

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Karin Brownlee at 8:30 A.M. on February 14, 2006 in Room 123-S of the Capitol.

All members were present except:

Susan Wagle- excused

Committee staff present:

Kathie Sparks, Kansas Legislative Research Department
Audrey Dunkel-Kansas Legislative Research Department
Helen Pedigo, Revisor of Statutes
Jackie Lunn, Committee Secretary

Conferees appearing before the committee:

Ron Laskowski-Kansas Chamber
Steve Rothrock-Whiteley's Inc.
Kari Clark-Wichita Surgical Specialists, PA
Criss Mayfield-Abbot Workholding Products

Others attending:

See attached list.

Chairperson Brownlee opened the hearing on **SB461--Workers compensation; preexisting condition; permanent partial general disability; supplemental functional disability compensation.**

Chairperson Brownlee introduced Kathie Sparks to review the *Kansas Department of Labor, Division of Workers Compensation 31st Annual Statistical Report. (Attachment 1)* Ms. Sparks stated the Kansas Department of Labor Division of Workers' Compensation assisted a great number of businesses and employees in navigating the Workers' Compensation Act during FY 2005. The Business and Accounting Self-Insurance Section approved 234 qualified employers to be self-insured. Eight new employers were accepted during 2005. The Fraud and Abuse Unit investigated over 300 cases and collected fines and assessments totaling \$139,750.44 which is up 83% from FY 2004. The Annual Seminars held in Overland Park and Wichita provided an educational outlet for over 660 professionals in the State. Upon the conclusion of Ms. Sparks review, there was discussion with the Committee. Chairperson Brownlee asked Ms. Sparks what kind of information the ombudsmen provide. Ms. Sparks stated she thinks they negotiate with the carriers, the injured parties, and provide basic information. Senator Wysong entered the discussion with a question for Ms. Sparks. He asked if she would describe the difference between an unscheduled permanent partial and a scheduled permanent partial. Ms. Sparks stated she did not know but would get that information and present it back to the Committee. Secretary Garner, Department of Labor entered the discussion at the request of the Chair. Secretary Garner stated that in the statute there is a schedule of injuries with a certain amount of time assigned for recovery and those are scheduled injuries. General body parts are unscheduled injuries. Secretary Garner also stated the ombudsmen provide a wealth of information to the employee, the employers, the insurance carriers. Chairperson Brownlee asked if they provide information to the worker that hopefully would prevent having to bring attorneys into the work comp process. Secretary Garner referred that question to Dick Thomas representing the Department of Labor Division of Workers' Compensation. Mr. Thomas stated they give information to anyone that calls in. They try get the employee and employer together and get them to reach a compromise. Senator Barone entered the discussion with a question on the table on Page 6 regarding total costs and overhead. Mr. Thomas stated the costs on page 6 are just the cost of the medical.

Chairperson Brownlee introduced Helen Pedigo from the Revisors office to explain the bill. Ms. Pedigo stated the bill was an act concerning workers compensation; relating to preexisting condition;

CONTINUATION SHEET

MINUTES OF THE Senate Commerce Committee at 8:30 A.M. on February 14, 2006 in Room 123-S of the Capitol.

permanent partial general disability; supplemental functional disability compensation; amending K.S.A. 44-510e and K.S.A. 2005 Supp. 44-501 and repealing the existing sections.

Chairperson Brownlee introduced Ron Laskowski representing the Kansas Chamber to give his testimony as a proponent of **SB 461**. Mr. Laskowski presented written testimony. (Attachment 2) Mr. Laskowski stated **SB 461** is positive workers' compensation reform designed to resolve inequities in existing workers' compensation law regarding an employer's responsibility for preexisting conditions and injuries resulting in loss of employment. The bill is intended to assure that the original intent of the Workers Compensation Act is recognized by both employers and employees. The bill addresses two workers compensation issues. The first is the issue of the employer's responsibility to provide compensation for preexisting conditions and the second involves the definition of what is a work disability under the Workers Compensation Act. Mr. Laskowski cited examples of abuse of the preexisting conditions which he had encountered in his field as an attorney for work comp insurance carriers. In closing, Mr. Laskowski stated **SB 461** is consistent with the theory of Kansas workers' compensation, which requires an equitable adjustment of injuries under a system, intended largely to eliminate controversies and litigation.

