Approved: 05-08-06
Date

MINUTES OF THE SENATE COMMERCE COMMITTEE

The meeting was called to order by Chairperson Nick Jordan at 8:00 A.M. on February 15, 2006 in Room 123-S of the Capitol.

All members were present.

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

Conferees appearing before the committee:
Jeff Cooper-Kansas Trial Lawyers Association
Dennis Phillips-Kansas State Council of Firefighters
Doug Allen-Worker
Jim Lubbers-Kansas State Firefighters Association
Hoyt Hillman-SPEEA
Chad Baldwin-Volunteer Firefighter
Dave Wilson-AARP
David Schauner-KNEA
Terri Roberts-Kansas Coalition on Workplace Safety
Beth Forester-AFL-CIO

Others attending:
See attached list.

Chairperson Jordan called the Committee's attention to **SB 360-Eminent domain; prohibition against tax incentive use and SB 493-Economic development; eminent domain; procedure; compensation** stating the Committee needed to take action on these bills.

Chairperson Jordan recognized Senator Barone. Senator Barone stated he had language to offer for **SB 493** to add a protest petition to the line of approval of eminent domain. Senator Brownlee entered the discussion asking Senator Barone where it should be added in the line of approval. Senator Barone stated the ideal place would be at the end of the process.

Chairperson Jordan recognized Senator Wysong who inquired about the procedure on **SB 493** since it was double referred. Chairperson Jordan stated the Commerce Committee would be deciding how they wanted the bill and the Judiciary Committee would also decide on how they wanted the bill and somewhere down the line the two bills would be blended together.

Chairperson Jordan recognized Senator Brownlee and she offered some ideas. The first would be agricultural land would not be condemned via eminent domain to be used for economic development. Senator Kelly entered the discussion regarding the definition of agricultural land. Senator Wagle entered the discussion with concerns regarding the definition of agricultural land. Senator Barone entered the discussion stating he feels the definition of agricultural land is important. He stated possibly that the 3 mile rule should apply and anything within 3 miles of the city limit would not be considered agricultural land. Senator Reitz entered the discussion and stated that eminent domain decisions are not made lightly and he stated he would not support any changes in eminent domain and that the present legislation as it stands is satisfactory to him. Senator Brownlee stated she would also like to limit the number of government agencies that have the power of eminent domain. Senator Kelly entered the discussion asking if they had any idea of how many times the government agencies exercise eminent domain. Senator Barone entered stating the threat of using eminent domain is used often. Senator Brownlee sited an instance where a water shed district took land by eminent domain and in doing so left one land owner without access to his land. Chairperson Jordan entered asking how it would affect KDOT. Senator Brownlee stated she felt that only city, state and county governments should have power of eminent domain.

Senator Brownlee made a motion that eminent domain could only be utilized by cities, counties and state government for economic development only. Senator Barone seconded.

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

A discussion followed with Committee on who has the power of eminent domain and who has the authority. Senator Kelly stated she has concerns with the motion.

Chairperson Jordan called for a vote on the motion on the floor. Motion carried with one "no" vote from Senator Wysong.

Senator Brownlee also stated she feels there should be a time limit on an economic development plan. Senator Schodorf agreed. Senator Kelly entered the discussion asking what the time frame should be. There was discussion with the Revisor, Helen Pedigo.

Senator Brownlee made a motion, the time frame on an economic development plan should be no more than 3 years from the first hearing until the approval. Senator Kelly seconded. Motion carried with one "no" vote from Senator Wysong.

Senator Brownlee shared more ideas on eminent domain. She stated that the Missouri Task Force proposed the following: a Land Owner Bill of Rights; the final written offer to purchase someone's property would have to be open for 30 days before a filing in Court could be done for condemnation and the land owner would be allowed to get a certified appraisal that could be entered into record. Senator Brownlee stated the entire process is to insure that the land owner be given full consideration.

Chairperson Jordan referred the Committee to the balloon which was brought to the Committee earlier. The balloon would expedite the proceedings.

Chairperson Jordan made a motion to accept the balloon to expedite the proceedings; to assign the hearing at the earliest possible date. Senator Wsong seconded. Motion carried.

Senator Brownlee made a motion to move SB 493 out favorable as amended. Senator Reitz seconded. Motion carried with one "no" vote by Senator Wysong.

Chairperson Jordan turned the meeting over to Chairperson Brownlee to continue the hearing on **SB 461- Workers compensation; preexisting condition; permanent partial general disability; supplemental functional disability compensation.**

Chairperson Brownlee introduced Jeff Cooper representing the KTLA to give his testimony as an opponent to **SB 461.** Mr. Cooper presented written testimony. (Attachment 1) Mr. Cooper stated **SB 461** is a benefit reduction bill. Mr. Cooper stated KTLA feels the bill creates preexisting conditions for every worker in the workforce and it abolishes work disability. Mr. Cooper stated, the evidence is clear that Kansas employers pay the lowest workers compensation rates in the region, and based on the survey by KCCI, employers are not concerned about workers compensation premiums. There is absolutely no evidence to support a need to reduce benefits to injured workers below their already extremely low levels. The bill is a reincarnation of a bill that the Senate previously dealt with and rejected. Even though it has been modified, the intent remains the same. The bill is designed to reduce benefits to injured workers and their families. He urged the Committee to reject the bill.

Chairperson Brownlee introduced Dennis Phillips representing the Kansas State Council of Firefighters to give his testimony as an opponent for to **SB 461** Mr. Phillips presented written testimony. (Attachment 2) Mr. Phillips stated the bill will have a very damaging effect on Kansas Firefighters when it comes to being compensated for their injuries under work comp. 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. Mr. Phillips stated the State Council of Fire Fighters is asking the Committee to oppose this bill.

Chairperson Brownlee introduced Doug Allen to give his testimony as an opponent for **SB 461.** Mr. Allen presented written copy. (Attachment 3) Mr. Allen stated after reviewing **SB 461** he understands, as a claimant, how it could negatively impact future claimants. He stated he suffered an injury on the job which affected his shoulder, back and both knees. Since he was unable to perform all his job duties he was terminated. He

stated for the past 16 months, his ex-employer and workers compensation carrier has withheld authorization for medical care for both knees. He stated he had not received any type of compensation from the workers compensation carrier or unemployment. He feels that **SB 461** will help the insurance companies to deny even more claims. He also feels that **SB 461** will legalize age discrimination, which will allow insurance carriers to fabricate that any and all injuries are preexisting conditions. In closing, Mr. Allen urged the Committee not to pass the bill.

