence, for the two on-the-job injuries of 10% each, claimant would receive his 20% impairment.

You will specifically note that, in this section of the law which deals with preexisting conditions, there is no mention of the natural aging process, and no discussion of undiagnosed, asymptomatic conditions. The natural aging process

language which has been variously referred to is contained in an entirely different section. Specifically, K.S.A. 44-508(e) reads:

> An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers a disability as a result of the natural aging process or by the normal activities of day to day living.

These changes were also added to the law in 1993 *but not in the section dealing with preexisting conditions.* These words simply clarified what has always been the law, that simply getting old does not equate to an on the job injury, and you are accordingly not entitled to workers compensation benefits.

Employers are often heard to state: "We only want to pay for what we caused." In fact, this was the same battle cry that was raised in 1993 and led to the changes in the law. We agree that employers should pay only for damages caused by the on-the-job injury. However, it is critical to understand how we measure, and have always measured, "damages" in workers compensation.

In workers compensation, the measure of damages is a comparison between the worker preinjury, and the worker post injury *relative to the ability to function.* Thus, assume a worker has a knee which allows him to run, jump, climb ladders and stairs, all without pain. The knee becomes injured. He now has limitations in terms of strength, activities, and range of motion. By definition, the injury caused all of the damages, or all of the loss of function. Without the injury, the worker may have gone for many years, or forever, without any resultant impairment. Recall that in workers compensation we do not award damages for pain and suffering, we do not care about quality of life issues--all we are concerned about is the worker's ability to function and the ability to do the job.

Similarly, if the worker had some limitation (i.e, impairment of function), and then suffers an on-the-job injury, the injury did not cause all of the damage. In those cases, the employer gets to show that the claimant only receives a portion of the impairment (i.e. compensation). (See again the examples of the 1993 changes set forth above).

Let's assume the worker has the ability to lift 80 pounds before injury, and after injury can only lift 10 pounds. Again, the injury caused all of the damage, and all of the loss of marketability. The "damage" is a reduction in lifting ability by 70 pounds. The fact that there may have been an underlying/asymptomatic condition is irrelevant in terms of damages as measured by the workers compensation system and caused by the injury.

Or consider a worker running a machine at Goodyear who is 50 years old. This worker has no difficulties with his right arm. He can lift, pull, push and perform his job totally and completely. If his arm gets caught in the machine and amputated, it defies common sense to say that he did not lose a 100% of his function of the arm by the

injury–despite the fact that there may have been diagnosable arthritis in his elbow.

Proponents have complained that they have a difficult time meeting their burden of proof. In fact, in the year 2005, I found 23 reported cases from the Board of Appeals dealing with preexisting conditions. In 5 of these cases, there was really no issue raised about the offset. In the remaining 18 cases, the employer successfully argued and received an offset in 16 cases, and in only 2 cases was an offset denied.

In essence, what proponents are arguing addresses a burden of proof issue. Their solution to their perceived problem is to allow them to use "junk medicine", while holding claimant's to a rigid standard. That is not "fairness." Furthermore, this is a massive change from what they requested in 1993.

In conclusion, proponents argue that we are merely "returning" to the original intent of 1993. Said position is completely erroneous. This is a vast, vast expansion of what the legislature passed in 1993. It will include virtually every worker over age 35 and/or every worker who has any type of health problem. It is unfair to workers, and unwarranted considering the already low benefits in Kansas.

Thank you for this opportunity to testify.

TESTIMONY IN OPPOSITION OF
SENATE BILL 461

BY
MIKE TRYON
March 7, 2006

Thank you Chairman Dahl and Members of the Committee for allowing me to appear in front of the Committee and present testimony today. My name is Mike Tryon. I live in Blue Rapids, Kansas.

I proudly served my Country in the 130th Field Artillery with the Kansas National Guard and was stationed in Iraq from January 28, 2004 through February 6, 2005. I served in the National Guard as a Medic. My medic pack that I carried on a daily basis weighed over 60 pounds. Additionally, while I was in Iraq I wore full armor which weighed 25 pounds or more. My duties in Iraq at times were very physical, and at the end of a hard day my back, my knees, in fact my whole body at times would hurt from having to carry the equipment over sometimes difficult terrain. I know my fellow veterans suffered from similar aches and pains, but we had a job to do and kept on going.

Fortunately, I was lucky enough to not suffer any injuries that I know of while I was in Iraq; however, I am sure the wear and tear of simply doing my duty will probably be a factor in my health in the future. While I physically have no known problems at the present time, I am concerned that under Senate Bill 461, down the road my prior service to my Country will be held against me and used to reduce my benefits. I am also concerned about the effect that this bill would have on all of my fellow veterans.

I am currently enrolled in nursing school and hope to complete that program in the near future. I know nursing is a physical job, and I am concerned that if I am injured doing my duties as a nurse, under this Bill the prior wear and tear I suffered while in Iraq would be used against me to reduce my benefits.

On behalf of myself and all veterans, I believe this Bill is discriminatory against myself and my fellow veterans and would ask you to oppose this Bill. Thank you for allowing me to speak here today.