Chairperson Brownlee introduced Steve Rothrock representing Whiteley's Inc. to give his testimony as a proponent of **SB 461**. Mr. Rothrock presented written testimony. (Attachment 3) Mr. Rothrock stated he owned a small pallet company located in North Topeka. He stated Whiteley's employs from 4 to 8 people, depending on the work load. Because he has a limited payroll he is automatically put into the "assigned risk pool" and he pays a higher fee for his workers compensation insurance. Mr. Rothrock stated he had two experiences in dealing with pre-existing conditions with Workers' Comp. In both cases he feels he paid for injuries that were pre-existing old injuries; one incurred on another job before being hired by Whiteley's and the other incident resulted in a total knee replacement, after the injury on the job had been repaired it was discovered that the knee was filled with arthritis which resulted from a car accident in years past. Mr. Rothrock feels that he had to pay in both cases for injuries which he was not responsible for. As a result of these two claims, his workers' compensation insurance premiums have gone up 55%. In closing, Mr. Rothrock urged the Committee to please consider changing the pre-existing conditions part in the Workers' Compensation laws to help small and large businesses survive. He also stated he feels he should only pay for the injuries that occur at his work place and the extent of damage that they cause and not damages that already exist.

Chairperson Brownlee introduced Kari Clark representing the Wichita Surgical Specialists, PA to give her testimony as a proponent of **SB 461**. Ms. Clark presented written testimony. (Attachment 4) Ms. Clark stated that she is not an owner but an employee. Wichita Surgical Specialists is a surgical office in Wichita consisting of 30 surgeons and 75 staff members. In the last year and half she has learned more about the Kansas workers' compensation laws regarding preexisting conditions. She cited a preexisting claim that Wichita Surgical Specialists is involved in. They hired a staff person for their medical records department. She started having absences, after one month of commencing employment, for various reasons. Through out all of her absences she never indicated that her job duties aggravated any current medical conditions or caused her medical conditions. One day she came to work limping but could not explain what had happened only that it did not happen at work. They sent her home. A few days later they received notification by a work comp attorney requesting the employee receive benefits for degenerative back problems aggravated by repetitive work activities. It has been two years since the claim was made and it remains open and amounting to \$362,000, in addition to a \$350.00 weekly payment. **SB 461** recognizes that the current preexisting laws and benefits need reform by providing more of a balance to both the employer and employee. In closing, Ms. Clark encouraged the Committee to continue to reform the work comp system so that it will be equally fair to all.

Chairperson Brownlee called the Committee's attention to a written only testimony Ms. Clark presented to the Committee from Jeffery R. Brewer, Legal Counsel for Wichita Surgical Specialists. (Attachment 5)

Chairperson Brownlee introduced Criss Mayfield, Director of Administration for Abbott Workholding Products in Manhattan, Kansas to give his testimony as a proponent of **SB 461**. Mr. Mayfield presented written testimony. (Attachment 6) Mr. Mayfield stated he represented a small manufacturing firm. His associations allow him to frequently interact with peers from many other similar companies. A very common topic of discussion is the Workers' Compensation system; the expense and difficulties in administering the program for their companies and the need for clarification and reform. The question of pre-existing conditions has been one of the most frustrating elements of the Workers' Compensation system. He stated that many of his peers feel victimized by a disregard, or overly liberal interpretation, of a preexisting condition in a claim. He stated that employers have become more defensive in their hiring practices. His company sends all new-hires through a thorough physical, a drug screen and a Physical Capacity Profile. He feels that their hiring practices will help provide a balanced and fair treatment of preexisting condition issues as defined in **SB 461**. He also stated that how functional disability and impairment are defined and treated has always been a complex issue. This element too often results in a long, unresolved situation that is confusing and frustrating for all parties. The refined definitions proposed in the bill offer a needed clarity, and improve the possibility of effective closure in these claims. The need to provide a safe and healthy work environment is a must for Employers. A fair and balanced workplace insurance system is also essential to survive. In closing, he urged the Committee to pass **SB 461**.