Chairperson Brownlee introduced Jim Lubbers representing the Kansas State Firefighters Association to give his testimony as an opponent to **SB 461.** Mr. Lubbers presented written testimony. (Attachment 4) Mr. Lubbers stated the Kansas State Firefighters Association feels that **SB 461** reduces or eliminates benefits for firefighters in two 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 firefighters ability to do his or her job. The definition of preexisting 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 disabled firefighters receive, few would qualify for disability benefits and those who do would receive far lower benefits than under current law. The Kansas State Firefighters Association feels that the law would make it more difficult to recruit and retain the dedicated volunteer firefighters that Kansas so desperately needs. In closing he stated **SB 461** is bad news for the 94% of working Kansans, including firefighters who depend on workers compensation when they are injured on the job.

Chairperson Brownlee called the Committee's attention to the written only testimony of Hoyt Hillman representing SPEEA an opponent of **SB 461.** (Attachment 5)

Chairperson Brownlee introduced Chad Baldwin a volunteer firefighter for Shawnee Heights Fire District to give his testimony as an opponent of **SB 461.** Mr. Baldwin presented written testimony. (Attachment 6). Mr. Baldwin stated the bill is unfair to Kansas workers and would require employees, particularly those who volunteer as Firefighters, to carefully evaluate their decisions so that a preexisting condition would not be held against them down the road. In closing, he asked the Committee to vote against **SB 461.**

Chairperson Brownlee introduced Dave Wilson representing AARP to give his testimony as an opponent to **SB 461.** Mr. Wilson presented written testimony. (Attachment 7) Mr. Wilson stated more than 40% of all AARP members work full or part-time. By 2010 there will be a serious labor shortage as baby boomers begin to retire and fewer and younger workers are available because of slow population growth between 1985 and 1996. He stated that older workers will continue to have a prominent and increasing role in the labor force in coming decades. Mr. Wilson feels that ageism is exactly what **SB 461** is about. It is discriminatory to aging workers. As part of AARP's national employment policy, they are strongly committed to expanding employment opportunities and promoting job security and benefits for workers of all ages to remove all barriers to equal employment opportunity. These goals include increasing employment opportunities and providing access to jobs through training, retraining and other programs designed both to encourage older workers to remain in the labor force and to improve the job security of all working Americans. Therefore, AARP strongly opposes **SB 461.** AARP believes 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. In closing, Mr. Wilson urged the Committee to oppose **SB 461.**

Chairperson Brownlee introduced David Schauner representing KNEA to give his testimony as an opponent to **SB 461.** Mr. Schauner presented written testimony. (Attachment 8) Mr. Schauner stated KNEA believes **SB 461** is not good public policy and it punishes workers who are injured on the job. He stated instead of cutting benefits and making it harder for workers to collect benefits, the Committee should be talking about how to improve the benefits for the workers in Kansas. In closing, he stated the KNEA stands in opposition on the bill and urged the Committee to do the same.

Chairperson Brownlee introduced Terri Roberts representing the Kansas Coalition on Workplace Safety to give her testimony as an opponent of **SB 461.** Ms. Roberts presented written testimony.(Attachment 9) Ms. Roberts stated **SB 461's** sole purpose is to reduce benefits to working Kansans who are injured on the job. She stated that both employers and insurance companies are benefitting from the state's current workers

compensation laws. She feel **SB 461** reduces or eliminates work comp benefits by redefining "preexisting condition" and eliminating work disability benefits for workers who suffer career-ending injuries. She urged the Committee to oppose **SB 461.**

Chairperson Brownlee introduced Beth Forester, Legal Counsel, representing the AFL-CIO to give her testimony as an opponent of **SB 461.** Ms. Forester presented written testimony. (Attachment 10) Ms. Forester stated **SB 461** is a bill that the Senate has dealt with previously, and rejected. The words have been tweaked but the intent is the same. It is a benefit reduction bill. Ms. Forester called the Committee's attention to testimony she presented from her partner, John Ostrowski, which he gave before the House Commerce and Labor Committee on January 18, 2006. (A copy of this testimony is on file in the office of the Kansas Senate Commerce Committee Secretary) Ms. Forester made note of the charts in Mr. Ostrowski's testimony. She stated that the work comp rates are the lowest in the region and urged the Committee not to pass **SB 461**.

Written Only testimony was also received from Robert, President, United Steel Workers of America, an opponent of **SB 461.** (Attachment 11)

Upon completion of Ms. Forester's testimony the Committee entered into discussion. Chairperson Brownlee asked Mr. Lubbers to clarify his statement regarding it would be more difficult to recruit and retain dedicated volunteer firefighters in Kansas. Mr. Lubbers stated that in the volunteer sector of firefighters if you have a preexisting condition you would not be covered by work comp and therefore would not be eligible to be a volunteer firefighter. They would not be able to pass a physical. Senator Barone entered with a question for Mr. Cooper representing KTLA regarding preexisting conditions and asked for examples. Mr. Cooper stated if someone had a back injury and the person was overweight, the doctors will routinely say 50% of the problem is the preexisting condition of being overweight. Then 50% will be withheld from benefits based on a condition which did not interfere with their ability to do the job. Mr. Cooper stated the reality is the preexisting condition does not relate to the problem. Senator Kelly entered the discussion with a question for Mr. Cooper asking if employers could not ask potential employees if they had any previous work comp claims. Mr. Cooper stated they could not ask before a job offer is made but after a job offer is made they can. Senator Kelly asked what options injured workers have if they don't receive benefits because of preexisting conditions and are unable to work. Mr. Cooper stated in most cases even when they receive benefits; the benefits are so low most generally loose their car, homes and families. In some cases, they can ask for vocational rehabilitation through SRS.

Chairperson Brownlee announced that tomorrow the Committee would be working **SB 515-Workers compensation pool; group-funded; surplus funds; adequate surplus funds** and would hear testimony from the remaining proponents on **SB 461.** She also announced the Senate Committee Planning Committee will meet today at 3:45 p.m. today in room 192-E.

Meeting adjourned at 9:30 a.m. with the next meeting scheduled for February 16, 2006 at 8:00 a.m. in room 123S.

Senate Commerce Committee
Guest List
Date: Feb 15, 2006

Chuck Oldfield	Topeka Chamber
David Schauner	KNEA
Lil Leith	Ks. AFL-CIO
Doug Allen	worker
Jim Lubbers	Kansas State Firefighters Assoc
MARK BORANYAK	CAPITOL STRATEGIES
DENIS WITTMAN	LOCAL #441
Beth Foerster	AFL-CIO
Tom Roberts	Kansas State Nurses Assn.
Kirby Clark	SHEET METAL WORKERS
CHRIS Butts	IBEW Lu. 271
MARK SHUGHART	SHEET METAL WORKERS
Lindsey Douglas	Heim Law Firm
Kathleen Smith	KDOR
Dennis Phillips	KSCFF
Ed Redmon	KSCFF
Dan Conkwright	Coalition for KS Job Growth
Scott Heidner	KSIA
Jeff Glendenning	ICS Chamber

KANSAS TRIAL LAWYERS ASSOCIATION

Lawyers Representing Consumers

To: Senator Karin Brownlee, Chair
Senate Commerce Committee

From: Jeff Cooper
Kansas Trial Lawyers Association

Date: Feb 15, 2006

Re: Testimony in opposition to Senate Bill 461

Thank you Chairman Brownlee and Members of the Committee. My name is Jeff Cooper. I am an attorney practicing primarily workers compensation in Topeka, Kansas. I represent primarily injured workers; however, I do represent some self-insured employers and small insurance companies. I am also a Pro Tem Appeals Board Member on the Workers Compensation Appeals Board, and teach workers compensation at Washburn School of Law as an adjunct professor and have done so for the last 15 years, the last 10 or so with Beth Foerster.

