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KANSAS ASSOCIATION FOR JUSTICE

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To: Senator Tim Owens, Chairman
Senate Judiciary Committee

From: Jeff K. Cooper, Cooper & Lee Law Offices, Topeka
On Behalf of the Kansas Association for Justice

Date: March 15, 2012

RE: HB 2558 As Amended Recusal of an administrative law judge (OPPOSED)

The Kansas Association for Justice (KsAJ) is a professional association of attorneys. KsAJ opposes Section 3 amending 2011 K.S.A. 44-523 relating to recusal of administrative law judges (ALJs). KsAJ believes current law is fair and effective and no changes are necessary.

Request for recusal of an ALJ on the basis that an ALJ cannot afford a party a fair hearing, is not a frequent occurrence. There must be **legally sufficient grounds** to reassign a case. Under the current law, "…the recital of previous rulings or decisions by the administrative law judge on legal issues or concerning prior motions for change of administrative law judge filed by counsel or such counsel's law firm, pursuant to this subsection, **shall not be deemed legally sufficient** for any believe [*sic*] that bias or prejudice exist, " 2011 K.S.A. 44-523(e)(4).

Under current law, when a party believes an ALJ cannot afford a party a fair hearing, the party first requests that the ALJ voluntarily recuse him or herself. Then the party requests the district court to determine if there is **legal sufficiency** to require the director of the division of workers compensation to reassign the case. The grounds that may be alleged that necessitate a recusal are set out in 2011 K.S.A. 44-523 (e)(3) as follows:

- The ALJ has been engaged as counsel in the case prior to the appointment as ALJ.
- The ALJ is otherwise interested in the case.
- The ALJ is related to either party in the case.
- The ALJ is a material witness in the case.

- The party or a party's attorney filing the affidavit has cause to believe and does believe that on account of the personal bias, prejudice or interest of the ALJ such party cannot obtain a fair and impartial hearing.

Under the current law, the director of the division may reassign an ALJ *without* the order of the district court.

The current law is the correct balance of flexibility and fairness. It assures administrative efficiency while allowing parties to seek the review of the district court if they feel that fairness requires it.

HB 2558 is unnecessary, inefficient, and burdensome. Under HB 2558 as Amended, if an ALJ does not recuse him or herself voluntarily, a party must first request that the director reassign the case. The director's decision may then be appealed to the Court of Appeals.

As noted, recusal is very infrequent. When it occurs, the question for the judge is not on the merits of the workers compensation case itself but on the legal sufficiency for recusal of an ALJ as set out in 2011 K.S.A. 44-523 (e)(3). If an ALJ fails to voluntarily recuse him or herself and the director does not reassign the case, district court is the appropriate place to seek a determination of whether there is legal sufficiency for recusal. In addition, process in district courts is faster. In the rare case where recusal is an issue, resolving the question at district court would allow the underlying workers compensation case to move forward more expeditiously.

KsAJ members believe no changes in the current law are needed. The current law is effective. It is imperative that a fail-safe be retained to review the decision of the director if a party feels the court could more objectively review the facts and the grounds that necessitate a recusal in 2011 K.S.A. 44-523 (e)(3). KsAJ members are satisfied with reviews by the district court of legal sufficiency.

The Kansas Association for Justice respectfully requests that the committee take no further action on Section 3 amending 2011 K.S.A. 44-523 of HB 2558 relating to recusal of judges.