MINUTES

HOUSE COMMITTEE ON LABOR AND INDUSTRY

September 1-2, 1993
Room 313-S -- Statehouse

Members Present

Representative David Heinemann, Chairman
Representative Al Lane, Vice-Chairman
Representative Garry Boston
Representative Tim Carmody
Representative Darlene Cornfield
Representative Les Donovan
Representative Richard J. "Dick" Edlund
Representative Jim D. Garner
Representative Robert Grant
Representative Gary K. Hayzlett
Representative Eloise Lynch
Representative William G. Mason
Representative Carlos Mayans
Representative Richard M. Nichols
Representative Greg A. Packer
Representative Janice Pauls
Representative Don Smith
Representative Sabrina Standifer

Staff Present

Jerry Ann Donaldson, Kansas Legislative Research Department
Jim Wilson, Revisor of Statutes Office
Kay Scarlett, Committee Secretary

Others Present

George Gomez, Director, Division of Workers Compensation
Bill Morrissey, Assistant Director, Division of Workers Compensation
George Welch, Director of State Self Insurance Fund, Division of Workers Compensation
Don Bruner, Director, Division of Labor-Management Relations and Employment Standards
Duane Guy, Industrial Safety Coordinator, Division of Labor-Management Relations and Employment Standards

Hal Hudson, National Federation of Independent Business, Kansas
Shelby Smith, Economic Lifeline II
Tom Slattery, Associated General Contractors of Kansas, Inc.
Bill Wempe, Kansas Insurance Department
Liz Maisberger, Kansas Association of School Boards
Bill Sneed, State Farm Insurance
Ken Bahr, Beech Aircraft
Kevin Robertson, Barbee and Associates
Jim McBride, citizen
David Shufelt, Division of Workers Compensation
Dick Smelser, Division of Workers Compensation
John Bouillet, Division of Workers Compensation
Anne Smith, Kansas Association of Counties
Richard Thomas, Division of Workers Compensation
Greg Skinner, Division of Workers Compensation
Isabel Vance, Division of Workers Compensation
Roland Smith, Wichita Independent Business Association
Sharon Huffman, Kansas Commission on Disability Concerns
Richard Mason, Kansas Trial Lawyers Association
Bernie Koch, Wichita Chamber of Commerce
Bill Jarrell, Boeing Aircraft Company
Janet Stubbs, Home Builders Association of Kansas
Dick Brock, Insurance Department
Craig Stromgren, Kansas Association of Counties

September 1, 1993
Morning Session

The meeting was called to order by the Chairman, Representative David Heinemann, at 9:07 a.m.

Workers Compensation

George Gomez, Director, Division of Workers Compensation, provided a workers compensation update since the new workers compensation legislation went into effect July 1. As expected, it has been rather hectic in their office. They have been traveling around the state explaining the many changes in workers compensation law, including the new ten-day rule on the reporting of accidents. The main challenge this month is the selection of a board of review. With a pool of 40 applicants to choose from, they hope to make the appointments to the Workers Compensation Board by September 18. Implementation of exact operating procedures of the Board are still under consideration. There had been some discussion as to the constitutionality of this section of the bill, but it is now thought it is probably okay, and they are proceeding as such.

Mr. Gomez introduced two benefit review officers who started work today; eventually, there will be a total of five. They will be staffing six ombudsmen. They currently have offices in Salina, Topeka,

Wichita, and Kansas City, but are going to start their initial program in Topeka and see how it goes. Space has been leased in the Merchants National Bank Building. As for the ombudsman program, they have expanded the 800 number capabilities, changed posters, brochures, letters, etc. They will be collecting data on computer, eventually 100 codes, on all calls to ombudsmen with the information available to all areas of workers compensation.

The fiscal note called for 63 extra people, which was cut down to 43 in the budget process. There will be about 35 additional personnel by October. Mr. Gomez still feels they will probably need the 63.

Bill Morrissey, Assistant Director, stated that the theme of the new Workers Compensation Act was to put the Division of Workers Compensation in control of these cases, not the attorneys for the parties. The legislation instructed them to provide educational materials and ombudsmen claims advisors to inform everyone involved in a case in an attempt to resolve the issue so it will not need to go further. If the case does go to litigation, there is the benefit review conference to resolve the issue at that stage. Ten days before a case would go to trial, there would be a prehearing settlement conference with an administrative law judge, in an attempt to reach agreement or reduce the intensity of litigation. The goal is to inform and educate people at each stage and try to resolve the issue at that time, before it goes any further.

In answer to a question from Representative Pauls, it was stated that rules and regulations have not been constructed at this time. The Division has been working on a medical fee schedule, with a hearing scheduled for next week.

Mr. Gomez informed the Committee that Section 12 states that when there is a preliminary hearing application filed, the Director "shall" have a benefit review conference. Another section in the legislation says the Director "may" have a benefit review conference. There is a conflict between the two sections.

The Division sent mailings to over 2,000 attorneys July 1, informing them of the changes in Workers Compensation Law. The oversight committee has been selected, but no meetings have been scheduled. The Division has experienced some problems getting attorneys to sign pleadings and notice-of-intent forms.

The Division has had its first question on the alcohol and drug portion of the statute that was unanticipated. An employer sent an employee for testing, and the test showed no drugs or alcohol. The employer turned the bill in to the insurance company under workers compensation, and the insurance company refused to pay.

The noncitizen death benefit was changed in the statute. Recently, the Kansas Supreme Court reversed that portion of the old law, so this section was wisely changed because of this ruling.

