Approved: April 1, 2004
Date

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE

The meeting was called to order by Chairman Don Dahl at 9:00 a.m. on February 17, 2004 in Room 241-N of the Capitol.

All members were present.

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

Conferees appearing before the committee: John Ostrowski, Kansas AFL-CIO
David Wilson, AARP
Kent W. Dederick, International Association of Firefighters
Timothy A. Short, Kansas Trial Lawyers Association
Ami Hyten, Topeka Independent Living Resource Center Inc

Others attending:
See Attached List.

The Chairman opened the hearing on **Sub-SB 181 - Workers Compensation: pre-existing conditions** and stated the hearing today would be exclusively on the first proposed Senate change to existing Kansas workers compensation law found on the first page of the bill.

John Ostrowski, Kansas AFL-CIO, an opponent to **SUB-SB 181** as it relates to pre-existing conditions, stated it was clear that the concerns of the proponents revolved exclusively around the now famous Hanson decision. In summary in Judge Moore's testimony on February 10, 2004, he stated "the Hanson decision has been frequently misread and misinterpreted."

KCCI believes that every injured Kansas worker should receive the full measure of compensation for the effects caused by a workplace injury, even where the injury only aggravates a pre-existing condition. This is an important concept. KCCI was indicating its willingness to pay for "aggravations, intensifications, or accelerations" of underlying conditions. The "full measure of compensation for the effect" of the injury is the worker's present inability to work versus his ability to work pre-injury.

In 1993, employers told the legislature that they would individually be responsible for the "full measure of compensation for the effects caused by workplace injury, even where the injury only aggravates a pre-existing condition." In exchange, they were to receive an offset for pre-existing functional impairment, and the Fund was to be abolished. If there is current dissatisfaction with that choice, then the Legislature should follow the recommendation of the Advisory Council Subcommittee and reestablish the Fund. Some employers/insurance carriers agree with this position, others apparently do not. The point is that the solution to the problem should not be the lowering of benefits (Attachment 1).

David Wilson, AARP Kansas Executive Council, testified as an opponent to **Sub SB 181,** stating more than 33 million men and women age 50 and older are in the labor force. This number will rise sharply as the workforce grows older. AARP strongly opposes pre-existing conditions. 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 (Attachment 2).

Kent W. Dederick, International Association of Firefighters, testified in opposition to the pre-existing conditions in **Sub SB 181**. Pre-existing conditions seem to be the most controversial and least understood issue relating to the workers compensation statutes today. Mr. Dederick asked if an employee should expect to lose workers compensation benefits because of arthritis and a degenerate joint disorder that x-rays and MRI's have shown are due to injuries that he had received throughout his working years? Or should the employer be willing to accept the responsibility for the accumulation of injuries that have occurred during his career (Attachment 3)?

MINUTES OF THE HOUSE COMMERCE AND LABOR COMMITTEE at 9:00 a.m. on February 17, 2004 in Room 241-N of the Capitol.

Timothy A. Short, Kansas Trial Lawyers Association, testified in opposition to pre-existing conditions in **Sub SB 181,** stating prior to the 1993 changes in the Kansas Workers Compensation Act, a worker who suffered an on-the-job injury was entitled to be compensated for his/her entire injury, even if a prior injury to the same part of the body or a pre-existing condition contributed to the new injury or resulting disability. If the injured worker was still receiving compensation from an earlier workers compensation claim for an injury to the same part of the body, the employer received a dollar for dollar credit for any weeks when compensation paid for the prior claim overlapped weeks when compensation was due for the new injury.

The injured worker has the burden of proving his/her overall functional impairment resulting from an on-the-job injury, and the employer has the burden of proving any pre-existing functional impairment. If the worker fails to present evidence showing the percentage of his/her overall impairment using the American Medical Association's (AMA) Guides, he/she is not awarded any compensation, even though the worker has permanent disability. Conversely, if the employer fails to present evidence showing the percentage of the worker's pre-existing impairment using the AMA Guides, no deduction is made from the overall impairment rating, even though the worker had some pre-existing disability. The Courts are not allowed to "fill in the blanks" for either party.

The proposed change in the pre-existing condition rules would still require an injured worker to prove his/her overall functional impairment using the AMA Guides but his/her employer would be allowed to prove the amount of pre-existing impairment with wild opinions given by a doctor without any basis. The proposed change would allow a doctor to attribute pre-existing impairment to a condition which had no symptoms and did not affect the worker's ability to perform any activity prior to the new injury.

Because there would be no standards for rating pre-existing impairment, the employer's doctor could even give a higher impairment rating for the pre-existing impairment than the doctor gives for the overall impairment (including the pre-existing impairment and the new injury) (Attachment 4).

Ami Hyten, Topeka Independent Living Resource Center, Inc., testified as an opponent to **Sub SB 181**, stating under the Americans with Disabilities Act, an individual is not considered to be a person with a disability if his or her condition has been corrected through medication or other intervention. **Sub SB 181** would turn courts' definition of a person with a disability under the ADA on its head. The bill states in essence that, no matter how capable a worker is in his or her job, in the state of Kansas, for purposes of workers compensation, he or she would always first be considered to be a person with a disability. The burden of proof would be flipped (Attachment 5).

The following written testimony in opposition was distributed: Mark Desetti (Attachment 6), Terri Roberts, Kansas State Nurses Association (Attachment 7), Donald F. Anderson, Risk Manager, City of Olathe, Kansas (Attachment 8). A proponent, Leslie Kaufman, Director, Governmental Relations, Kansas Cooperative Council (Attachment 9).

The Chairman adjourned the meeting at 10:00 a.m. The next meeting will be February 18, 2004.