Upon the conclusion of Mr. Mayfield's testimony, Chairperson Brownlee announced that because of the time limitation the other proponents would be able to testify on **SB 461** on Thursday.

The meeting was adjourned at 9:30 a.m. with the next scheduled meeting on February 15, 2006 at 8:00 a.m. in room 123 S.

Senate Commerce Committee

Guest List

Date: Feb 14, 2006

CRISS MAYFIELD	ABBOTT WORKHOLDING PARTNERS
Phil Leigh	Ks. AFL-CIO
Doug Hollands	DOHA
Cheryl Caldwell	Texas Chamber
Alex Kotovantz	P.I.A.
Diane Costello	Clack Chamber
Richard Temple	12002 W R
Jeff Cooper	KTCA
Dennis Phillips	KSCCF
Ed Redman	KSCCF
Duane Simpson	KGFA - KARA
Lindsey Douglas	Hein Law Firm
Steve Bstone	Whitaker's Inc
Kiel Bannera	intern
Hari Clark	Nichols Turpin CM Specialist
Tom Falm	GUEST. SEN. DALMER
LARRY MAGILL	Ks Assn of Ins Agents
Beth Owens	Halliburton Govt Relations
Sean Tomb	Division of the Budget
Jim Whitoff	Kansas AFL-CIO
MARK BOSSNYSK	CAPITAL STRATEGIES
Terri Kaufman	Ks Coop Council
Callie Hill Denton	KTCA
Scott Heidner	KSIA
Jeff Glendon	KS Chamber

Lang Kans
Doug Allen

Ks P+C Assn.
worker

**Kansas Department of Labor
Division of Workers Compensation
31st Annual Statistical Report**

Summary Memorandum

The Kansas Department of Labor Division of Workers' Compensation assisted a great number of businesses and employees in navigating the Workers' Compensation Act during FY 2005. The Business and Accounting Self-Insurance Section approved 234 qualified employers to be self-insured. Eight new employers were accepted during '05. The Fraud and Abuse Unit investigated over 300 cases and collected fines and assessments totaling \$139,750.44 up 73 percent from FY2004. The Annual Seminars held in Overland Park and Wichita provided an educational outlet for over 660 professionals in the State.

ADMINISTRATIVE STATISTICS

(see Section 1, pages 12-24; page 31, Table 1-6)

- Fiscal Year 2005, the Division processed 66,456 first reports of injury (42,364 paper and 24,015 EDI), 17,480 applications for hearings, and 6,727 employer elections. The Business section issued 234 self-insurance permits to employers, including eight to new applicants.
- The average weekly volume of EDI first reports of injury constituted 36 percent of the total number of accident reports filed with the division (total includes paper and EDI reports).
- The Ombudsman section provided information upon request to 29,258 parties during the fiscal year.
- The Research section responded to 39,843 requests for workers compensation histories.

WORKPLACE INJURIES & ILLNESSES IN KANSAS

Occupational Injuries and Illnesses in Kansas (see Section 2, page 27, Table 2-1)

- There were 64,761 occupational injuries and illnesses reported to the Division of Workers Compensation during FY2005. The FY2005 total reflect all accidents occurring during the year, including fatalities, and represents an increase of 387 reported injuries and illnesses, or a 0.6 percent increase, from the previous year's total.
- The average duration of a workers compensation claim dropped 20 percent from 489 days in 2003 to 391 days for 2004. The average medical recovery time for 2005 was 193 days, down 22 percent from the previous year, and median time away from work dropped from 35 days in 2003 to 30 days in 2004.
- From another perspective, 177 employees per day were injured on the job in Kansas last fiscal year.
- Workplace fatalities increased 29.5 percent from the previous year (to 57, from 44 reported deaths), and were the same as the 11-year average of reported cases.