Vocational rehabilitation now is voluntary. The Division believes that now employers and insurance companies will be doing more of a cost analysis on vocational rehabilitation, the reason being the new formula on permanent partial disability. Insurance companies can lower indemnity payments and the employer can lower the experience modification by lowering the indemnity payments by pushing for vocational rehabilitation training at the right time. They feel vocational rehabilitation will still be used; however, it will be voluntary. Boeing is considering using vocational rehabilitation as a means of helping with Americans with Disabilities Act (ADA) requirements.

The Division has had their first child support assignment. It is good in that someone noticed the new part of the statute and was using it; however, no reference was made to workers compensation statutes.

There have been some dramatic changes in the Wichita area on prehearing settlement conferences. Litigation settlements have gone from 20, 30, and 40 percent to 50, 60, and 70 percent on prehearing settlements. These are cases that a judge will not have to be involved in, other than monitoring negotiations. What helps make this work is that everyone involved in a case has to be present at the prehearing settlement conference.

The Division is altering its open records procedure, so when an employer dials in, he will be given an identification number and a warning that it is against the law to check a person's records until after he has been hired, according to ADA rules. Persons whose records are accessed will also be sent a postcard notifying them that their records have been accessed. This is a significant change that they think will eliminate any ADA liability the state may have, as it is illegal under federal rules for a governmental entity to participate in ADA discrimination.

The Division is going to participate in a national data collection system in conjunction with the National Council on Compensation Insurance (NCCI). When an accident occurs and the employer reports it to the carrier, the report will be electronically transmitted overnight to the Workers Compensation Division. In the future, a doctor will be able to direct bill the carrier, and the information will also be sent to the department. It will probably take about two years to complete the system.

Mr. Gomez met with the Attorney General's office yesterday, regarding an assistant for workers compensation. They will probably staff one investigator and one clerical person in this area.

Only one doctor has applied for the staff position, so they may not have a doctor hired until January. Utilization peer review is also to be in place by January 1. It would have been helpful if a doctor had been hired to help set this up. Instead, they are meeting with the Hospital Association to learn from their utilization peer review procedures. They are looking for a system of protocol to be used, such as an American Medical Association (AMA) book on symptoms, tests, and treatment, and the possibility of all claims above a certain amount ($15,000 or $20,000) being sent to utilization review.

The new Workers Compensation Law mandated the use of the *Third Edition Revised of the AMA Guidelines*; now, there is going to be a fourth edition. The question was raised whether to go to a general term such as the latest edition of the *AMA Guidelines* to avoid this technical problem in the future. There was fear last session that we would be adopting nothing without a specific number. Neither title is actually correct. The correct title is *AMA Guidelines to Evaluation of Physical Impairment*. The technically correct title was sent out July 1, and there have been no problems. The Committee may want to address this next session.

George Welch, Director of State Self Insurance Fund, Division of Workers Compensation, gave a progress report on the state safety program authorized by the 1993 Legislature. His office plans to begin a pilot safety program with a local high-accident agency, specifically, Kansas Neurological Institute. He hopes they can have impact right away with this program and have a favorable report when the 1994 Legislature convenes in January (Attachment 1).

The meeting adjourned for lunch and planned to reconvene at 1:30 p.m.

Afternoon Session

Don Bruner, Director, Division of Labor-Management Relations and Employment Standards, shared some of his professional concerns about workplace safety and health in Kansas (Attachment 2). Mr. Bruner explained the federal Office of Safety and Health Administration (OSHA) consultation to the Committee in detail, explaining that an employer of a small business (less than 500 employees) must request their service. They do an industrial safety and health survey of the plan, write recommendations, and assist the employer in bringing his plant up to OSHA standards. If they find serious hazards in a plant, the employer has to agree to correct the hazard. He is given 30 days to do so; however, extensions are granted. If the problems are corrected, the company receives a one-year exemption from being inspected by OSHA. His agency cannot fine private sector employers, but they can fine public agencies. His department does not report employers to OSHA.

OSHA has a right-of-entry policy, meaning they can inspect any business at any time, without prior notice. OSHA fines are considerable, with a minimum of $500 up to $7,000 or more per incident. Recently, there was a $1.5 million fine to a packing plant and a $500,000 fine to a construction company. If OSHA had found all the hazards their office found in their consultations last year, it would have amounted to over $3 million. Their office can do 30 or 40 consultations a month. They are averaging 50 to 60 requests per month, with a backlog of 225 requests.

After the Workers Compensation Law was changed to require insurance companies to provide accident prevention information, Mr. Bruner sent out a survey to see what is now being provided. Results of the survey are attached (Attachment 3). An information handout on accident prevention programs for insurance carriers and self insureds is also attached (Attachment 4). He said many insurance carriers are concerned about the cost of safety programs. Mr. Burner said accident prevention through insurance carriers was not the only way to go. Another solution would be to take money we are spending on accident prevention and expand the OSHA consultation program.

The Department of Human Resources is holding a Safety and Health Conference October 26, 27, and 28 in Wichita, with the seminar on October 28 geared for small businesses that usually do not have the time to attend this type of meeting (Attachment 5).

If they pass, the OSHA Reform Acts, S.B. 575 and H.B. 1280, would make two major changes affecting Kansas. The definition of employer would include all public employers and would establish a fee fund for the OSHA consultation program, with fees going to the federal program (Attachment 6). This is not a glowing future for what they are trying to do in Kansas. If these acts should pass, Kansas would have the option of becoming an 18(b) state, meaning we would take over the enforcement of OSHA totally in Kansas. Funding would go from 90 percent federal and 10 percent state to 50-50 funding. Iowa is the only state in this area that is an 18(b) state. Their Commissioner of Labor recently told him that their fines and penalties paid for their program and put $400,000 in the State General Fund.