When we are talking about changing workers compensation benefits, it is easy to get caught up in the employer/employee terms. How this or that will or will not affect injured workers/employers. I think it is important to keep in mind who the injured workers are. They are our friends and neighbors, sons and daughters, brothers and sisters, and people in our community. This includes the people who protect us, the policemen, the firefighters, those that risk their lives to protect us and our property. In fact, this workers compensation systems covers 94% of all people in Kansas at the present time. How does Senate Bill 461 affect all of these important people in our lives, including our family and friends.

1. Kansas workers compensation at the present time pays our friends and family some of the lowest benefits in the Nation, and the lowest benefits in the Region.

2. Insurance companies are receiving record profits, and in fact Kansas is routinely in the top level of profitable workers compensation systems for insurance companies.

3. The CEO's of Kansas corporations and businesses as surveyed by KCCI reflects that workers compensation is not even an issue with them.

4. Low workers compensation rates and low benefits are touted by groups seeking to bring business to the State of Kansas.

Senate Commerce Committee
February 15, 2006
Attachment 1-1

Terry Humphrey, Executive Director

Fire Station No. 2 • 719 SW Van Buren Street, Suite 100 • Topeka, Ks 66603-3715 • 785.232.7756 • Fax 785.232.7730

E-Mail: triallaw @ ink.org

5. Comparatively, the most seriously injured workers are friends and family who are forced into this system routinely lose everything they have — their cars, their homes, their pride, because of low benefits and abuse by insurance companies and employers.

Senate Bill 461 would hurt every person, our friends, our family, who had the misfortune to be injured at work. This Bill would particularly disadvantage our older workers most. Every person would have a preexisting condition. That condition might be degenerative disc disease, arthritis, high blood pressure, diabetes, high blood sugar, gout, cataracts, poor eyesight, hemorroids, or any other physical condition or malady you can think of would be utilized. This Bill would hold these conditions against the worker. These preexisting conditions would be used to reduce or eliminate all or a portion of the already lowest benefits in the Region by the percentage any preexisting condition contributed to any resulting claim.

It is important to focus on the terms used. The proposals in Senate Bill 461 dealing with the aggravation of a preexisting condition focuses on the word "condition." The current statute focuses on reducing compensation by the amount of functional impairment determined to be preexisting. The proposed changes made in Senate Bill 461 have entirely different meanings.

Contrary to the testimony you have heard regarding employers receiving credit for preexisting impairment, Administrative Law Judge Bruce Moore testified in front of the House Commerce and Industry Committee, and testified that there is currently no problem with employers receiving credit for preexisting impairment. Contrary to what you heard, again, as noted by Judge Moore, employers routinely receive credit for preexisting impairment. As a practicing attorney, on the vast majority of cases, there is no real issue as to whether or not someone has preexisting impairment, and the parties regularly and routinely agree to the amount of preexisting impairment which is subtracted from the ultimate award.

Attachment A to this testimony reflects reported Decisions by the Appeals Board in the year 2005, which clearly reflect that employers are receiving credit for preexisting impairment. The testimony you have heard that employers are not getting credit for preexisting impairment is flat simply wrong. Administrative Law Judge Bruce Moore confirms that the testimony you heard yesterday is wrong. There is no problem with the statute as written and as being interpreted and applied by the Administrative Law Judges and the Appeals Board for the State of Kansas.

The proposal by KCCI and Senate Bill 461 goes well-beyond the scope of any intent in 1993. KCCI wants to have doctors give an opinion as to the percentage that any preexisting **condition** contributes to workers compensation benefits. This is a fundamental change in Kansas law. This is a fundamental change in how we treat our friends, neighbors and family. These changes would require litigation on every case based on a doctor's opinion based on no objective findings as to how much a preexisting unknown preexisting condition contributed to the overall condition. Under the current law, the physician must look at the same requirements for a preexisting condition that they look at to determine a rating. The injured worker has to prove his case based on the *AMA Guides*. However, under this Bill,

the employer can now use any subjective evidence to say that an injured worker should receive less benefits.

An example would be, someone who is over 40 and had degenerative disc disease in his back. Degenerative disc disease, as you know, is really just the simple normal aging process that occurs to all of us. At the request of the insurance carrier and employer, who hire the doctors, a doctor could very easily give an opinion that if it were not for the degenerative process then the episode of lifting the 50 pound box probably would not have resulted in a permanent injury, and therefore all of the impairment, compensation of whatever nature, would be the result of the preexisting condition. It does not make any difference under Senate Bill 461, as drafted, whether or not the individual had any knowledge of a preexisting problem, had any symptoms, or any other problems with their back. Nor would it make any difference whether they had ever missed a day's work with regard to their back.

Make no mistake, the real intent of this Bill is to further reduce workers compensation benefits to injured workers.

The other portion of this Bill deals with the work disability definition that we have had since 1993. This definition was previously dealt with in Senate Bill 181, and appropriately rejected. The proponents to this Bill testified that the task list portion of the work disability is difficult to deal with, and they believe results in inappropriate benefits being awarded to injured workers. Again, keep in mind, that premiums and benefits are well-below the regional average. Contrary to what you have been told, the doctors routinely work with the task lists and those task lists are provided to the doctors well in advance of their deposition, and most doctors have no problem with reviewing the tasks and providing their opinion utilizing the restrictions. This system has been in place since 1993, and is modeled after the 15-year work history utilized by social security in determining entitlement to benefits on a daily basis. In reality, the insurance companies would like you to believe that there is a substantial problem with the 15-year task list when really the only problem is that employers are required to pay benefits when they refuse to accommodate an injured worker.

It is imperative to remember that a worker is never entitled to work disability if the injured worker is brought back to work and paid at least 90% of their wages. In that respect, the employer has the ability to control in every case whether or not they pay work disability. This is the incentive that the law has had in place since 1993 to encourage employers to retain injured workers. Make no mistake, under Senate Bill 461, there is absolutely no incentive for the employer to retain an injured worker.

Under Senate Bill 461, there are at least three procedural hoops that an injured worker must jump through before even being entitled to supplemental compensation.