Senate Commerce Committee

February 14, 2006

Attachment

1-1

**Table 2-1
Kansas Total Occupational Injuries & Illnesses by
Severity FY1995-FY2005**

Fiscal Year	No Time Lost Illnesses & Injuries		Time Lost Injuries & Illnesses		Fatal Injuries		Total Injuries & Illnesses
	Total No Time Lost	% of Total Injuries & Illnesses	Total Time Lost	% of Total Injuries & Illnesses	Total Fatal	% of Total Injuries & Illnesses	
FY1995	52,473	55.49%	42,030	44.44%	67	0.07%	94,570
FY1996	68,674	71.79%	26,929	28.15%	60	0.06%	95,663
FY1997	73,415	75.14%	24,220	24.79%	64	0.07%	97,699
FY1998	63,071	63.77%	35,767	36.16%	70	0.07%	98,908
FY1999	68,995	72.07%	26,674	27.86%	61	0.06%	95,730
FY2000	71,327	79.21%	18,653	20.71%	69	0.08%	90,049
FY2001	64,533	75.97%	20,368	23.98%	44	0.05%	84,945
FY2002	52,549	72.16%	20,223	27.77%	53	0.07%	72,825
FY2003	55,101	80.87%	12,994	19.07%	42	0.06%	68,137
FY2004	48,298	75.03%	16,032	24.90%	44	0.07%	64,374
FY2005	36,335	56.11%	28,369	43.81%	57	0.09%	64,761

Source: Kansas Division of Workers Compensation

Occupational Injury & Illness Incidence Rate in Kansas (see Section 2, page 30, Table 2-2; page 31 Figure 2-1)

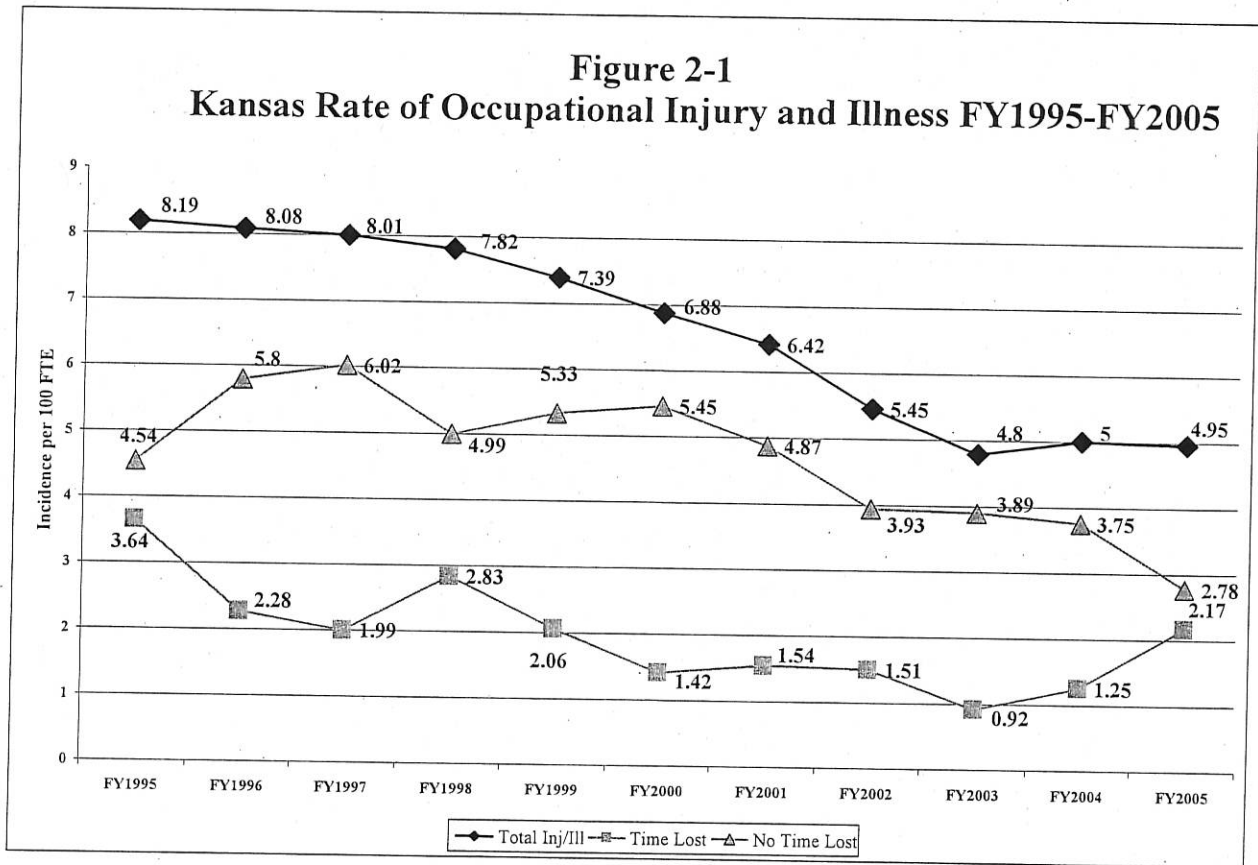
- The “total injuries and illnesses” incidence per 100 full-time equivalent workers in the private and non-federal public sectors in Kansas was 4.95 in FY2005.
- The incidence rate decreased on average 4.8 percent per year (between FY1995 and FY2005) and decreased overall by nearly 40.0 percent since FY1995.
- The “no time lost” injuries and illnesses incidence rate decreased by 38.8 percent since FY1995 and decreased on average 3.7 percent per year (between FY1995 and FY2005).
- The “time lost” injuries and illnesses incidence has decreased by 40.4 percent since 1995.
- The incidence rate for fatalities decreased by 17 percent since FY2000 and decreased by 24.1 percent since FY1995. Although the incidence rate increased by 29.4 percent from FY2004, it decreased on average 0.5 percent per year (between FY1995 and FY2005).