Duane Guy, Industrial Safety Coordinator, Division of Labor-Management Relations and Employment Standards, expanded on the safety and health issues already discussed (Attachment 7). He stated that there are provisions in the OSHA penalty provisions for small businesses when penalties are assessed. First, they look at the size of the business (there is a 50 percent reduction for small businesses). Second, they look at whether there has been a good faith effort on the part of the employer, such as a safety and health program, or whether he has asked for the state OSHA consultation service. Penalties can be

reduced down to about 25 percent. OSHA concentrates its efforts by high-hazard industries, as does the OSHA consultation service.

OSHA is now involved in safety and health programs; it has always recognized the need, but failed to require specific programs. Part of the consultation service is to help develop written safety and health programs now mandated by OSHA. Necessary items in a good safety and health program include management commitment, employee involvement, labor-management committees, goal setting, and inspection procedures (about 10 percent of the total program). The state has the equivalent of 2.5 full-time employees in the safety area and 2.5 industrial hygienists. Shortage of personnel is one reason they have 225 requests backlogged. He felt money might be better spent in safety and health programs, rather than inspections.

Nebraska just enacted a mandatory consultation program effective July 1, 1993; this is a consideration, not a recommendation.

The meeting adjourned at 3:50 p.m. The next meeting is scheduled for September 2, at 9:00 a.m.

September 2, 1993
Morning Session

Sharon Huffman, Kansas Commission on Disability Concerns (KCDC), addressed the Committee on the employment provisions of ADA that specifically refer to workers compensation. The Commission's main concern is the problems associated with the workers compensation records being open to the public. ADA prohibits questions regrading previous workers compensation claims prior to offer of employment (Attachment 8).

Ms. Huffman included several attachments with her testimony:

1. excerpts from the Equal Employment Opportunity Commission final rule on Title I, the employment provisions of ADA that specifically refer to workers compensation (Attachment 9);

2. samples of disability discrimination complaints to the Kansas Human Rights Commission (Attachment 10);

3. a copy of a letter from Richard D. Charlton, Sr., attorney for Advocates for Disabled Access to Programs and Training, Inc. to the Department of Human Resources, recommending closing workers compensation records (Attachment 11); and

4. results of a February, 1993 KCDC survey of all 50 states asking about their policies regarding workers compensation records being released to the public (Attachment 12).

Legislation passed last session makes workers compensation records subject to the Kansas Open Records Act, providing more restriction. The Division of Workers Compensation is currently making some changes that will restrict access to claimant records, will notify the claimant that his or her records were requested or reviewed, and also provide a tracking system as to the source of the inquiry. She feels that while this method may catch the violators, it is not a means to stop them.

KCDC feels the only way to stop access to workers compensation claim files is to repeal K.S.A. 44-550b or to amend it to require written authorization from the claimant prior to release of information.

Richard Brock, Administrative Assistant, Kansas Insurance Department, reported on developments in the Insurance Commissioner's office as a result of workers compensation reform legislation passed last session. He provided a sample copy of a letter sent to the president of each insurance company authorized to write workers compensation insurance in Kansas to be sure that top management knew that Kansas had made substantial changes in its workers compensation laws and asked them to take another look at Kansas as a good place to do business. Response from the letter has been encouraging (Attachment 13).

Mr. Brock provided a copy of workers compensation informational material for Kansas employers and employees to be provided by insurance companies, as required in Section 7 of the new workers compensation legislation. The Division of Workers Compensation is translating the brochure into Spanish and is looking at the possibility of combining both languages on one brochure. After October 1, 1993, this information must accompany every workers compensation insurance policy and any renewal issued to a Kansas employer (Attachment 14).

All insurance rates have to be filed and approved by the Commissioner of Insurance before being used in Kansas. In reply to a question by Representative Smith, if a rate increase or decrease is appealed, the burden of proof falls on the Insurance Department to prove that the rate is excessive or discriminatory. As of July 1, 1994, they will be going to lost cost rates, which means that NCCI will file only that portion of the rate that reflects the losses that are expected to be paid. That portion of the rate that reflects insurance company expenses will be filed separately by each insurance company. When one organization files for all companies, it relies on averages, and therefore, provides no incentive to reduce expenses and to lower rates. This will make each company look at its own expenses and possibly, make rates a little more competitive.

Chairman Heinemann expressed his opinion that next session we have one bill on workers compensation that basically makes all the technical clarifications necessary to fulfill the intent of what we passed last year. Policy changes should be in a separate bill.

The meeting adjourned at 11:15 a.m. The next meeting is schedule for November 1, at 9:00 a.m.

Prepared by Jerry Ann Donaldson

Approved by Committee on:

December 3 per Donaldson
~~November 2,~~ 1993
(Date)

93-0007819.01/jad

9-1-93
GEO. U H
W.C.

S T A T E E M P L O Y E E S A F E T Y
A N D H E A L T H P R O M O T I O N U P D A T E

Presented to the House Labor & Industry Committee

September 1, 1993

Department of Administration
Division of Personnel Services
State Self Insurance Fund

House Labor & Industry
Attachment I
9-1-93

STAFFING

Three positions have been allocated to develop, organize and implement the State Employee Safety and Health Promotion program. A Personnel Management Specialist IV will head up the program, supported by a Personnel Management Specialist II and an Office Assistant III. This program will receive the full support of other staff in the Self Insurance Fund.

SPACE

Adequate space for staff is currently being prepared on the fifth floor of Landon building, adjacent to space currently occupied by the Fund. This space should be ready for occupancy by September 15, 1993. It is located in room 554.