Hoop 1 - Senate Bill 461 looks at whether or not the employee is "capable" of engaging in work for wages equal to 90% of the average weekly wage. The employer and insurance carrier will argue in every case that the worker is capable of earning 90% or more and will hire a vocational expert that will testify that the worker is capable of earning 90% or more.

Hoop 2 - Was the separation from work for economic reasons, for cause, or for voluntary separation (really three possible hoops in one)? Employers and insurance carriers will argue that the separation from employment was due to an economic downturn, and if there is an economic downturn they are not required to pay anything beyond a functional impairment. Secondly, if the injured worker happened to be late for work, leave early, or for any minor infraction and discharged, work disability benefits would not be available. Or, if the injured worker's spouse who is in the Military was transferred to another base out of state, or for any other voluntary separation, benefits would not be available.

Hoop 3 - Was the separation from employment due solely to the work-related injury? If here are any other factors involved with no longer working for the employer, i.e., preexisting conditions, moving out of state, etc., supplemental compensation would not be provided.

Even if the worker was somehow able to manage to jump through all three hoops and their subparts, benefits paid for the injury would be substantially less than the current already low benefits. I have attached a comparison of the current law and the proposed changes, and using similar facts, shows what the real difference would be. Exhibit 2. The bottom line is that any supplemental payment is so small that employers will not retain the injured workers as there is no incentive to do so.

Keep in mind also that these are our friends, family, neighbors, that have been so seriously injured that they cannot return to the type of work they were doing at the time of the injury. Senate Bill 461 would simply kick them on top of the scrap heap and let them fend for themselves with no vocational rehabilitation or any other safety net for them or their family. In reality, these individuals would become the burden of you and I as taxpayers.

In conclusion, the evidence is clear that Kansas employers pay the lowest workers compensation rates in the Region, and that even based on the survey by KCCI, employers are not concerned about workers compensation premiums. There is absolutely no evidence to support a need to reduce benefits to injured workers below their already extremely low levels. Senate Bill 461 is a reincarnation of a bill that the Senate previously dealt with and rejected which has been modified, but the intent remains the same. This is a Bill designed to reduce benefits to injured workers and their families, who are our neighbors, our friends, our brothers and sisters, and is not good for Kansas in any fashion. We would urge you to reject Senate Bill 461.

EXHIBIT 1 - ATTACHMENT 2005 CASES WHERE EMPLOYERS AND INSURANCE CARRIERS WERE AWARDED CREDIT FOR PREEXISTING IMPAIRMENT

The following cases are cases from the Appeals Board where the Board found substantial preexisting impairment:

1. Casey v. HIX Corporation, Docket Nos. 262,319 and 1,006,409. In this case, the claimant alleged psychological injury in addition to a physical injury. The Board found the psychological problems to all be preexisting and, therefore, found no additional impairment based on psychological injuries.

2. Knaak v. Case Corporation, Docket Nos. 251,521 and 251,857. In this case there were two dates of injuries. On the second date of accident, the Board found the claimant sustained only a temporary aggravation and refused to award additional compensation on the second date of injury as was no new impairment.

3. Williams v. Wesley Medical Center, Docket No. 270,044. The Appeals Board found and subtracted a 5% preexisting to the body as a whole impairment.

4. Swathwood v. Medicalodge of Columbus, Docket No. 270,543. In this case the claimant had settled a prior workers compensation case with a 12% to the body as a whole rating. Following a second injury involving the back, the Appeals Board reduced the award on the second injury by the 12% preexisting impairment previously given to the claimant.

5. Jacobs v. Chamness Technology, Docket Nos. 1,003,734 and 1,005,459. In this case the claimant had a prior left knee replacement, and the respondent was given credit for a preexisting 37% impairment to the left knee.

6. Prue v. Asplundh Tree Expert Co., Docket No. 270,870. In this case the Board reduced the award by a 5% preexisting impairment.

7. Bale v. Hutchinson Hospital, Docket No. 1,003,853. The claimant's award was reduced by a preexisting 15% to the body as a whole impairment rating.

8. Aumiller v. American Packaging Corp., Docket No. 1,002,887. The claimant had received a prior award based upon a 10% impairment rating to the body as a whole following a subsequent injury to the same body part, the respondent was given credit for the previous 10% impairment to the body as a whole.

9. Oberzan v. Calibrated Forms Co., Inc., Docket No. 261,781. The respondent was given credit for 15% permanent impairment functional to the body as a whole.

10. Bell v. Integrated Health Services, Docket No. 1,005,394. The claimant had a previous cervical fusion and received a previous settlement based upon the 10% body as a whole rating. Respondent was given a credit for the preexisting credit.

11. Wilder v. City of Topeka, Docket Nos. 1,001,649 and 1,004,830. Respondent was given credit for a 50% impairment to the lower extremity showing that based on the x-rays taken before the date of accident was shown basically bone on bone.

12. Shane v. Treasure Chest Advertising, 116 P.3d, 55 (2005). Kansas Court of Appeals affirmed the Appeals Board Decision granting respondent credit for a preexisting 10% functional impairment rating.

EXHIBIT

COMPARISON OF CURRENT LAW AND PROPOSED CHANGES

FACTS:

Joe Smith is a 42 year old electrician/mechanic earning $50,000.00 a year. While working with a heavy piece of machinery, Mr. Smith suffers a herniated disc in his back. Mr. Smith has surgery and is off work 30 weeks. As a result of the injury, Mr. Smith has a permanent 25 pound lifting limit and has a 10% impairment under the *AMA Guides, 4th Edition*. As a result of his injury, Mr. Smith cannot go back and perform the physical requirements of his job, and the employer does not provide accommodated work. (The employer can limit compensation to the 10% functional only by providing Mr. Smith a job.)

30 weeks of temporary total disability are paid at the rate of $467.00 per week (max rate for July 1, 2005 through July 1, 2006). At $50,000.00 a year, Mr. Smith's average weekly wage, without considering fringe benefits, was $961.54 a week.