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Hearing on SB 461
Workers Compensation
House Commerce & Labor Committee
March 6-7, 2006

Good Morning, Mr. Chairman and Members of the Committee, I am Kevin Flory representing the Kansas State Firefighters Association (KSFFA). Jim Lubbers, President of KSFFA, was unfortunately unable to be here today. On behalf of the 518 Kansas fire departments that are members of the Kansas State Firefighters Association I respectfully request your opposition to SB 461.

Fire fighters are critical to the safety of the people of the state of Kansas, and they depend on the workers compensation system to protect them if they are injured on the job. Almost half of Kansas' fire fighters are unpaid volunteers (of the total 15,962 Kansas fire fighters, 7,872 are unpaid). Those of us who are firefighters, including volunteer firefighters, know that our job is dangerous. That is why we emphasize training and safety. But accidents still happen, and when they do, we have a right to expect the state's workers compensation system to protect us if we are injured.

Unfortunately, SB 461 reduces or eliminates benefits for firefighters in three ways:

(1) By redefining "preexisting condition" to mean virtually any condition a firefighter may have, including conditions that are not symptomatic, have not been diagnosed and have never limited a firefighter's ability to do his or her job. This definition includes undiagnosed conditions associated with the simple fact of aging, such as degrees of osteoporosis or arthritis.

(2) By changing the formula that determines who is eligible for work disability benefits and the amount of compensation a disabled firefighter receives. Under SB 461, few would qualify for disability benefits and those who do would receive far lower benefits than under current law.

(3) The five year look-back period for task loss does not adequately represent the true skills and tasks a firefighter has acquired over the period of their working life. The current 15 year look-back is appropriate because it is the same standard used by Social Security for purposes of determining transferable skills.

Amendments to SB 461 were made in the Senate but unfortunately the amendments do little to cure the serious flaws of SB 461. Even with the amendments, SB 461 will not only reduce benefits for injured workers but also reduce the number of workers who are eligible for such benefits. But it will have another, unintended consequence: It will make it more difficult to recruit and retain the dedicated volunteer firefighters that Kansas so desperately needs. Who would commit to support their community as a volunteer firefighter if they can't be assured they will be covered if they are injured?

The truth is that Kansas workers already receive among the lowest work comp benefits in the country. In fact, the maximum disability benefits have not increased since 1987—*almost 20*

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years. In sharp contrast, Kansas ranked 6th in workers compensation insurance profitability in 2003.

In short, SB 461 is bad news for the 94% of working Kansans, including nearly 16,000 firefighters, who depend on workers compensation when they are injured on the job. On behalf of KSFFA, I respectfully request that you support Kansas firefighters and the communities they serve by rejecting SB 461.

Kansas Coalition for Workplace Safety

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

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

S.B. 461 Workers Compensation: Re-defining Pre-Existing Conditions

Testimony Before House Commerce & Labor Committee
March 7, 2006
Terri Roberts, R.N., Chairperson

Chairman Dahl and members of the committee, I am Terri Roberts, Executive Director of the KANSAS STATE NURSES ASSOCIATION and chair of the KANSAS COALITION FOR WORKPLACE SAFETY. The Coalition is a group of more than 30 organizations representing nearly 500,000 working Kansans, including firefighters, nurses, teachers, senior citizens, businesses, labor unions and other organizations. Thank you for this opportunity to speak in opposition to SB 461.

As many of you know, this is not the first time the KANSAS COALITION FOR WORKPLACE SAFETY has spoken against proposals like SB 461 whose sole purpose is to reduce benefits to working Kansans who are injured on the job. In fact, SB 461 is nothing more than a re-hashing of the same old proposals that the Legislature rejected in 2003 and 2004. Then, as today, there is no compelling state interest to advance a measure that serves only to reduce the state's already-low benefits to injured workers.

First and foremost, Kansas employers already pay work comp insurance premiums that are far lower than both the country and regional averages. Recently, the Kansas Insurance Department approved a 2% decrease in rates for the voluntary market for 2006. In fact, since 1994, the Insurance Department has lowered the combined premiums more than 32%. In short, Kansas employers enjoy some of the lowest rates in the nation.

Secondly, insurance companies are profiting in Kansas. In 2003, Kansas ranked 6th in the country in work comp profitability. In fact, in 2002 and 2003 Kansas was one of only six states in which work comp insurers booked a profit *even before adding in their investment income.*

In other words, both employers and insurance companies are benefiting from the state's current workers compensation laws. It is therefore no surprise that workers compensation did not make the list of "Most Important Issue Facing Kansas Business" in a recent poll by the Kansas Chamber. In fact, that same Chamber poll found that nearly 75% of the businesses surveyed were satisfied with the quality of their workforce.

Unfortunately, the only ones who are suffering under the current laws are the injured workers who are forced to subsist on the state's paltry benefits. And SB 461 proposes to add to their problems by reducing or eliminating these benefits in two ways: (1) by redefining "preexisting condition" to reduce or eliminate benefits for a larger share of

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the Kansas workforce; and (2) by virtually eliminating work disability benefits for workers who suffer career-ending injuries. I will briefly address each of these issues.