TRAINING

In testimony before this committee last session, the Behavioral Accident Prevention Process was explained and offered as the process we planned to utilize. This process, you may recall, reduces accidents through management of at-risk behaviors. It is a proactive process that identifies, measures and improves safety-related behaviors upstream before accidents happen. The process is based on measurement, upstream sampling of key variables, problem solving and employee involvement. It is an effective safety management process that identifies and corrects existing systems that produce at-risk behavior and develops new systems that encourage safe behavior.

Currently, we are negotiating with a company that can provide training for this core group and an additional three people from an agency that has a high frequency accident rate. The purpose of the training is to: 1) establish a mechanism for continuous improvement of safety performance; 2) significantly reduce accident frequency during the first one year period of the process; 3) improve behaviors and attitudes that are critical to safety; 4) increase employee involvement, morale and positive attitude toward safety; and 5) provide a system that allows for measurement of true safety improvement.

Allocated positions shall be filled to coincide with available space. A target date to commence training, the first phase, is October 1, 1993, with Assessment and Planning for Implementation, phase 2, to begin three weeks later.

Training in Room 552

REMARKS BEFORE THE HOUSE LABOR & INDUSTRY INTERIM COMMITTEE
REVIEW OF NEW WORKER'S COMPENSATION ACT
AND
WORKPLACE SAFETY ISSUES
SEPTEMBER 1, 1993

Good morning Mr. Chairman and members of the Committee. My name is Don Bruner, Director of the Division of Labor Management Relations and Employment Standards, Department of Human Resources. Also appearing will be Duane Guy, Industrial Safety Coordinator for the Industrial Safety and Health Section.

We welcome and thank the Committee for the opportunity to discuss workplace safety issues in Kansas.

Kansas has for over 100 years maintained a strong policy on providing workers a workplace free of safety and health hazards. Such dates back to the Industrial Commission in the late 1800's, followed by the Department of Labor which became the current Agency. The Secretary's current duties and authorities are broad and comes from several areas of Kansas Law related to safety concerns. i.e.

K.S.A. 44-636 -- Public sector employment enforcement.

K.S.A. 77-536 -- Special immediate authority upon finding imminent dangers to employees or other persons exposed.

K.S.A. 75-5740 -- Mandate to promote workplace safety and health education, citizens cooperation, accident prevention and safety measures of every kind and character.

Federal OSHA Consultation -- The Secretary has entered into a contract with the U.S. Department of Labor, Occupational Safety & Health Administration to provide consultation services to small high hazard private sector employers (500 employees or less) in Kansas. Such is a no cost service which is funded by 90% Federal funds with a 10% State match. This service provides on-site consultation with recommendations and technical assistance in hazard abatement.

New Accident Prevention Section 10, SB 307, 1993 -- The Secretary has a duty to enforce this provision of law to assure that insurance companies and group-funded self-insured plans maintain and offer accident prevention services which are adequate. My research of the meaning of the word ADEQUATE indicates it is simply equal to THAT WHICH IS INTENDED. Firms or plans who's services are found not to be adequate are referred to the State Insurance Commissioner's jurisdiction for remedy.

House Labor and Industry
Attachment 2
9-1-93

ISSUES & CONCERNS REGARDING THE ENFORCEMENT OF NEW SECTION 10, SENATE BILL 307, 1993

In any new endeavor immediate questions require answer so that planning can take place. In planning for accident prevention enforcement it became apparent that discussion with employers regarding current (pre-law) services was required. A decision was made to use a single page "VOLUNTARY PREVENTION INQUIRY FORM". Employers requesting services under the OSHA consultation program would be asked to answer the questions raised. (a copy is attached) As can be ascertained we are concerned with determining the extent, quality and effectiveness of accident prevention services being provided prior to July 1, 1993.

The limited time to accomplish this inquiry necessarily limits the number of responses we would receive. Accordingly the attached results are based upon 20 responses from employers. Their use of the consultation program and demonstrated interest in improving workplace safety may weight the sample to indicate existing conditions that are above that which actually exist. Employers who know they have safety problems and do not have the will or fiscal ability to make corrections will normally not request our services. This same factor may present itself within the accident prevention in the same manner.

This inquiry reveals some interesting points and if they are true indicators of that to come, may give serious consideration to the fiscal ability of marginal insurance companies. The findings indicate that 40% of the employers report that they received no accident prevention services at all. In fact in some cases the employers safety representative did not know who the worker's compensation insurance carrier was.

Additionally, consider that only 55% of the 60% receiving services were given written recommendations that were based upon OSHA standards or other nationally accepted concensus standards. Further that only 20% of the 60% indicated follow-up was made and lastly, only 45% of the 60% indicated that their interest was advanced by the service.

The above is reported with full knowledge that a full professional survey might give a better picture, I believe that this snapshot can be relied upon with a reasonable margin of error.

If reasonably acceptable, what conclusions can be drawn and what would be their meaning?

First, consider that insurance company or group-funded self-insured plan which is among the 40% that does not provide services. Because such services are used by some as a point of marketability one can assume cost is most likely the reason for

lack of services. Further, consider under Section 10 that this insurance entity is required to develop and maintain the kinds and type of services described in law. Such will be established at a considerable cost. To not maintain the services is in violation of their right to do business in Kansas. They do not have the option of having the services and just not offer same to insured employers. This approach is clearly not adequate and will also trigger the required actions of the Insurance Commissioner.

The question arises, will insurance companies be forced to stop doing business in Kansas? Any consideration to raise rates to cover costs will run counter to the intent of the Legislation.

Second, consider that if the scenario discussed above develops there will be increased administrative costs for all agencies involved.

Third, will the desired reduction of safety hazards be achieved and more important will the insured employers actually receive benefit from the service? Our limited data indicates a 50% chance.

Fourth, consider that actual reduction of rates under a successful accident prevention program would require an extended period of time because of the reporting and rate making procedures involved.