Table 2-2
Kansas Non-Fatal Occupational Injury & Illness
Incidence Rate* FY 1995- FY 2005

Fiscal Year	No Time Lost Illnesses & Injuries*	Time Lost Injuries & Illnesses*	Fatal Injuries*	Total Injuries & Illnesses*
FY1995	4.54	3.64	0.0058	8.19
FY1996	5.80	2.28	0.0051	8.08
FY1997	6.02	1.99	0.0052	8.01
FY1998	4.99	2.83	0.0055	7.82
FY1999	5.33	2.06	0.0047	7.39
FY2000	5.45	1.42	0.0053	6.88
FY2001	4.87	1.54	0.0033	6.42
FY2002	3.93	1.51	0.0040	5.45
FY2003	3.89	0.92	0.0030	4.80
FY2004	3.75	1.25	0.0034	5.00
FY2005	2.78	2.17	0.0044	4.95

Source: Kansas Division of Workers Compensation, Kansas Labor Market Information Services

*Per 100 Full-time Equivalent Non-Federal Workers



Cause of Occupational Injury & Illness (see Section 2, page 41, table 2-8)

- Lifting is the most frequent cause of occupational injury for “total injuries and illnesses,” “no time lost” and “time lost” cases
- Forty-three percent of lifting injuries result in time lost for the injured worker.
- Objects being lifted were the most frequent cause of injury after lifting and unclassifiable injuries.

**Table 2-8
Most Frequent Causes of Occupational Injuries & Illnesses
FY2005**

Cause of Injuries & Illnesses	No Time Lost	Time Lost	Fatality	Total Inj/Ill
LIFTING	4,259	3,150	1	7,410
OTHER INJURY (NOT OTHERWISE CLASSIFIED)	3,787	1,153	13	4,953
OBJECT BEING LIFTED OR HANDLED ON SAME LEVEL	3,264	1,094	1	4,359
PUSHING OR PULLING	2,019	1,017		3,036
HAND TOOL, UTENSIL; NOT POWERED	1,581	1,200		2,781
FOREIGN BODY IN EYE	1,790	770		2,560
REPETITIVE MOTION	1,658	894		2,552
FALLING OR FLYING OBJECT	1,489	968		2,457
STRUCK OR INJURED BY FELLOW WORKER, PATIENT	1,163	1,193	4	2,360
	1,324	768		2,092

Source: Kansas Division of Workers Compensation

EMPLOYER WORKERS COMPENSATION COSTS 1998-2003

(see Section 3, pages 101-102, Table 3-5)

For the first time the division has calculated and published standard measures of employers costs for workers compensation, statewide, adjusting for inflation over the period 1998-2003

- Premiums as a percentage of wages in Kansas, common statistic for measuring employer’s costs, increased at an annual average rate of 1.5 percent from 1998-2003. This measure is controlled for inflation.
- Premiums as a percentage of wages in the entire United States, however, increased at an annual average rate of 8.7 percent from 1998-2003. This measure too is controlled for inflation.