In 1993, the Kansas Workers Compensation Act was amended to prevent an injured worker from receiving compensation more than once for the same injury. As a result, an employee who aggravates a preexisting condition is *not* eligible to receive full compensation. Instead, the law states that "[a]ny award of compensation shall be reduced by the amount of functional impairment determined to be preexisting."

But proponents of SB 461 want to expand the definition of preexisting condition to go well beyond preventing an injured worker from "double-dipping." Their intent is to redefine preexisting condition as a means of reducing benefits to virtually all workers, even those who have no prior work-related injuries. In fact, under SB 461, the term "preexisting condition" can mean *any* condition an employee may have, even conditions that have never been symptomatic, have never been diagnosed and have never interfered with the employee's ability to work or carry out her daily activities. What's more, SB 461 does not require employers to use standard medical guidelines to prove the employee's preexisting condition. An employer can submit *any* medical testimony, including junk medicine, as proof of a preexisting condition.

94% of working Kansans are covered by the state's workers compensation system, and all will be affected by this proposal. But it is the older worker who will feel its effects most keenly. That's because older workers are more likely to have undiagnosed conditions associated with the natural process of aging, such as degrees of osteoporosis or arthritis. Under SB 461, these newly labeled "preexisting conditions" will be used to reduce or eliminate benefits to older workers who are injured on the job.

According to AARP, 80% of its members aged 50 to 54 are employed, and 44% of all AARP members work full- or part-time. In fact, the overall workforce in Kansas is aging, including those of us here today. Should we have our benefits reduced solely because we have been blessed to live past the age of 25? Is there any compelling state interest served by reducing compensation to this important and growing segment of our workforce? Absolutely not. Don't be fooled by proponents of SB 461. Their distorted definition of "preexisting condition" is so broad as to mean nothing less than the human condition itself. By casting such a wide net, they seek only to reduce benefits to a larger share of the workforce.

Whereas nearly every worker will have a preexisting condition under SB 461, few, if any, will qualify for work disability benefits, or what SB 461 calls "supplemental compensation."

Work disability is a means of compensating a worker who has suffered permanent injuries on the job and, as a result, earns less than he did before the accident. Under current law, the criteria for work disability is pretty straightforward: An injured worker becomes eligible for disability benefits *only* if he is not working at a job that pays 90% or more of his pre-injury wage. That means that *in every case*, an employer can avoid paying work disability simply by retaining the injured employee and paying him 90% of his pre-injury wage. This makes sense. If a worker does not have to compete in the labor market to earn wages with his permanent disability, he should not receive work disability. This provision under current law has proven to be a huge incentive to return injured workers to productive employment and earning a real paycheck.

Unfortunately, SB 461 eliminates this incentive to retain injured workers by making it easier for employers to avoid paying one dime of disability and making it harder for the permanently injured employee to qualify for disability compensation. In effect, SB 461 establishes a virtual obstacle course that the permanently injured worker must overcome to obtain work disability or supplemental compensation. I will address each obstacle briefly.

First, there is the "capacity to earn" trap. As I mentioned, current law says that an employer can avoid paying work disability by retaining an employee at 90% of his or her pre-injury wage. But under SB 461, an employer can avoid paying disability simply by showing that an injured worker has the "capacity to earn" 90% of his pre-injury wage. This formula is not based on an employee's actual earnings or on the availability of a real job but on a theoretical determination made by the employer's vocational expert. A permanently injured worker who does not prevail in this "battle of the vocational experts" will not receive disability compensation. Unfortunately for the permanently injured worker, a theoretical job is not a real job, and you can't pay the rent with your "capacity to earn."

Let's assume that the injured worker bypasses this first hurdle because his employer keeps him on the job to avoid paying work disability. SB 461 sets up a second set of obstacles, which I call "separation traps." Under the proposed measure, an employer can terminate the injured worker at any time and still avoid paying work disability. All the employer needs to do is claim that the lay off was due to an economic downturn or that the employee was fired for cause or that the employee quit voluntarily. In fact, if the employee is separated from his job for any reason other than the work-related injury, the employee is not eligible for work disability.

Remember, under current law, the separated employee would be eligible for disability pay until he or she is earning 90% of her pre-injury wage. But under SB 461, the injured worker, whose work abilities have been permanently changed by an on-the-job injury, is easily tossed back into the open labor market to compete on a playing field made uneven by his work injuries.

SB 461 establishes barrier after barrier to prevent employers and their insurers from compensating permanently injured workers. And the few workers who somehow manage to overcome each obstacle along the way will receive supplemental benefits that are significantly lower than available under current law. The sad irony is that injured workers in Kansas already receive among the lowest benefits in the nation and lower than all of our neighboring states.