We would not argue that accident prevention services of insurance companies and group-funded self-insured plans do not play an important function in rate making or accident reduction. However, we do argue that it alone is not sufficient. The nature of accident prevention as established in the law is missing a most important factor - that being employer commitment to a strong workplace safety program. This will better follow an equally strong incentive such as a method of automatic rate reductions for reaching safety benchmarks. The employer that invests in safety and reduces accident rates by reason of an effective safety program should enjoy a return on their investment and efforts without undue delay.

We remain convinced that a safety program with incentives which utilizes the provisions and procedures of the current OSHA consultation services is the best approach to workplace safety in Kansas.

In considering workplace safety issues in Kansas one must look to the future and consider changes which may impact. One major factor requiring attention is -

The OSHA Reform Acts, Senate Bill 575 and House Bill 1280. They make two major changes affecting the State of Kansas.

First, the proposed acts amend the definition of employer to include all public employers in Kansas.

This would automatically invoke the OSHA pre-emption of state enforcement of K.S.A. 44-636 unless Kansas elects to become and is approved as an 18(b) (OSHA enforcement) state.

In this status Kansas would deposit fines and penalties for OSHA enforcement into the Kansas treasury. Otherwise, under OSHA enforcement they would be deposited in the U.S. Treasury. Under current penalty and fine structure, receipts could be greater than the 50% match of the State. In any event this approach should be fully discussed and considered upon passage of OSHA reform legislation if it remains in current form. Any such consideration will also involve Kansas Legislative approval or statute.

Secondly, if passed the reform act will establish a federal fee fund for our consultation program. Employers both public and private who then request consultation services in our 7(c)(1) program would be charged a fee. Fees are to be deposited in a federal "fund" to be used to fund training and assistance nationwide. A general rule here is that small states most often do not receive back an amount equal to what they contribute.

I thank the Committee for your kind considerations. If my Division can be of service at any time in the future, please call 296-4386. I will stand for question on my remarks at this time or at the end of Mr. Guy's remarks regarding the safety program operation in KDHR.

Voluntary Prevention Inquiry Form
Date: _____

Workers Compensation Insurance Carrier is:

Name: _____

Address: _____

Name of Person Interviewed: _____ *Title* _____

The following questions relate to accident prevention or loss control services provided by the above insurance carrier.

1. *Is accident prevention service provided?* *Yes* 60% (12) *No* 40% (8)

   If yes, describe: ONLY 25% COULD OR DID DESCRIBE SOME PART OF THE ACCIDENT PREVENTION SERVICES RECEIVED.

2. *Are written recommendations issued?* *Yes* 55% (11) *No* 45% (9)
   (If yes, inquire if a copy can be furnished)

3. *Are recommendations based upon nationally accepted standards or OSHA?* *Yes* 45% (9) *No* 55% (11)

4. *Does the insurance company require correction or follow-up inspection(s)?* *Yes* 20% (4) *No* 80% (15)

   If no, what action does the insurance company take to verify correction? 15% INDICATED THAT SOME ATTEMPT TO VERIFY CORRECTION WAS MADE

5. *In your view, was the employer's interest in reducing accidents advanced by this service?* NO ANSWER 5% (1) *Yes* 45% (9) *No* 50% (10)

   If no, explain: 5% EXPLAINED THE REASON SUCH DID NOT ADVANCE THE INTEREST OF THE EMPLOYER

6. *Does the employer feel the service provided would provide reasonable protection from OSHA citations for violations?* NO ANSWER 5% (1) *Yes* 40% (8) *No* 55% (11)

7. *Does the employer use the services of independent industrial safety consultants?* *Yes* 25% (5) *No* 75% (15)

House Labor and Industry
Attachment 3
9-1-93

A REVIEW OF ACCIDENT PREVENTION SERVICES PRIOR TO THE LAW

- DATA FROM 20 INSPECTIONS WERE REVIEWED
- 60% (12) HAD RECEIVED ACCIDENT PREVENTION SERVICES
- 44.7% (68) OF THE 152 SERIOUS AND 82.6% (95) OF THE 115 NON-SERIOUS HAZARDS IDENTIFIED WERE FOUND WITH EMPLOYERS WHO HAD RECEIVED ACCIDENT PREVENTION SERVICES
- THE 12 EMPLOYERS WHO RECEIVED ACCIDENT PREVENTION SERVICES AVERAGE 5.66 SERIOUS AND 7.9 OTHER THAN SERIOUS IDENTIFIABLE HAZARDS EACH
- THE REMAINING 40% (8) OF THE EMPLOYERS REVIEWED RECEIVED NO ACCIDENT PREVENTION SERVICES
- 55.3% (94) OF THE 152 SERIOUS AND 17.4% (20) OF THE 115 OTHER THAN SERIOUS HAZARDS IDENTIFIED WERE FOUND WITH EMPLOYERS WHO HAD NO ACCIDENT PREVENTION SERVICES PERFORMED.
- THOSE 8 EMPLOYERS NOT RECEIVING SERVICE AVERAGE 11.75 SERIOUS AND 2.5 OTHER THAN SERIOUS HAZARDS EACH

INFORMATION HANDOUT
ACCIDENT PREVENTION PROGRAMS

Workplace safety and accident prevention is a key element of the new law. This requirement was designed with the idea of holding down premium rates for employers. Because rates are based in part on claims experience - e.g. disability compensation paid out - the prevention of employee accidents through enhanced safety measures is one of the best ways employers can help keep rates down.

By law, insurance carriers and group-funded plans must make accident prevention programs available to clients. Notice of such accident prevention programs must appear on the front page of every policy issued after July 1993.