Mr. Smith has 10 tasks in his 15-year work history, five of which require lifting over 25 pounds, and five of which require lifting of less than 25 pounds. Consequently, Mr. Smith would have a 50% task loss. (assumption for purposes of this illustration)

Further assume that Mr. Smith was able to find a job within his restrictions earning $600.00 a week. This would result in a 38% wage loss. (assumption for purposes of hypothetical)

CURRENT LAW	SENATE BILL NO. 461
Under current law Mr. Smith is entitled to whichever is greater, his functional impairment or his work disability. **Functional impairment** 400 (415 - 15 weeks of temporary total disability/1st 15 weeks of temporary total disability do not count against the total number weeks available) x 10% permanent partial impairment under the *AMA Guides, 4th Edition* = 40 weeks of benefits x $467 total **$18,680.00** the value of functional impairment. **Total functional impairment $18,680.00.** **Work disability** 50% task loss, + 38% wage loss = 88% ÷ 2 = 44% work disability. 400 x 44% = 176 weeks of compensation x $467 (max weekly comp rate) = $82,192.00 total work disability. **Total work disability $82,192.00.** Total Award $82,192.00 paid over 176 weeks from the date of injury at the rate of $467 a week. Since work disability is greater than functional impairment, the Award is based only on work disability. **If Mr. Smith had not been injured and had been able to continue working for the 176 weeks, he would have earned $163,461.80. ***If Mr. Smith had been able to work over the entire 415 weeks, he would have earned $399,039.10 (415 x $961.54)	**Functional impairment** assume to be the same as under current law; however, it is unknown if the 5th Edition would change the functional impairment rating. **Total $18,680** **Supplemental compensation** only available if the answer to each of the three following questions is in the negative. In other words, the employee would have to jump through each of these three hoops before they would be entitled to any supplemental compensation. **1. Is Mr. Smith capable of engaging in work for wages equal to 90% of the average weekly wage of the date of injury $961.54?** The employer and insurance carrier will argue that Mr. Smith is capable of earning 90% or more, and most likely will hire vocational experts that will testify that he is capable of earning 90% or more. **Yes ⇒ No supplemental compensation** **No** ⇓ **2. Was separation of employment for economic reasons for cause or a voluntary separation?** Employers and insurance carriers will argue that the separation was due to economic downturn, and if business had not been bad they could have accommodated the employee, but due to recent cutbacks, they simply did not have a position to offer them. Additionally, if Mr. Smith happened to be late for work, leave early, or any other potential reason, if he is discharged for cause, Mr. Smith would not be entitled to any supplemental compensation, or if Mr. Smith left work for any other reason, he would not be entitled to compensation. **Yes ⇒ No supplemental compensation** **No** ⇓ **3. Was the separation from employment due to any oher reason other than "solely to the work-related injury?"** Again, if there are any other factors in his separation from employment, i.e., any other health issues, family problems, preexisting conditions, moving out of State because spouse, who is in the Military, is being reassigned to a different post, supplemental compensation would be denied. **Yes ⇒ No supplemental compensation** **No** ⇓ Average weekly wage at the time of the injury $961.54. Compensation after the injury from the job Mr. Smith found of $600 per week = a 38% wage loss, which would equate to 38 additional weeks of supplemental compensation. 38 weeks of compensation would equal 38 x $467 = $17,746.00 total compensation. Functional impairment $18,680.00; Supplemental compensation $17,746.00; Total compensation = $36,426.00 **Total Supplemental Compensation $17,746.00** **Total Compensation $36,426.00** **Again, if Mr. Smith had not been injured and had been able to continue working over the entire 415 weeks benefits were paid would equal $399,039.10.

"PROGRESS THROUGH UNITY"

KANSAS STATE COUNCIL OF FIRE FIGHTERS

Affiliated With

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

Co-Chairpersons Brownlee and Jordan and members of the Commerce Committee.

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

The work firefighters are ask 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 conditions 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

Senate Commerce Committee
February 15, 2006
Attachment 2-1

TESTIMONY TO SENATE COMMITTEE ON COMMERCE AND LABOR

RE: SENATE BILL 461

Good Morning. I am Doug Allen from Spring Hill, Kansas. I was injured rising out of and in the course of employment in Kansas resulting in permanent impairment. I have reviewed Senate Bill 461. As a claimant, I understand how Senate Bill 461 could negatively impact future claimants.

I injured my shoulder, back and both knees as a result of accidents which occurred in Fall of 2004 and May of 2005. My employer and their workers compensation insurance company provided surgery for my shoulder and some medical care for my back. However, since I was unable to perform all my job duties, I was terminated in June of 2005. I was in therapy for 4 ½ months. But, for over 16 months, my ex-employer and their workers compensation carrier have withheld authorization for medical care for both knees. Also, I have not received any form of compensation from the workers compensation carrier or unemployment. The insurance companies' "starve out" tactics work so well already, Senate Bill 461 will only help them to deny even more claims. Personally, I was forced to retain the services of an attorney in hopes to obtain any relief.

I have experienced the abuse and power employers and insurance companies have. In my case, both my ex-employer and the insurance adjuster performed a full investigation and discovered my accidents were legitimate and compensatory. However, they both still informed me that I should have these injuries covered by my health insurance because I was in my early forties and they could prove I am just getting "old and decrepit". Senate Bill 461 will legalize age discrimination, which will allow insurance carriers that fabricate that any and all injuries are pre-existing conditions. When I read Senate Bill 461, I can imagine how happy the insurance companies are to see a bill that will legalize the contemptuous attitude they already show claimants. This bill will empower the insurance companies further by allowing more ambiguous, pre-existing condition claims used by

their physicians. 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.

We have won two Court Orders that required the respondent to provide medical care. At the second hearing, the Judge asked the respondent why they did not provide medical care as he so ordered. And their answer contained in the judge's order stated, I quote "they simply chose not to provide the services of a physician". The sad fact is that there are no penalties to force the insurance companies to follow court orders.

In the case of "Economic Reasons", Senate Bill 461 allows more ways "OUT" for the insurance companies instead of strengthening the laws in favor of claimants.

As someone who has experienced the workers compensation system first hand, I want you to know that future claimants are your constituents, friends and neighbors. I have taken an active role in telling my story so that others will not experience what I have experienced. I'm attaching my testimony on HB 2731 relating to workers compensation benefits increases which I have also testified on this year. As law makers, your constituents need you to consider the consequences of these bills. Please, do not allow Senate Bill 461 to pass. 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.

Thank You.

TESTIMONY TO HOUSE COMMITTEE ON COMMERCE AND LABOR

RE: HOUSE BILL NO: 2654

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 the very substandard benefits provided to injured workers in this State. I have reviewed House Bill No. 2654 and appreciate that it provides for an increase in benefits currently being paid. I want you to understand that these changes are insufficient to meet the needs of injured workers in Kansas.

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 September and October of 2004. 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. 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 now says I can go to any doctor I want and the insurance company must pay but I've not been able to find an orthopedic surgeon who will assume care under the circumstances.

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.

I understand House Bill No. 2654 does increases some benefits, however, a much more realistic view should be taken. It is my understanding that there have been no changes in the method of computation to determine weekly benefits since July 1, 1974. (At which time it was determined the claimant's weekly benefit would be based on two-thirds (2/3) of his average weekly wage not to exceed sixty-five percent (65%) of the State's average

weekly wage for the preceding year). Please consider a more significant change in the law. I know the *Coalition on Workplace Safety* can provide you with statistics to show how low Kansas benefits are compared to those provided in other states. Why is it unreasonable to compute compensation on the injured workers actual wage?

The payment of benefits as the law is currently written can only cause the ruination of injured workers in this state. Workers who are supporting families and who become temporarily or permanently disabled cannot live on $467/week (the current maximum payable in Kansas). I want to give my employer a full day's work for a day's pay. All I and others want is fair compensation when our jobs disable us. Kansas law does not do that now.

