



To: Senator Julia Lynn, Chairperson  
Members of the Senate Commerce Committee

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

Date: February 4, 2013

RE: **SB 73 Concerning workers compensation (OPPOSED)**

The Kansas Association for Justice (KsAJ) is a professional association of attorneys with members across the state. KsAJ supports strong workers compensation laws. Kansas workers are the engine of our economy. Balanced laws providing reasonable and adequate protection for workers support a robust economy and benefit employers and employees.

KsAJ opposes SB 73 as currently drafted. KsAJ's specific concerns are as follows:

**Process of Administrative Law Judge (ALJ) Recusal.** SB 73 amends the process by which a party seeks the recusal of an administrative law judge, and review of the decision. 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.

SB 73 amendments to the recusal process are unnecessary, inefficient, and will only delay resolution of claims. The current process works effectively and should be retained.

Under SB 73, if an ALJ does not recuse him or herself voluntarily, a party must first request a determination by the workers compensation board as to the legal sufficiency of the affidavit for recusal. The board's decision may then be appealed to the Court of Appeals.

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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).

- 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.

If an ALJ fails to voluntarily recuse him or herself and the director does not reassign the case, a 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, which benefits all parties. Under the current law, the director of the division may reassign an ALJ *without* the order of the district court.

KsAJ members believe no changes in the current law are needed. The current law is effective. KsAJ members are satisfied with reviews by the district court of legal sufficiency.

**Presumption of Wage Loss, Undocumented Workers.** SB 73 amends the definition of “wage loss” in K.S.A. 2012 Supp. 44-510e (a)(E)(i), which deals with establishing post-injury wages. Under current law, an employee must have the legal capacity to enter into a valid contract of employment to establish post-injury wage loss. Under SB 73, if an employee is neither a US citizen nor authorized to work in the US, it is conclusively presumed that the employee has no wage loss.

Rather than discouraging undocumented workers from seeking employment in Kansas, SB 73 creates an economic incentive for employers to hire undocumented workers. However, once injured, undocumented workers will still require costly emergency medical care. Instead of payment through workers compensation insurance coverage, the costs of care will simply be shifted to (1) taxpayer funded social programs including Medicaid and Medicare, (2) increased hospital service charges, and (3) increased private health insurance premiums, paid by Kansans.

Despite SB 73's hidden cost shifts to the State, Kansas businesses, and Kansas citizens, insurers will receive a windfall. Since insurance companies charge insurance premiums based on the number of workers employed, insurers will collect premiums based on benefits to injured workers that will never be paid.

**AMA Guide, 6<sup>th</sup> Edition.** Under current law, the degree of permanent disability caused by a work place injury is determined using impairment ratings established in the American Medical Association's Evaluation of Functional Permanent Impairment Guide, 4<sup>th</sup> Edition. Under SB 73, use of the 6<sup>th</sup> Edition is mandated.

Requiring the 6<sup>th</sup> Edition is ***not*** a technical amendment to statute, and it will have a negative impact on Kansans with permanent disabilities. The 6<sup>th</sup> Edition (2007) contains new approaches

to rating impairment designed to increase standardization. The decreases in impairment ratings cannot be attributed to greater validity or reliability. The AMA *Guides* were designed by a consensus process. There is no indication that independent testing has been undertaken.

The 6<sup>th</sup> Edition has been discredited by experts. John F. Burton, a scholar on the nation's workers compensation system, has challenged the AMA Guide 6<sup>th</sup> Edition as not being evidence-based. He also told the New York State Workers' Compensation Board that the basis for the AMA Guides was "hokum."

Proponents of the 6<sup>th</sup> Edition urge that the 6th, and earlier editions of the *Guide*, are intended only to aid physician assessment of impairment. However, the reality is that use of the AMA *Guides* is a substantial factor in determination of the economic result for Kansans permanently injured on the job.

There is no uniform nationwide standard for using the AMA Guides. Some states have developed a state-specific rating schedule. According to the National Council for Compensation Insurance (NCCI), not all states use the AMA Guides or mandate which edition be used. Of those that do, some commonly use the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, or 6<sup>th</sup> Edition. Regionally, there is not consistency. Colorado uses the 3<sup>rd</sup> Edition; Nebraska and Missouri do not specify; and Oklahoma commonly uses the 5<sup>th</sup> Edition (as of 2012.)

In some cases, states have considered and specifically rejected use of the 6<sup>th</sup> Edition, including New York, Kentucky, and Iowa. An Iowa Task Force was charged with making recommendations regarding incorporation of the 6<sup>th</sup> Edition, and concluded, "The six edition paradigm is not the future for Iowa."

Currently, Kansas physicians have been reluctant to rate injuries within the workers compensation system. The complexity of the 6<sup>th</sup> Edition could further discourage physicians.

It is critical that the Legislature assure that the workers compensation laws are fair and benefits are adequate. KSAJ urges the Committee not to rush into changes that are unsound, and will cause uncertainty for workers, physicians, and employers.

Many states, like Kansas, use the 4<sup>th</sup> Edition of the AMA Guides. The negative impact of changing the law in Kansas outweighs any possible benefit.

**The Kansas Association for Justice respectfully opposes SB 73 as currently drafted, and specifically requests that the Committee amend the bill to eliminate the provisions relating to ALJ recusal, calculation of post-injury wage loss, and mandatory use of the 6<sup>th</sup> Edition of the AMA Guides.**