From their nonsensical definition of "preexisting condition" to their obstacle course for the permanently disabled, proponents of SB 461 make exceeding clear their disdain for older workers and injured workers. Their proposed changes convey a "use 'em and lose 'em" attitude toward all Kansas workers and underscore their eagerness to sacrifice injured workers in order to cut costs. The provisions in SB 461 were rejected by the Kansas Legislature in 2003 and again in 2004. I urge the committee to reject them again in 2005.

Thank you.

The Eroding Value of Workers Compensation Benefit Cap Levels

A report prepared for the
Kansas Coalition for Workplace Safety

By
Patricia Oslund
Research Economist

Policy Research Institute
The University of Kansas
Lawrence, Kansas
Dr. Steven Maynard-Moody, Director

February 8, 2006

The Declining Value of Workers Compensation Benefit Cap Levels

This report addresses the effect of price inflation on the purchasing power of Workers Compensation Benefits. Worker compensation benefits depend on factors such as the extent of a worker's wage level and the extent of his injuries. However, benefits are capped at fixed dollar amounts. Benefit caps are not adjusted on a regular basis. As each year goes by, the maximum allowable benefits go less and less far towards supporting an injured worker and her family.

In this report, we look at two possible methods of valuing maximum benefit caps. One approach looks at what could be purchased by a worker whose injuries and wages warrant compensation at one of the maximum benefit levels. How have price changes affected the purchasing power of a worker's payments? To complete this analysis, we examine several alternative price adjustment measures provided by the US Bureau of Labor Statistics (BLS)[1]. A second approach looks at wages; what would benefit caps look like today if they had grown by the same rate as Kansas average wages per employee?

Method 1: Purchasing Power Adjustment

We all experience the impact of inflation in our daily lives. Inflation produces winners and losers; one couple may retire comfortably on the proceeds of a home that has risen in value. Another couple may drift into poverty as the purchasing power of a fixed pension erodes. Inflation hits hardest on those whose income or benefits are defined in fixed dollar terms that are not adjusted over time. People who depend on benefits that have been capped under Kansas Workers Compensation provisions are a good example of this hardest hit group.

How to measure changes in the value of a dollar

When prices change, the purchasing power of a dollar changes accordingly. If people purchased only one good, say bread, measuring the purchasing power of a dollar would be easy: it simply would be the amount of bread that could be purchased with a dollar. But real people purchase an array of hundreds of goods and services. Furthermore, people purchase these goods and services in different proportions: for some people, gasoline is 20 percent of their weekly expenditures; for others it is only 5 percent. Hence there is no perfect measure of the value of a dollar or of the "cost of living."

However, the BLS calculates *approximations* of the cost of living, published as the often cited Consumer Price Index, or CPI. And in fact, there is not a single CPI, but rather several CPIs, each of which depends on the population group whose expenditure patterns are tracked. Examples of price indexes include:

all urban residents in the US (the most commonly used CPI)
all urban wage earners and clerical workers in the US
urban residents in the Midwest
urban wage earners and clerical workers in the Midwest
urban residents in the Kansas City Area (no other Kansas areas are included by BLS)
urban wage earners and clerical workers in the Kansas City Area.

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BLS price indexes are computed as the ratio between the weighted average of prices in the current time period to prices at some historical base time period (1982-1984 is used as the base for the CPI). By definition, the index is 100 in the base period. If the Consumer Price Index were 200 today, this would mean that prices on average had doubled since the base period. Inflation is calculated as the percentage change in a price index. Table 1 below shows several commonly used price indexes and the inflation that is computed from them.

Table 1: Price Indexes and Inflation

Index Name	Index-July 1987	Index-July 1993	Index-July 2000	Index-Dec. 2005	Inflation 1987-2005	Inflation 1993-2005	Inflation 2000-2005
CPI-All Urban Consumers	113.8	144.4	172.8	196.8	72.9%	36.3%	13.9%
CPI-All Urban Consumers-Midwest	112.3	140.0	168.8	189.7	68.9%	35.5%	12.4%
CPI-All Urban Consumers-Kansas City	111.5	137.5	165.0	187.3	68.0%	36.2%	13.5%
CPI-Urban Wage Earners and Clerical Workers	112.7	142.1	169.4	192.5	70.8%	35.5%	13.6%
CPI-Urban Wage Earners and Clerical Workers-Midwest	110.4	137.2	165.1	185.1	67.7%	34.9%	12.1%
CPI-Urban Wage Earners and Clerical Workers-Kansas City	108.6	133.5	159.5	178.6	64.5%	33.8%	12.0%

As can be seen in Table 1, all of the listed priced indexes follow the same general pattern. However, prices have risen less rapidly in Kansas City and in the Midwest than they have in the nation as a whole. Similarly, prices based on the expenditure patterns of wage earners and clerical workers have risen less rapidly than prices based on the expenditures of all urban consumers.

In the calculations that follow, we rely on the CPI for Kansas City wage earners and clerical workers. The definition of this group most closely matches the characteristics of those who may become eligible for Kansas Workers Compensation benefits. It would be straightforward to change our calculations to make use of a different index; however this would not change our overall conclusions.