**Table 3-5
Employer Workers Compensation Costs 1998-2003**

		Non- Inflation Adjusted Total Wages Kansas	Inflation Adjusted Total Wages Kansas	Inflation Adjusted Average Annual Increase 1998- 2003*	Inflation Adjusted Total Increase 1998- 2003*	Premiums as % of Total Wages	Average Annual Increase 1998- 2003*	Total Increase 1998- 2003*
Total Wages for Kansas				0.90%	4.30%			
	1998	\$34,480,895,902	\$38,771,145,623					
	1999	\$36,405,814,885	\$39,850,410,747					
	2000	\$38,546,008,818	\$40,827,737,832					
	2001	\$39,787,033,805	\$41,503,458,505					
	2002	\$40,181,390,263	\$40,944,134,953					
	2003	\$40,450,524,720	\$40,450,524,720					
Total Premiums Earned for Kansas				2.20%	10.40%			
	1998	\$261,594,835	\$294,143,501					
	1999	\$252,545,287	\$276,440,273					
	2000	\$247,235,161	\$261,870,234					
	2001	\$269,386,691	\$281,008,115					
	2002	\$307,451,748	\$313,287,962					
	2003	\$324,780,102	\$324,780,102					
Premiums as a Percentage of Total Wages- Kansas							1.50%	5.80%
	1998					0.76%		
	1999					0.69%		
	2000					0.64%		
	2001					0.68%		
	2002					0.77%		
	2003					0.80%		
Premiums as a Percentage of Total Wages- U.S.							8.70%	-3.70%
	1998					2.17%		
	1999					2.11%		
	2000					1.90%		
	2001					1.87%		
	2002					1.03%		
	2003					2.09%		

*Negative percentage indicates a decrease

KANSAS CLOSED CLAIM STUDY

(see Section 3, page 148, table 3-18; pages 152-153, table 3-22)

- Reviewed 1,235 randomly selected closed claims.
- Median total claim costs for 2004 were \$9,715. The indemnity percentage of the total claim costs per sample for 2004 was 48.04% while medical costs constituted, on average, 52% of the total costs (table below and this on page 148).
- Total costs have increased, adjusting for inflation, on average 6.9 percent per year from 1998-2003. The total increase, adjusted for inflation was 35.2 percent over the same period

Table 3-18
CCS Total Costs for Claims 1999-2005

Sample Year	Median Total Costs*	Percent Indemnity	Percent Medical
1998	7,396.00	52.58%	47.42%
1999	6,909.00	51.28%	48.72%
2000	7,064.00	47.88%	52.12%
2001	7,398.50	46.96%	53.04%
2002	9,147.50	52.51%	47.49%
2003	11,242.50	52.12%	47.88%
2004	9,715.00	48.04%	51.96%

Source: Kansas Division of Workers Compensation

*Sum of total incurred indemnity & medical per claim

- Temporary total disability (TTD) claims had median indemnity costs of \$2,495, and were the most common type of claim in our sample (943). For the next two most frequent types of claims, the median total indemnity for unscheduled permanent partial claims (169) was \$8,054 and scheduled permanent partial (62) median totaled \$5,304. See Table 3-14 (all calendar year 2004).

Table 3-14
2005 CCS: Indemnity Costs by Benefit Type

Benefit Type	Mean	Median	n
Temporary Total	\$8,994.30	\$2,495.00	943
Temporary Partial	\$2,774.10	\$324.00	11
Unscheduled Permanent Partial	\$13,079.00	\$8,054.00	169
Scheduled Permanent Partial	\$7,923.90	\$5,304.00	62
Permanent Total	\$710.00	\$710.00	2
Death	\$112,216.00	\$112,216.00	1
Lump Sum Settlements (Indemnity portion)	\$6,162.67	\$8,552.00	3

Source: Kansas Division of Workers Compensation

*Claims that closed in 2004 with paid indemnity & medical.