Accident prevention programs may be provided by insurance carriers free of charge or under a separate contractual arrangement. The programs must be staffed and implemented by trained field safety representatives, who must meet qualifications as outlined by law. Insurance companies and group-funded plans failing to meet this requirement are subject to legal penalties.

The programs must be tailored to meet the needs of the various employers and worksites around the state. These programs must include: surveys, recommendations, training programs, consultations, analysis of accident causes, industrial hygiene and industrial health services (adequate to meet the needs of the employer) and other assistance as needed to implement the program.

STATE ASSISTANCE

Accident prevention programs will be enforced by the Division of Labor Management Relations and Employment Standards (913-296-4386), which will conduct field inspections as needed. At least once a year, each insurance carrier must submit an accident prevention services plan to the Division of Workers Compensation for review. Such information must include:

- The amount of money spent by the insurance carrier or group-funded plan on accident prevention services;
- the number and qualifications of field safety representatives;
- the number of site inspections performed by field safety representatives;
- evidence of the effectiveness and accomplishments of the services; and
- additional information as required by law.

House Labor and Industry
Attachment 4
9-1-93

KANSAS
DEPARTMENT OF HUMAN RESOURCES
INDUSTRIAL SAFETY & HEALTH
512 SW 6TH AVE
TOPEKA KS 66603-3174

BULK RATE
U.S. POSTAGE
PAID
TOPEKA, KS
PERMIT NO. 157

44TH ANNUAL

KANSAS SAFETY AND HEALTH CONFERENCE

A SAFETY PROGRAM REQUIRES MORE THAN TECHNOLOGY AND A PLAN. LEARN HOW TO CONVINCE PEOPLE TO PRACTICE GOOD SAFETY HABITS. ALSO, ACQUIRE THE LATEST INFORMATION FROM THE OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION. LEARN HOW TO SET UP A JOINT LABOR-MANAGEMENT SAFETY AND HEALTH COMMITTEE OR FIND OTHER GOOD SOLUTIONS TO SAFETY ISSUES AFFECTING YOUR INDUSTRY. ATTEND THE **1993 KANSAS SAFETY AND HEALTH CONFERENCE OCTOBER 26-28, 1993,** AT THE **AIRPORT HILTON INN, 2098 AIRPORT ROAD, WICHITA.** THE CONFERENCE IS SPONSORED BY **INDUSTRIAL SAFETY AND HEALTH, KANSAS DEPARTMENT OF HUMAN RESOURCES** AND CO-SPONSORED BY THE AMERICAN INDUSTRIAL HYGIENE ASSOCIATION--MID AMERICA CHAPTER; AMERICAN ASSOCIATION OF OCCUPATIONAL HEALTH NURSES--KANSAS CITY & WICHITA CHAPTERS; AMERICAN SOCIETY OF SAFETY ENGINEERS--WICHITA AND HEART OF AMERICA CHAPTERS; PUBLIC RISK MANAGERS ASSOCIATION; ASSOCIATED GENERAL CONTRACTORS OF KANSAS, INC.; BOEING COMMERCIAL AIRPLANES, INTERNATIONAL ASSOCIATION OF MACHINISTS / BOEING HEALTH AND SAFETY INSTITUTE; KANSAS CONTRACTORS ASSOCIATION, INC.; KANSAS DEPARTMENT OF HEALTH AND ENVIRONMENT; WESTERN RESOURCES, INC.; KANSAS RURAL ELECTRIC COOPERATIVES, INC.; ENVIRONMENTAL AND SAFETY SERVICES, INC.; KANSAS STATE FIRE MARSHAL DEPARTMENT; NATIONAL SAFETY MANAGEMENT SOCIETY; SAFETY AND HEALTH COUNCIL OF WESTERN MISSOURI AND KANSAS, INC.

House Labor and Industry
Attachment 5
9-1-93

AGENDA

October 28, 1993

7:30 A.M	Registration
8:00 A.M.	Welcome and Introductions of Speaker Panel
8:15 A.M.	Recordkeeping and Reporting (OSHA & EPA)
10:15 A.M.	Break
10:30 A.M.	Occupational Safety and Health Administration Regulations
NOON	Lunch (provided)
1:15 P.M.	Department of Transportation Requirements
2:30 P.M.	Break
2:45 P.M.	Environmental Protection Agency
3:30 P.M.	Other Issues and Management Practices
4:00 P.M.	Adjourn

PRESENTERS

Michael D. Hermsen, ASP, is an expert in OSHA and EPA compliance programs, facility safety program management, occupational safety and confined space entry. He holds a bachelor of science degree in occupational and traffic safety education from Iowa State University and has completed the 40-hour course on Hazardous Waste Operations and Emergency Response.

James E. Fleer is an expert in Superfund site management, environmental remediation management, Incineration and PCB issues, UST management and hazardous waste management. He holds a bachelor of science degree in chemical engineering from the University of Missouri, and a master of business administration from the University of Kansas. He has been published in professional journals.

Regina M. Neese, senior ergonomist, is an expert in ergonomics, safety and health programs, accident investigation, workers compensation, industrial engineering and training. She holds a bachelor of science degree in industrial engineering and industrial/organizational psychology from Kansas State University and a master of science degree in industrial engineering from Kansas State University.

Theresa Hodges, Director of the Office of Pollution Prevention, Kansas Department of Health and Environment, holds a bachelor of arts and a master of arts degree in microbiology from the University of Kansas. During her 20-year tenure at KDHE, she has worked in the Health and Environmental Laboratory, where she served as safety coordinator.

REGISTRATION INFORMATION

Early registration is $50. After October 17, 1993, registration is $55.