Adjusting benefits for inflation

Several workers compensation benefits are subject to a maximum capped level. Caps for total disability, partial disability, and temporary total disability have not been adjusted since 1987. The functional only cap has been set at $50,000 since 1993, and the death benefit cap has been set at its current level of $250,000 since 2000.

As can be seen in Table 2 below, substantial increases in Workers Compensation benefit caps would be necessary to bring the purchasing power of the benefits back to what they were when the caps were established. To put this in human terms, a worker in 1987 could have heated his home for a month, purchased 5 pounds each of bananas and hamburger, brought home 5 half-gallons of ice cream, and filled his car twice--all for under $100[2]. Today, the heating bill alone would be over $100. Averaged over all of the goods a typical worker buys, prices are almost 65 percent higher than they were in 1987.

Table 2: Capped (Maximum) Benefits Adjusted for Inflation as of Dec. 2005

Capped Benefit	Maximum Amount ($)	Date Last Adjusted	Inflation Based on KC CPI	Adjusted Amount ($)
Permanent Total Disability	125,000	July, 1987	64.5%	205,625
Permanent Partial Disability	100,000	July, 1987	64.5%	164,500
Temporary Total Disability	100,000	July, 1987	64.5%	164,500
Functional Only	50,000	July, 1993	33.8%	66,900
Death	250,000	July, 2000	12.0%	280,000

Source: Data from BLS (see endnote 1). Calculations by PRI, University of Kansas.

Method 2: Average Wage Adjustment

So far, we have examined the effect of consumer price changes on the value of Workers Compensation benefits. This section takes an alternative approach, asking "what would benefit caps look like if they had kept pace with average *wage* changes?" It is true that the single biggest factor behind changes in the average wage is price changes, so the price and wage approaches will give somewhat similar results. However, wage changes also reflect such factors as changes in productivity and collective bargaining agreements.

Each year, the Kansas Department of Labor[3] computes a statewide average weekly wage. This statewide average is used to peg maximum weekly Workers Compensation benefits—at two-thirds of the Kansas average wage per worker. But while wage growth is reflected in the growth of maximum weekly benefits, it does not affect benefit caps. As wages rise and caps remain constant, this means that many injured workers will reach their benefit caps in fewer weeks.

Table 3 below shows the adjustments that would be necessary in order for benefit caps to keep pace with the growth of wages in Kansas. We find that adjustments based on wage growth would be somewhat higher than adjustments based on changes in the Kansas City CPI.

Table 3: Benefits Caps Compared with Growth of Kansas Average Wages

Capped Benefit	Maximum Amount ($)	Date Last Adjusted	Growth in Kansas Av. Wage through 2005	Adjusted Amount ($)
Permanent Total Disability	125,000	July, 1987	82.4%	228,000
Permanent Partial Disability	100,000	July, 1987	82.4%	182,400
Temporary Total Disability	100,000	July, 1987	82.4%	182,400
Functional Only	50,000	July, 1993	49.2%	74,600
Death	250,000	July, 2000	16.5%	291,250

Source: Wage data from Kansas Department of Labor (see endnote 3).
Calculations by PRI, University of Kansas.

Summary

We have examined the impact of fixed maximum benefit caps using two different methods. Under method 1, we used the CPI for wage earners and clerical workers for Kansas City to measure inflation. We found that benefits that were capped in 1987 would need to increase by about 65 percent to adjust for inflation; benefits that were capped in 1993 would need to increase by about 34 percent, and benefits capped in 2000 by about 12 percent.

Under method 2, we used data from the Kansas Department of Labor to measure changes in the average wage level. We estimated how much benefit caps would need to change in order to track wage growth. We found that benefits that were capped in 1987 would need to increase by about 82 percent to match wage growth; benefits that were capped in 1993 would need to increase by about 49 percent to match wage growth, and benefits capped in 2000 by about 17 percent.

The two methods differ somewhat in their exact dollar estimates. However, they both tell the same story—that maximum Workers Compensation benefits have eroded substantially over time.

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[1] Data for Consumer Price Indexes are published by the US Bureau of Labor Statistics and are available on the BLS Web site: http://www.bls.gov/cpi/home.htm (02/08/2006).

[2] Data on prices for specific items are published By the US Bureau of Labor Statistics in its "Average Price Data" series. We used data for Kansas City where available and data for the Midwest Region otherwise. http://www.bls.gov/cpi/home.htm (02/08/2006).

[3] Data on average wages are calculated by the Kansas Department of Labor. Historical data from 1993-2005 are published on the KDL website: http://www.hr.state.ks.us/wc/html/wccurrent_ALL.html (02/08/2006). Additional historical data were received directly from KDL.

Testimony of Kevin Fry
House Commerce & Labor Committee
SB 461
March 7, 2006

My name is Kevin Fry, I have been a volunteer firefighter with Burlingame Fire District #6 for 12 years. I currently carry the rank as Captain. Our district serves a rural area just 25 miles southwest of Topeka. Our district covers 110 square miles of rural farmland, the City of Burlingame, 14 miles of the Kansas Turnpike, 8 miles of Burlington Northern/ Santa Fe Railroad, as well as 8 miles of federal highway and 8 miles of state highway.