Please understand these injured workers are not only Republicans and Democrats but members of our families and our friends and neighbors. We should not treat our friends and neighbors this way.

Kansas State Firefighters, Association Inc.

Organized August 13, 1887

Hearing on SB 461
Workers Compensation
Senate Commerce Committee
February 15, 2006

Good Morning, Madam Chairman and Members of the Committee, I am Jim Lubbers, President of the Kansas State Firefighters Association (KSFFA). I am appearing today on behalf of the 518 Kansas fire departments that are members of the Kansas State Firefighters Association to ask 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 two 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.

SB 461 is intended not only to reduce benefits for injured workers but also to 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 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.

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Attachment 4-1

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To: Senator Karin Brownlee, Chair
Senate Commerce Committee

From: Hoyt Hillman, Society of Professional Engineering Employees in Aerospace

Date: Feb 15, 2006

RE: SB 461 Workers compensation; relating to preexisting condition; permanent partial general disability; supplemental functional disability compensation

I am Hoyt Hillman, Labor Representative from the Society of Engineering Employees in Aerospace to the Kansas Coalition for Workplace Safety.

I submit this testimony today as part of 30 organizations representing nearly 500,000 working Kansans including aerospace workers, building trades, teachers, senior citizens, police and firefighters. Thanks for the opportunity to discuss our concerns with SB 461.

I have read SB 461 and think that the Kansas Chamber of Commerce and the authors are trying to improve the business climate in the State of Kansas. Overall that's a good goal as long as we keep our perspective. This bill tries to wring even more money out of a program that is already one of the least expensive for businesses services in the United States.

As we know, the business climate is dependant on resources. Workers are resources and educated, healthy and productive workers are needed for business. This bill tries to micro-manage the Kansas Work Comp process and ignores the macroeconomic effect it will cause.

There is no real economic advantage to the state or to businesses to push more injured workers out the door and on to the street. Once the employee moves from the private business sector to the public sector, the private dollars supporting the individual becomes public dollars. Taxpayer dollars are very expensive. Taxpayers pay $2.00 for every $1.00 delivered in State services and you are lucky to get 25% back from Federal programs.

The current language in the bill allows for accommodation of injured workers at 90% of their previous wage with some caps. It is not meant to be generous, but it works and accommodation is the most efficient and productive way to maintain experienced workers. SB 461 removes any incentive for businesses to retain workers. This bill, if passed, would be successful in trimming costs on a micro-level but add additional costs to businesses paying for Work Comp, Unemployment insurance and state taxes.

As Kansas State Legislators, you look for ways to improve the economic climate and make both Kansans and their businesses successful. There are plenty of suggestions in the post audit reports on ways to do that and none of them require micro-managing.

Thank you.

Senate Commerce Committee
February 15, 2006
Attachment 5-1

TESTIMONY IN OPPOSITION TO SENATE BILL 461

BY

CHAD BALDWIN

Thank you Chairman Brownlee and Members of the Committee. My name is Chad Baldwin. I am a Volunteer Firefighter with Shawnee Heights Fire District and live in Berryton, Kansas. I also work full time as a paid firefighter.

As I am sure you are aware, my jobs are very physical jobs. While fighting a fire, my equipment, alone, weighs 60 pounds plus. While fighting fires I handle hoses and fire equipment, all of which is heavy and physically demanding work. Dealing with these kinds of physical activities over a long period of time is going to have an adverse impact on my physical condition. Through my job, I have a lot of wear and tear on my body, and a lot of nicks and dings that through the years are probably going to result in conditions that are possibly going to affect my ability to do my job.

If later on down the road, years from now, I have a serious injury, under this Bill the insurance company would say "sorry, your prior condition has deteriorated through the years due to the physical nature of your jobs." I would be precluded from receiving workers compensation benefits based on some preexisting condition that I probably would not even be aware of.

If I continue to work as a Volunteer Firefighter and continue to perform the heavy physical work involved and the nicks and dings over time, which under this Bill would result in a preexisting condition, even though I have no symptoms, I am wondering how many people like myself will be willing to volunteer.

What incentive does a Volunteer Firefighter have to save your property and your lives when the effects of doing so will later on be held against me and, perhaps, result in me and my family being denied compensation.

This Bill is unfair to Kansas workers and would require employees, particularly those who volunteer as Volunteer Firefighters, to carefully evaluate their decisions so that a "preexisting condition" does not down the road be held against them and their family.

In summary, you are going to be asking someone, such as myself, to "look before they leap," and that is probably not what you want your firefighter, your policeman, or someone else in that situation to be required to evaluate. This Bill would have a devastating impact on Volunteer Firefighters and every other employee in Kansas, and I would respectfully ask that this Committee vote against Senate Bill 461.

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February 15, 2006
Attachment 6-1

AARP Kansas

February 15, 2006
Senator Brownlee, Chair
Senate Commerce Committee
SB 461

Good morning Madame Chair and Members of the Senate Commerce 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 four percent of all AARP members work full or part time. That number will increase as the workforce grows older.

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 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.

Ageism is exactly what SB 461 is about. It is discriminatory to aging workers – top 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 and to removing all barriers to equal employment opportunity. These goals include

555 S. Kansas Avenue, Suite 201 | Topeka, KS 66603 | 785-232-4070 | 785-23
Marie Smith, President | William D. Novelli, Executive Director and CEO | www

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increasing employment opportunities and providing access to jobs through training, retraining and other programs designed both to encourage older workers to remain in the labor force and to improve the job security of all working Americans.

Therefore, AARP strongly opposes SB 461. 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.

(8)

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

David Schauner, Testimony
Senate Commerce Committee
February 15, 2006
Senate Bill 461

Dear Co-Chairs Brownlee and Jordan 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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February 15, 2006
Attachment 8-1

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

Kansas Coalition for Workplace Safety

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

Coalition Members:
- 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 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
- Wichita Building and Construction Trades Council
- Wichita-Hutchinson Labor Federation of Central Kansas
- Thomas Outdoor Advertising, INC

Testimony Before Senate Commerce & Labor Committee
February 15, 2006
Terri Roberts, R.N., chairperson
Kansas Coalition for Workplace Safety

Chairman Brownlee 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 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.