Make check payable to the Kansas Safety and Health Conference. The check and this form should be mailed to: The Industrial Safety and Health Section, Kansas Department of Human Resources, 512 S.W. 6th Ave., Topeka, KS 66603-3174.

Cancellations must be made one week prior to the conference date in order to receive a full refund. Refunds will require a Social Security number for individuals or a federal employers identification number for businesses. Send cancellations in writing to the address above.

For more information, call: 913-296-4386

Name _____

Business _____

Address _____

_____

Phone: _____

CHEMICAL AND PETROLEUM

1:30 p.m. **Confined Space and Industrial Rescue, Rescue Equipment Specifications** – Mark Baker – *Chief Rescue Instructor for the Roco Corporation and a Captain with the Wichita Fire Department*

2:30 p.m. **Rescue Equipment Specifications** – Mark Baker (cont.)

3:30 p.m. **Confined Space Rescue Techniques** – Mark Baker

ENVIRONMENTAL

1:30 p.m. **Emergency Planning/Community Right-to-Know Update** - Gen. Dan Karr, *Director of the Division of Emergency Preparedness, Adjutant General's Office* & Jon I. Flint, *Program Manager, Community Right-to-Know Program, Kansas Department of Health and Environment*

2:30 p.m. **Radon Programs and Guidance – Federal EPA Perspective** - Steve Chambers, *Environmental Scientist, Radiation and Indoor Air Section, US Environmental Protection Agency*

3:00 p.m. **Radon in Kansas** - Harold Spiker, *Chief of Environmental Radiation and Emergency Preparedness Section, Kansas Department of Health and Environment*

3:30 p.m. **Naturally Occurring Radioactive Materials (NORM), a Kansas Perspective** - Harold Spiker

4:00 p.m. **Clean Air Update** - John Irwin, *Director, Bureau of Air and Radiation, Kansas Department of Health and Environment, Topeka.*

INDUSTRIAL HYGIENE

1:30 p.m. **Program Implementation: Industrial Hygiene Communication to Management** - Panel includes: Steven H. Chesnut, CIH, *Senior Industrial Hygienist and Regional Office Manager for Environmental Science and Engineering, Inc.*; Doug Rush, *IHIT, OHST, REPA, Industrial Hygienist for Integrated Solutions;* Diane M. Czarnecki, *Industrial Hygienist with Environment Science and Engineering, Inc.;* Rod Duke, *Industrial Hygiene Manager for Boeing Commerical Airplane Group, Wichita Division* and Eric Phillips, *Industrial Hygienist with Vulcan Chemicals in Wichita.*

2:30 p.m. **Regulatory Outlook for next 5-10 years** – (panel)

3 :00 p.m. **Tailoring Exposure Assessment to Your Facility - (panel)**

4:00 p.m. **Evaluating Industrial Hygiene Issues Associated with New Processes** - (panel)

LABORATORY SAFETY

1:30 p.m **Myths of Radioactivity, an Introduction** - Ruth N. Schuckman Dakotas, Director of Safety, University of Kansas Medical Center

1:45 p.m. **Overview of the Radiation Regulations, 10 CFR** - Bureau of Air and Radiation Control, Kansas Department of Health and Environment

2:30 p.m **Overview** (cont.)

2:45 p.m. **Today's Laboratory Safety** - Richard Alsager, *Fisher Scientific*

3:45 p.m. **Polution Prevention in the Laboratory** - Dr. Steven Galitzer, *PhD, Industrial Hygienist, Kansas State University*

MANUFACTURING

1:30 p.m **Status of NIOSH/OSHA Ergonomic Regulatory Activity** - Jeffrey E. Fernandez, *PhD, PE, Associate Profesor of Industrial Engineering, Wichita State University*

2:30 p.m. **An Effective Smoking Cessation Program** - Bruce Garren, *Manager, Finance Systems and Corporate Policies for Cessna Aircraft Company, Wichita* and Kristy Hoffman, *Policy and Procedures Analyst, Cessna Aircraft Company*

3:30 p.m. **EMF – Separating Fact From Fiction** - Arthur G. Varanelli, *Assistant Corporate Manager, Occupational Safety and Health, Raytheon Company, Lexington, MA*

PUBLIC SECTOR

1:30 p.m. **How to Set Up a Comprehensive Injury Treatment Program to Better Manage Your Workers' Compensation Costs** Dr. Stephan Sparks, *Medical Director, HCA Wesley Occupational Health Services* and Mary Sterling, *Program Director, HCA Wesley Medical Center, Occupational Health Services*

2:30 p.m. **The Wellness Cycle: How Do You Keep Your Work Force Healthy?** Brad Stephan, *Director,* Marty Winslow, *Senior Consultant,* Suzanne Faber, *Senior Consultant,* Payer Marketing and Cecilia Pivonka, *Coordinator of Physical Assessment, all with HCA Wesley Medical Center, Wichita*

3:30 p.m. **Wellness Cycle** (cont.)

4:00 p.m. **Exhibits Close**

OCTOBER 28, 1993

LABOR-MANAGEMENT JOINT SAFETY & HEALTH PROGRAMS

7:15-8:15 a.m. **Buffet Breakfast**

7:30 a.m. Registration

8:30 a.m. **United Auto Workers/GM, Historial Perspectives of Joint Programs** - Don Eflin and Al Warren

9:20 a.m. **Break**

9:30 a.m. **Government Perspective of Joint Programs** Governor Joan Finney (tent)

10:20 a.m. **Break**

10:30 a.m. **Optimum Process to Return Workers to Work after Injury** - Darsi Carico and Lary Worthy, *Return to Work*

11:20 a.m. **The Perspective From the Floor. Management and Employee Working Safety Issues Together** - Tom Stout/Employee

Noon **Lunch** (provided)

1:00 p.m. **Findings of CTD Joint Research Study Completed at The Boeing Commerical Airplane Group Wichita Division** – CTD Study

1:45 p.m. **Break**

1:55 p.m. **Process Oriented Human Factors in Manufacturing** -Sherril Walker

3:00 p.m. **Adjourn**

5

A-5

HIGHLIGHTS

- The annual Safety and Health Conference now offers valuable safety information to the small business owner. The new no-frills Small Business Safety Institute on Thursday presents essential safety information in a compact format for a small price.