The services we provide include hazardous materials response, first responder medical response, automobile extrication, light industrial rescue as well as fire suppression.

Our department consists of 25 volunteers. Our district, in size, number of volunteers, and responsibilities, is a good example of most rural volunteer fire departments in Kansas. We all know that the majority of the state is protected by volunteer fire departments much like ours. In most cases these volunteers perform their duties with very little or no compensation. Basically they provide fire and emergency services protection to the businesses and residents of rural Kansas with free labor.

In 2004 volunteer firefighters in Kansas spent thousands of man hours performing duties at incidents. If Kansas communities had to pay for these services in the future, the cost would be astronomical. Any legislative proposal that pushes Kansas away from volunteer fire services has to be grounded in this reality.

A serious consequence of SB 461 is the decline of rural and suburban fire service. Today volunteer fighters are in demand but short supply. Passage of this bill will only accelerate this shortage. Communities will not only suffer a lack of fire protection, they will also pay higher property and causality insurance premiums due to higher ISO ratings. The ISO (Insurance Services Office) is a private company that rates the quality of fire protection in a given area based on three things, dispatching abilities, the fire department itself and the water supply. Several items are considered in the rating process for the fire department's portion. Response times, the number of personnel placed on scene and training are very important factors in the rating as well as equipment. The ISO rating is used by insurance companies to help them determine risk and apply rates. The rating schedule starts at a class 1 rating as the best protection and a class 10 rating meaning virtually no fire protection. It is in a business and homeowner's best financial interest to pay insurance rates based on a good ISO rating. A good ISO rating takes years of planning and hard work for a volunteer fire department. It is time consuming and requires dedicated personnel. However, a dedicated volunteer fire department with a good ISO rating can have a very positive impact on the economic well being of the area it serves.

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We are constantly trying to recruit new members and retain our experienced ones. We are asking people to volunteer their time to perform dangerous and time consuming jobs with the minimal protection provided by our current workers' compensation laws. It is getting very difficult to ask a person to volunteer their time to perform duties that have the potential to injure or incapacitate them to a point they may not be able to provide for their families.

I would like to share with you what happened to me on April 7, 2004. During a routine training exercise with the fire department, I injured my knee resulting in reconstructive surgery and a long rehabilitation. I was released to return to my full time job as a construction worker on March 3, 2005. I was fortunate in the fact that workers' compensation at that time allowed me the proper care and treatment to return me to my regular occupation. Had workers' compensation not paid for my injuries, I would have been forced to either give up my regular job or try to return to work before I was completely healed, possibly resulting in further injury or disability. In my situation, everything worked out, I kept my job and remained on the fire department.

If Senate bill 461 is successful, the changes to the workers' compensation laws will weaken the benefits to all injured workers, both paid and volunteer. In the case of volunteer firefighters, you would have to be out of your mind to subject yourself to the possibilities of being injured while providing free labor to the businesses and citizens of the State of Kansas if this bill passes.

We are asking that you respectfully oppose Senate Bill 461 as we see this as yet another nail in the coffin of the volunteer fire service in the State of Kansas.

Local 307

Robert Tripp, President
Dale Strathman, Vice President
Kevin McClain, Recording Secretary
Earl Ransom, Financial Secretary
Nelson Van Dyke, Treasurer

Rubber/Plastics Industry Conference
1603 N.W. Taylor
Topeka, Kansas 66608
785-234-5688 • Fax 785-234-3116

TESTIMONY IN OPPOSITION TO
SB 461
COMMERCE & LABOR COMMITTEE
BY WIL LEIKER
USW 307

The Workers Compensation Law was enacted to protect the employer from being sued and to have a safety net for the injured worker. Year after year, the law is eroded to be little more than an employer protection act. You may smile to yourself and think that is okay, but one day while looking in the mirror, you will finally ask yourself, "did I do my best for all citizens of Kansas?"

The proponents would like for you to make this a KCCI vs. Trial Lawyers and organized labor bill. Don't be fooled by the cheap rhetoric. The KTLA and the AFL-CIO are two visible groups in this battle, but also are the firefighters, nurses, AARP and a half million working Kansans. 94% of the entire Kansas workforce faces the potential damaging result if this bill becomes law. Jobs which service us: Nurses, firefighters, police, state troopers, teachers plus a gamut of others who we count on to be there for us, could be devastated if the bill were to become law.

In rural areas volunteer firefighters risk their lives to protect us and our property. Under this bill, they could have a pre-existing injury they don't know even exists. While protecting us on a voluntary basis, if injured, they could end up not being able to do their normal job and not receive the present minimal compensation for this injury while helping the community.

Thousands of Kansans are asked to go to IRAQ and Afghanistan. They carry a heavy load of personal equipment, are dropping on their knees and performing every physical deed possible in a war zone. Not all injuries are visible. Many besides the mental will show up later. To ask people to defend our country, protect us and be rewarded by to throwing these folks out to fend for themselves if injured when they return to their normal job. This determination of a pre-existing injury could be 20 or 30 years later.