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Summary of Testimony in Support of Senate Bill 461
Presented to Senate Committee on Commerce
on February 14, 2006.

I. INTRODUCTION:

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

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

1. History and Current Status of Law:

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

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

Senate Commerce Committee

February 14, 2006

Attachment 2-1

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

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

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

1. The employer has the burden of proving that the claimant has preexisting functional impairment. (See *Hanson vs. Logan U.S.D.* 326, 28 KanApp. 2d, 92 (2000).
2. Preexisting functional impairment percentages reached as part of a prior settlement agreement are essentially meaningless under K.S.A. 44-501(c).
3. For all practical purposes the employer must prove that a prior rating had been assigned by a physician to the exact same body part affected by the work injury.
4. If an impairment rating exists, the employer must prove that the rating was determined using the same rating system in effect at the time of the most recent injury for which credit is sought.
5. The employer must prove that the claimant was symptomatic with respect to the same body part immediately prior to the most recent injury for which credit is sought.
6. The employer must prove that the preexisting condition limited the worker's abilities or activities.
7. The employer has the burden of obtaining testimony from any physicians who may have rated claimant prior to the most recent injury for which credit is sought in order to establish the basis for any rating that was assigned.

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

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

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

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

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

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

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

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

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

B. Reform Regarding the Definition of "Work Disability":

1. Current Status of Work Disability Definition:

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

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

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

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

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

Research, although not exhaustive, fails to identify any other state in the United States that utilizes a similar system of compensation job loss related to work injury.

2. **Senate Bill 461 Provides Positive Reform of Work Disability Laws in Kansas:**

Review of work disability cases over the last twelve and a half years establishes that the current system of determining work disability is inequitable and does not constitute good public policy. Problems with the current system of defining work disability include the following:

1. Physicians who are often disinterested or too busy are asked to play a pivotal role in defining an injured worker's level of work disability.
2. Physicians having no expertise in the area of task loss are often times reluctant to offer opinions regarding job tasks or offer opinions without proper consideration.
3. The burden of proof is unfairly weighted in favor the claimant. Claimant is, often times, the only person available to determine the essential job tasks that he or she performed during the last fifteen years prior to the work related injury. Knowledge of the claimant's actual employment history as well as the specific essential job tasks and physical demands is most often exclusively known only by the claimant.
4. The requirement of a fifteen year essential job task history determined from all of the claimant's prior jobs creates a situation where a claimant is likely to exaggerate physical aspects of the essential job tasks to increase work disability.
5. The employers face a difficult and cumberson burden in attempting to determine the truth of the claimant's representations regarding their fifteen year work history. Neither claimant, respondent, or vocational counselors often agree on what the definition of a work task is.
6. Awarding work disability based upon claimant's work that was performed many years prior to the injury creates a situation where awards are based on inaccurate and incomplete information.

7. Claimant's under the current system are awarded for not returning to work whether it be with the same or different employer. Under existing law, the amount of work disability compensation the claimant can receive is increased if he or she is not working.
8. While the existing law requires that claimant exercise a good faith effort in attempting to find re-employment, a heavy burden of proof falls on the employer as a claimant can easily exaggerate the extent to which he or she has sought employment.
9. The current definition of work disability encourages litigation.
10. Current work disability definitions unfairly compensates workers who are separated from post-injury employment for reasons totally unrelated to the work injury.

Senate Bill 461 corrects many of these inequities and inherent problems. Under Senate Bill 461:

1. Task loss is no longer an issue and physicians are free to spend their time treating patients.
2. Unwarranted work disability awards are prevented by taking into consideration not only an employees actual wages but the employees "capability" of engaging in work.
3. Prevents unwarranted work disability awards when separation from employment is due to reasons totally unrelated to the work injury, i.e. economic downturn, voluntary quit, and termination for cause.
4. Protects injured employees, who despite good faith effort, are not capable of engaging in work for wages equal to 90% or more of the pre-injury gross average gross weekly wage by providing supplemental functional disability compensation.
5. Represents good public policy by encouraging workers to return to work and earn a maximum wage.
6. Eliminates determination of work disability based upon subjective, irrelevant, and unreliable information associated with claimant's prior task history.