Kansas AFL-CIO

2131 S.W. 36th St. Topeka, KS 66611 785/267-0100 Fax 785/267-2775

UNION YES

President
Mark Love

Executive Secretary Treasurer
Jim DeHoff

Executive Vice President
Wil Leiker

Executive Board

Paul Babich
Doris Branham
Mike Brink
Kurt Chaffee
Herb Dicus
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David Han
Tom Harkness
Hoyt Hillman
Larry Horseman
Jim Keele
Lloyd Lavin
Emil Ramirez
Steve Rooney
Rory Schaffer
Mark Shughart
Richard Taylor
Brian Thompson
Dan Woodard

TESTIMONY REGARDING SB 461
SENATE COMMERCE COMMITTEE
FEBRUARY 15, 2006
KANSAS AFL-CIO
BETH REGIER FOERSTER

Madam Chairman and Members of the Committee:

My name is Beth Regier Foerster, and I appear on behalf of the Kansas AFL-CIO regarding SB 461. As an attorney, I have represented injured workers for many years. I am also an adjunct professor at Washburn University School of Law teaching workers compensation. In addition to my written testimony being presented this morning, I am distributing a copy of testimony prepared by my partner, John M. Ostrowski, given to the House Commerce & Labor Committee on January 18, 2006. The testimony presented in the House reviews the status of workers compensation in Kansas and is supported by specific documentation included as multiple attachments. As Mr. Ostrowski pointed out to the House, none of the attachments are created by proponents of claimants. Most of the documentation attachments come from the NCCI, the Division statistics, or the Kansas Chamber.

Senate Bill 461 is a bill that the Senate has dealt with previously, and rejected. The words have been "tweaked", but the intent is the same. Make no mistake about it, this is purely and simply a benefit reduction bill. If passed, it would again hit injured workers and their families "right between the eyes." I hope to demonstrate to you that, like its predecessors, the bill is both unnecessary and harsh.

A. BACKGROUND INFORMATION

According to the Kansas Chamber's own survey of 300 Business Owners and Executives in Kansas in October and November of 2005, workers compensation is not a problem for Kansas employers. (Attachment 1, House testimony). Employers are concerned with high taxes, high energy costs, helping small businesses, and government mandates (see Attachment 1, House testimony). In fact, as this Committee heard from Mr. Lew Ebbert, the bright spot in the Kansas survey, according to employers, is the productivity and work ethic of Kansas employees. One wonders whether or not the individual employers

KANSAS AFL-CIO SOLIDARITY

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Attachment 10-1

B. THE EFFECTS OF THE PROPOSED BILL

It is not possible to review all of the negative effects that this bill would have on Kansas families who suffer the misfortune of an on-the-job injury. The Kansas AFL-CIO again emphasizes that the bill masquerades as "reform." The singular intent is to further reduce benefits.

Specifically looking at the bill, the first portion (Section 1, lines 38-41) deals with preexisting conditions. As discussed at length with regard to SB 181 which was previously introduced, there is a material distinction between a preexisting "disability or impairment" and a preexisting "condition."

To qualify as an "impairment" or "disability", the underlying medical anomaly must in some way, or in some capacity, impair or disable. In short, the medical anomaly must do more than simply exist. What this bill seeks is a reduction in benefits for, at a minimum, every worker over the age of 35. No matter how active, no matter how strong, no matter how healthy, all workers over age 35 will have some arthritis; and thus a reduction in benefits. This does not even take into account even younger workers below that age who may be slightly overweight, have diabetes, or some other condition which in no way impairs their ability to work for their employer. As a matter of policy, is this the course the legislature wants to follow considering the already troublesome and disturbingly inadequate benefit levels?

In addition, all objective standards are removed in attempting to measure these so-called preexisting conditions. Physicians, always initially hired by insurance carriers, will be permitted to simply "opine" that some alleged preexisting condition <u>contributed</u> to the on-the-job injury. If they estimate that this is a 50% or 60% contribution there is a corresponding reduction in benefits. Most injured workers do not currently seek the advice of an attorney. However, when workers are told that they will receive an "offset" for some undiagnosed and asymptomatic alleged condition, they are likely to become involved in litigation.

In addition, the proposed amendment is so broad in its reach that it is not even confined to the body part injured. Assume a worker has a bad knee and slips and falls in water suffering injury to the back. The argument will be made that the worker receives zero compensation for the injury to the back because the slip and fall was completely "caused" by the weakened knee.

In short, the proposed bill will cause an increase in litigation and arbitrarily reduce benefits for virtually every on-the-job injury.

The second portion of the bill deals with work disability. Again, this has been dealt with previously and rejected. Once again, the proposal is merely a reduction in benefits for those workers who cannot return to work earning 90% of their preinjury wage. It is to be recalled that injured workers do not receive lifetime benefits, but rather receive a very limited "adjustment period" when they suffer wage loss.

The current definition of work disability was created by the 1993 legislature. All of the 1993 changes to the law negatively impacted the injured workers of Kansas. The singular provision which was beneficial to workers was that the definition of work disability provided an incentive for employers to retain injured workers in the workplace.

The proposed bill not only reduces benefits to those workers who cannot return to earning the same or similar wages, but it also completely removes any incentive for employers to retain these workers. In fact, the language as drafted virtually insures that no worker will be accommodated. A so-called supplemental payment is so minuscule that employers will terminate employees rather than being burdened with any physical impairment.

Furthermore, a worker will be unable to show that the separation of employment was due solely to the on-the-job injury in the face of <u>any</u> competing evidence put forth by the employer.

Finally, it is to be recalled that the Kansas legislature previously abolished, for all intents and purposes, vocational rehabilitation in workers compensation. With this further erosion of an incentive to return workers to work, more injured breadwinners will be "tossed on the scrap pile."

C. CONCLUSION

The Kansas AFL-CIO recognizes that Kansas employers must remain competitive in order to provide jobs for Kansas citizens. The statistics show, and the Chamber's own survey shows, that if Kansas employers are not competitive, it is not due to the current state of workers compensation. Kansas employers pay the lowest premiums in the region.

The Kansas legislature should be discussing ways to improve benefits for injured workers, and should not be discussing benefit cuts. The Kansas AFL-CIO has supported multiple ideas which could simultaneously increase benefits and maintain these low premiums. The Kansas legislature should also maintain the incentive, as minimal as it is, for employers to accommodate workers by returning them to work. A removal of the incentive is particularly harsh considering the previous abolishment of vocational rehabilitation.

of Kansas would support a bill which further diminishes benefits to their employees.

In Kansas, workers compensation premiums have continued to fall. This is despite the fact that medical costs, which represent approximately 60% of the dollars spent in the system, are rising exponentially. Another rate reduction was approved this year in the voluntary market. Overall, since 1989, there has been over a 30% rate reduction in premiums (see Attachment 8, House testimony). In fact, and as is well known, Kansas employers enjoy the lowest premiums in the region, and some of the lowest premiums in the nation.

Conversely, Kansas employees are suffering from extremely low benefits. Some of the statistics bear repeating:

1) Kansas is only one of four states to cap permanent total disability benefits. Of the four states with a cap, Kansas is 50% lower than the next lowest state. In other words, we are the lowest in the nation by a substantial amount.

2) Kansas is the sixth lowest in the nation in terms of weekly wage replacement when injured workers cannot return to work due to injury (see Attachment 13, House testimony).

3) A Kansas worker who loses an arm or a leg is capped at $50,000. This is less than the injured worker would have received in 1987.