Now about 20% of these types of claims are litigated, if this bill passes all claims will be challenged by the insured carriers. That means they will hire their attorneys, defense attorneys (who change by the minute) and doctors and spend those dollars which should be going to the injured worker. KCCI and the insurance industry criticizes the trial lawyers, then, they themselves, hire hundreds of attorneys to beat the injured workers out of the small benefits the law now allows.

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Why, why is this bill so important? Business as a whole rated this far down on their issue list when surveyed by the KCCI. Health care costs are their issue, taxes were their issue, not workers compensation. The Kansas employers pay the 4th lowest insurance rate in the nation, the lowest in the region. Kansas 4th, Oklahoma 15th, Nebraska 19TH, Colorado 34th, Missouri 35th. It can not be because of high benefits. Benefits in Kansas are the 7th lowest in the nation, the lowest in the region. Kansas 7TH, Nebraska 13TH, Missouri 27TH, Colorado 32ND, Oklahoma 34th. Yes, you can find a state like Indiana which one procedure is lower than Kansas, but over all, this attempt at cheating the value of 90% of all Kansan's who go to work each day is pathetic. The work ethic of Kansas employees is second to none. Why is their protection at the other end of the spectrum?

Is the Kansas workforce to be put at risk to increases profits for the already highly profitable insurance industry?

This is simply a benefit reduction bill.

Employers can drive down the cost of Workers Compensation: They can do this by not injuring, maiming, and killing the Kansas worker. How do we accomplish this together, a few suggestions are; be selective in hiring, provide proper training on their job function, provide proper training on safety and train managers to look for the possible next injury. Producing more in less time with the same equipment does not make a safe work place. Train people to know what to do if an injury does occur, provide good, hassle-free medical attention if an injury does occur, get the injured employee back to work whenever medically possible, the sooner the better. This valued employee is going broke being off work, employers must work with their employees to make a proactive fight against injuries. Lowering the benefits only puts more pressure on the social system of the state.

If you injury and maim me, make me unproductive, where do I as a Kansan go?

Testimony Opposing SB 461
House Commerce and Labor

Date: Tuesday, March 7, 2006
From: Richard Taylor, Business Manager of Plumbers and Pipefitters Local 441
and
Central and Western Kansas Building Trades Council

Good morning. My name is Richard Taylor and on behalf of the 45,000 union building trade workers across Kansas, it is my pleasure to be here this morning. Thank you for the opportunity to provide my testimony opposing Senate Bill 461.

My official title is Business Manager for the Plumbers and Pipefitters Local 441, which includes 1,500 tradesmen in the state who perform work on boilers, chillers, high-volume air-conditioning and heating units, plumbing installations, refineries, utility facilities and many other projects – from industrial to commercial to residential. I also am proud to represent the tens of thousands of men and women across the state employed as electricians, carpenters, sheet metal workers, ironworkers, and the various other construction trades. We are also affiliated with other organized groups across the State such as machinists and aerospace workers, teachers, service workers, firefighters, etc.

We strongly oppose SB 461. We feel it is unfair to all working men and women of this state regardless of occupation.

The building trades are involved on the national level with a program call "Helmets to Hardhats". You will be hearing more about this over the next couple of months. Basically, it is an opportunity for military men and women to enter into our trades and develop a career that will provide a good living and benefits for them and their families. They will be given credit depending on the type of work and experience they gained while defending our country and continuing to provide us all with the freedom we enjoy today.

As most Americans, we welcome these men and women into our ranks with open arms and appreciate the sacrifices they have made for our Country. This is another group that SB 461 will hurt. If they are injured on the job at some point in the future, undoubtedly, some preexisting condition, that they themselves may not even be aware of, could be related to their time serving in the military and deny them the full compensation they so rightly deserve.

We urge you to carefully weigh the consequences of this bill, not only on our proud military, but all working men and women of this State, before you go on record as one supporting this piece of legislation. It could just as easily affect you, your family and friends, or anyone in any type of occupation that is injured on the job.

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Our number one priority is to protect the rights of all working men and women in this State. That is why I am here this morning in opposition of SB 461.

Thank you again for this opportunity.

Testimony on Senate Bill 461
By
Charles Yunker, Adjutant
The American Legion, Dept. of Kansas

Thank you for providing me the opportunity to testify on Senate Bill 461 today. The American Legion is concerned with some of the proposed changes to the Kansas workers compensation laws but at the same time we applaud other proposed changes. For example on page five of Senate Bill 461 we applaud the reducing the average of the fifteen year period to five years when averaging the weekly wage of an employee for two reasons: that is; a five year average will provide a more realistic average wage base and in most cases a more realistic view of a disability.

However we are concerned with subsection (2) beginning on line 41 of page one and continuing to line one of page two which addresses preexisting conditions. The American Legion believes that provision alone can and will be used to deny military veterans gainful employment for which they may otherwise be qualified to perform. The federal Department of Veterans Affairs (VA) is known to limit the amount of compensation due veterans whenever possible including thousands who are rated at zero percent.