II. CONCLUSION:

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

Respectfully Submitted,

Fisher, Patterson, Saylor & Smith

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February 14, 2006

Testimony before the Senate Commerce Committee

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

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

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

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

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

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

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

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

Senate Commerce Committee
February 14, 2006
Attachment 3-1



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Therese E. Cusick, M.D., FACS
Mark J. Niederee, M.D., FACS

Colon-Rectal & General

Surgery

Michael G. Porter, M.D., FACS
Justin A. Reed, M.D., FACS

Trauma & General Surgery

R. Stephen Smith, M.D., FACS
R. Joseph Nold, Jr., M.D.

Organ Transplantation

& General Surgery

Charles F. Shield, III, M.D., FACS
John L. Smith, M.D., FACS**

Hepatic Surgery**

Duane L. Osborne, M.D., FACS**

Pediatric Surgery

Philip J. Knight, M.D., FACS
Kimberly A. Molik, M.D.

Peripheral Vascular Surgery

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Douglas J. Milfeld, M.D., FACS
Thomas H. Estep, M.D., FACS*
William R.C. Murphy, M.D., FACS
Walter W. O'Hara, Jr., M.D.
Wade L. Fischer, M.D., FACS*
Philip F. Bongiorno, M.D., FACS

Neurological Surgery

Nazih Moufarrrij, M.D., FACS
John P. Gorecki, M.D., FACS

Administrator

Kari Clark

Hearing for Senate Bill No. 461
Committee on Commerce
Tuesday, February 14, 2006
Proponent Testimony
By Kari Clark

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

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

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

Senate Commerce Committee

February 14, 2006

Attachment 4-1

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

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

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

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

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

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

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

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

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

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WESTERN KANSAS OFFICE
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February 10, 2006

VIA FACSIMILE 494-6803 ORIGINAL WILL BE MAILED

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

Re: Senate Bill No. 461

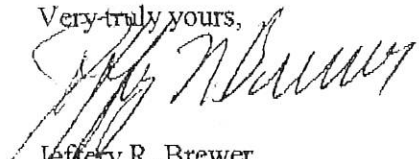
Dear Ms. Clark:

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

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

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

Very truly yours,



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

JRB/pah

Senate Commerce Committee
February 14, 2006
Attachment 5-1

To : Kansas Senate, Committee on Commerce
Testimony For SB461

February 14, 2006

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

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

I represent a small manufacturing firm - a typical industrial employer. My committee associations allow me to frequently interact with peers from many other similar companies. A very common topic of discussion is the Worker's Compensation system - the expense and difficulties in administering the program for your company, and the need for clarification and reform.

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

The question of pre-existing conditions has been one of the most frustrating elements of the system. Many of us have felt victimized by a disregard, or overly liberal interpretation, of a pre-existing condition in a claim. Most employers have there own "horror stories" of this situation, and I certainly could relate some of our own painful examples of unnecessarily expensive claims. I won't take up your time today to detail those stories of frustration. I am most concerned that this imbalance too often fosters an attitude of suspicion in our personnel management. We need to improve on that.

Employers have become more defensive in their hiring practices. We now send all new-hires through a thorough physical, a drug screen, and a Physical Capacity Profile. The P.C.P. testing of your structural health is a system I strongly advocate. That testing (1) confirms that the individual can safely perform the essential elements of the assigned position, and (2) establishes a documented base line of the individual's structural/joint condition. That base line will help provide a balanced and fair treatment of pre-existing condition issues as defined in SB461.

How Functional Disability and Impairment are defined and treated has always been a complex issue. This element too often results in a long, unresolved situation that is confusing and frustrating for all parties. The refined definitions proposed in SB461 offer a needed clarity, and improves the possibility of effective closure in these claims.

The need to provide a safe and healthy work environment is a must for Employers. A fair and balanced workplace insurance system is also essential. Please continue your efforts along those lines - pass Senate Bill 461.

Senate Commerce Committee
February 14, 2006
Attachment 6-1