4) The cap for permanent partial disability has been frozen since 1987 at $100,000.

5) The cap for temporary total disability has been frozen since 1987.

These are merely some of the highlights of the failure of the Kansas workers compensation system to adequately compensate injured workers.

Therefore, it is against this background of the lowest premiums in the region, employer satisfaction, and extremely low benefits that this bill slashing benefits is being introduced. One should seriously question the motivation of the proponents of SB 461. Why would injured workers and their families again become the target?

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

WRITTEN TESTIMONY IN OPPOSITION OF SENATE BILL 461

BY
ROBERT TRIPP
President, United Steelworkers of America Local 307
Volunteer Fire Fighter, Shawnee County Fire District #1

PREEXISTING CONDITIONS

Senate Bill 461 drastically reduces workers compensation benefits available to injured workers. Under Senate Bill 461 any **"preexisting condition"** whether known or unknown to the injured worker, whether causing problems or not causing problems prior to an injury, symptomatic or unsymptomatic, will serve to reduce benefits. All that will be required to obtain a reduction or possible elimination of benefits would be the "opinion of a physician." The physician does not have to rely on any sort of definition of a preexisting condition, but can base it on any sort of speculation the physician desires.

1. A preexisting condition can be any type of preexisting that can possible exist. Examples would probably include degenerative discs, osteoporosis, high blood pressure, diabetes, obesity, arthritis, poor eyesight, cataracts, etc. I am certain that our returning Veterans from Iraq would have preexisting conditions from explosions, shrapnel, wounds and numerous other preexisting conditions, that could possibly contribute to work-related injuries later on. Of course, under this provision, our Veterans would be disadvantaged if the have any preexisting problems, whether they amount to an impairment or not, whether they are causing any problems, or not, or whether they have any symptoms whatsoever. This Bill would reduce or eliminate compensation if any of these Veterans suffered a later injury and there is any contribution between the two.,

Under the current law, awards of workers compensation benefits are presently reduced by any preexisting impairment. Impairment means that an injured worker would be required to have a preexisting condition that would be ratable under the *AMA Guides*. To prove entitlement to workers compensation benefits, an injured worker must move their impairment caused by an injury utilizing the *AMA Guides*. Senate Bill 461 does not require utilization of any objective evidence such as the injured worker is required to use, but rather is based strictly on an opinion of some physician without utilization of the *AMA Guides*. It seems blatantly unfair to require injured workers to prove their impairment utilizing *AMA Guides*, but lessen the requirement of proof by employers to use any opinion of a doctor whether that condition was problematic or not which, obviously, is a much lower threshold of proof for the employers.

Senate Commerce Committee
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Attachment 11-1

An example of how this Bill would work, if passed, is as follows: a worker who is starting to develop cataracts, slips on water leaking from a known defective pipe at work, falls and breaks their arm. This worker would be denied compensation, or at a minimum, compensation would be reduced because the preexisting condition of early stage cataracts contributed to their fall, because if not for their poor eyesight, they would have seen the water on the floor and not fallen. Under this bill, it would not make any difference if the employer was negligent and purposely knew and did not fix the pipe. If the worker has a preexisting condition, and even if that condition is unknown to the injured worker, and it in any way contributes to "disability, functional impairment or work disability" resulting from the work injury, benefits will be reduced by the percentage of contribution "in the opinion of the physician." This opinion will come from the same physician that the employer or insurance carrier hires, and every case will be litigated based on some preexisting condition, known or unknown, to the injured worker.

SUPPLEMENTAL COMPENSATION

Further, this Bill will **totally eliminate** the current incentive in the law for employers to retain injured workers. The end result of this Bill will be that every employee who has an injury will be terminated, because the supplemental compensation, if a worker would ever get to that point, is so low there is absolutely no incentive to keep an injured worker working.

Based on the definitions in the section pertaining to supplemental compensation, it is submitted that no worker will ever even get an supplemental compensation, because there are numerous insurmountable hoops that the injured worker would have to jump through before they would even become entitled to supplemental compensation.

HOOPS

If the injured worker is "capable" of earning 90% of their preinjury wages, no supplemental compensation will be provided. The employer and insurance carrier will argue in every case that the injured worker is capable of earning 90% or more, vocational rehabilitation providers will be hired that will testify that every worker is capable of earning 90%, and no supplemental compensation will be paid.

2. Assuming the worker is not capable of engaging in wages equal to 90%, then the next hoop is whether or not the separation from employment was for "economic reasons, for cause, or a voluntary separation." Employers will argue that if business had been better, they would have kept the injured worker working, or will find some minor violation of the company policy and terminate the injured worker and use that as an excuse to not pay benefits. If the injured worker leaves for any reason in a voluntary separation benefits would be denied. So, if the injured worker's spouse was transferred through their Military employment to Germany, benefits would be denied, because they voluntarily left the employment.

3. If through some minor miracle, the worker was able to jump through the first two hoops, if the separation from employment was due to any other reason, other than "solely due to the work-related injury" benefits would be denied, as well. So, if there were any other factors involved in the separation from employment, i.e., health issues, family problems, family issues, preexisting conditions, etc., supplemental compensation would be denied.

But, let's say we have a situation where an injured worker, through some miracle, would be entitled to supplemental compensation. Compare our current law with Senate Bill 461. I have attached a comparison of the current law and the proposed changes. As Attachment 1, under the current law without going through all of the details, if the employer did not keep Joe Smith working, total work disability would be paid in the amount of $82,192.00. Keep in mind that the employer, by simply retaining the injured worker within the restrictions of the doctor, would only pay $18,680.00 for an injury that permanently limits Mr. Smith to a 25 pound lifting limit. This equates to a $64,000.00 incentive for the employer to keep the injured worker working.

Under the law contained in Senate Bill 461, even assuming Mr. Smith was able to get any supplemental disability, the total supplemental compensation would be $17,746.00.

As you can see, there is a huge difference in the amount of benefits payable to someone who has lost the ability to perform their chosen occupation. It is important to note that if Mr. Smith had not been injured and continued to work over the entire 415 week period that workers compensation benefits would be provided, he would have earned, assuming he did not receive any wage, cost of living increases, etc., $399,039.10. Obviously, under either system, the injured worker is severely disadvantaged, but more so under Senate Bill 461, and there would be absolutely no incentive for the employer to keep an injured worker working following an injury under Senate Bill 461.

Finally, I think it is important to really consider who we are dealing with in these workers compensation issues. We often talk in terms of employer/employee, insurance carrier, claimant, etc.; however, in real terms these injured workers are our neighbors, our sons and daughters, our brothers and sisters, and our friends across the street. Our friends and neighbors, our sisters and brothers, our extended family, are the ones that are going to suffer the consequences if they are unfortunate enough to be injured on the job. This Bill is bad, unfair and most of all not necessary.