Thousands of Kansas citizens are proudly serving in the Middle East today and many more will serve in the foreseeable future. Unfortunately many will suffer both combat and non-combat injuries but thankfully most will fully recover. However many of those who do "fully recover" are rated at zero percent by the VA yet years later those same injuries can and do affect a person's body. Even those soldiers, sailors, airmen and marines not wounded or otherwise injured will be impacted simply because of the demands placed upon them during active duty. This is especially true of mature members of the National Guard and Reserves who have years of service in their chosen branch of service whose bodies do not rebound quite as quickly or as completely as their younger counterparts.

The percentage of servicemen and women affected by Post Traumatic Stress Disorder (PTSD) resulting from today's war range from 20 to 30% or more. Many cases of PTSD lie dormant for years and more often than not it takes months to establish a claim with the VA including a simple case of hearing loss for example much less one more complicated such as PTSD or a skeletal-muscular issue.
The federal government and others once used the slogan, "Your Best Bet-Hire the Vet" because most veterans possessed a better work ethic and were more loyal than their non-veteran peers. Also veterans are used to the discipline required to perform many jobs. But how many employers will begin to use the provisions of Senate Bill 461 as an excuse not to hire veterans in the first place, or if hired how many veterans will be adversely affected by the proposed provisions of SB 461 in the form of reduced benefits while they seek just compensation from the VA. Or is the employer argues that a veteran employee's disability is the result of a pre-existing condition as the result of their military service that the VA refuses to recognize.

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TESTIMONY IN OPPOSITION OF
SENATE BILL 461

BY
JOHN HORNBAKER
March 7, 2006

Thank you Chairman Dahl and Members of the Committee for allowing me to appear in front of the Committee and present testimony today. My name is John Hornbaker. I live in Junction City, Kansas. I am a 12-year veteran of the United States Army. During the time of my active service, I served six years in Germany with the 3rd Infantry Division, and have been deployed in Macedonia, Bosnia, Croatia, and Kosovo.

After serving 10 years, I left the Army in November 2002. I was reactivated in October of 2004, and recently spent one year in Kosovo and returned February 14, 2006. In Kosovo, I participated in numerous peacekeeping and stability missions, including observation positions where I monitored traffic and performed several compound raids. During these activities I wore full interceptor body armor and also carried equipment weighing over 60 pounds. My duties required me to traverse rugged terrain, including up and down mountains, frequently several miles at a time.

My service to the Military required me to be in optimum physical shape, and we worked very hard to stay in battle-ready physical condition, so that we could perform the very physical heavy tasks required.

I did suffer some physical injuries while on active duty, and the Military has done a very good job of taking care of those service connected problems. I feel confident that if I have further problems related to those injuries, the Military will continue to take care of those injuries.

However, the physical nature of my military service often resulted in aches and pains in various parts of my body, and myself and my fellow soldiers frequently ignored the pain and stiffness and kept doing our duty. This kind of work is hard on a person's body.

I am now working in the private sector in the construction field, and I am concerned that if I am injured on my job the effects of my prior military service will be held against me and my benefits reduced if Senate Bill 461 became the law. As a veteran, I do not believe it is fair to deny or reduce benefits as a result of conditions that may be present, but unknown to me, as a result of my military service. On behalf of all veterans and all members currently in the active service who, someday, will be in the labor market like myself, I would urge you to oppose Senate Bill 461, as I believe it discriminates against individuals who have been in the Military. Thank you for allowing me to testify.

KANSAS NATIONAL EDUCATION ASSOCIATION / 715 SW 10TH AVENUE / TOPEKA, KANSAS 66612-1686

David Schauner, Testimony
House Commerce Committee
March 7, 2006
Senate Bill 461

Dear Chairman and Committee members:

Thank you for the opportunity to speak in opposition to **Senate Bill 461.**

As General Counsel for the Kansas National Education Association I am speaking on behalf of the 30,000 plus teachers and other school employees in Kansas who would be negatively affected if the provisions contained in **Senate Bill 461** become law.

Kansas NEA believes these changes are not good public policy and that they punish workers who are injured on the job.

Although at first blush teaching may not seem like a physically dangerous occupation however many teachers are injured on the job each year either by students or due to broken or dangerous infrastructure in their work place.

That portion of **Senate Bill 461** which proposes a "capable of engaging in work for wages" standards could be particularly hard on teachers who, based upon their educational background, might be able to work at Wendy's or perform some lesser paid task that might make them ineligible to receive or reduce their workers compensation benefits.

The other changes proposed for work disability and functional impairment represent dramatic, and in some cases, draconian changes in Kansas public policy creating not only damage to the injured worker but will undoubtedly result in more litigation and expense for both claimants and employers alike.

In conclusion, Kansas NEA on behalf of its members stands firmly opposed to the changes contained in **Senate Bill 461.** We ask that the Committee reject these anti-worker changes.

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Telephone: (785) 232-8271 FAX: (785) 232-6012 Web Page: www.knea.org