- Learn to develop a labor-management team with the goal of accident prevention at the Thursday seminar

- Keynote speakers will address important issues both Tuesday and Wednesday mornings.

- Six concurrent workshops are scheduled Tuesday and seven are planned for Wednesday. Nationally prominent speakers will cover specific safety, health and environmental topics in detail.

- The exhibits will open Tuesday morning at 7:30 a.m. and close at 4 p.m. Wednesday. A cash-bar reception will be held Tuesday at 5 p.m. in the exhibit area. You will be able to exchange ideas and receive information from nearly 40 exhibitors on equipment and services available in the Midwest. The National Safety Council will host a viewing room for its video library. In addition, professional and trade organizations will host a literature table for activities and membership information.

- Visit the General Motors van with the latest information on safe driving.

- The 44th Annual Kansas Safety and Health Conference will be "green." All promotional materials will be printed on recycled paper. Bins will be available for collecting paper to be recycled. Coffee will be served in ceramic cups. Unserved food will be donated to local charities.

REGISTRATION

- **Continuing Education Credit:** Applications have been made to the American Industrial Hygiene Association; American Society of Safety Engineers; and the Kansas State Board of Nursing. Certificates of Attendance will be made up for persons submitting individual course applications in other disciplines.

- **Registration Options:** Materials included for all options. Full registration includes meals, breaks and receptions over the three days. One-day packages include all regularly scheduled meals, breaks and receptions for that day. Afternoon workshops registration includes only breaks. A special rate allows students to monitor sessions without meals or breaks. However, scholarships for students are available by calling (913) 296-4386. Extra meal tickets may be purchased for guests.

- **Cancellations** must be made one week prior to the conference date in order to receive a full refund. Refunds will require a Social Security number for individuals or a federal employers identification number for businesses. They may be in writing to **ATTN: Delores Howland, Industrial Safety and Health, KDHR, 512 W. 6th, Topeka, KS 66603**, or they may be called in to the **General Information Number - 913-296-4386.**

- **Hotel Reservations:** The Conference will be held at the Airport Hilton Hotel, 2098 Airport Road, Wichita, KS 67209. Call: 316-945-5272. Please identify yourself as part of the Kansas Safety & Health Conference to receive the special rate and to help the conference.

- **Checks and Address:** Make checks payable to The Kansas Industrial Safety & Health Conference. The check and the form below should be **mailed to:** Industrial Safety and Health, Kansas Department of Human Resources, 512 S.W. 6th Ave, Topeka, KS 66603-3174.

MAIL

Name_____

Job Title _____

Name _____

Job Title_____

Name_____

Job Title_____

Organization_____

Address_____

_____Phone (___)_____

SS # or tax ID_____

Government employees may mail this form with payment or purchase authorization number. Government Authorization number_____

☐	$165	Early full registration - 3 days including meals, breaks & receptions
☐	$185	Full registration after Oct. 18, 1993
☐	$90	One-day registration - including meals, breaks & conference materials. Day_____
☐	$35	One afternoon workshop (breaks only) Day_____
☐	$15	Student Registration - three days, no meals. (scholarships available)
☐	$8	Extra meal tickets available: Breakfasts
☐	$13	Lunches
	____	Subtract 10 percent if three or more persons are registered at the same time from the same organization.
	____	**TOTAL ENCLOSED**

5
4-6

OCCUPATIONAL SAFETY & HEALTH REPORTER

Volume 22, Number 42 March 24, 1993

A weekly review of workplace health and safety issues.
THE BUREAU OF NATIONAL AFFAIRS, INC.

SPECIAL SUPPLEMENT

THE COMPREHENSIVE OCCUPATIONAL SAFETY AND HEALTH REFORM ACT S 575, HR 1280

The push for expanded worker protection measures intensified as comprehensive job safety reform bills were introduced in the House March 10 (HR 1280) and in the Senate March 11 (S 575).

Rep. William Ford (D-Mich), chairman of the House Education and Labor Committee and the House bill's chief sponsor, said the Comprehensive Occupational Safety and Health Reform Act is aimed at reducing the estimated 10,000 job-related deaths, 1.7 million disabling injuries, and 390,000 cases of occupational disease each year.

Senate sponsors Edward Kennedy (D-Mass) and Howard Metzenbaum (D-Ohio) contended the bill would benefit industry by helping reduce the costs associated with occupational deaths, injuries, and illnesses.

The Kennedy-Metzenbaum bill is similar to job safety reform legislation the two Democrats introduced in the 102nd Congress and incorporates some changes that were included in a House version.

The bills call for health and safety programs for all employers and labor-management safety and health committees for employers with 11 or more workers; expanded criminal sanctions; extension of coverage to state and local government workers; mandated standards on ergonomics, medical surveillance, and exposure monitoring; and specific measures for the construction industry.

The House bill was referred jointly to the committees on Education and Labor and House Administration; the Senate bill was referred to the Committee on Labor and Human Resources.

Text of the Senate bill follows; the House bill starts on p. 1883.

S. 575

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Comprehensive Occupational Safety and Health Reform Act".

(b) REFERENCE.—Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(c) TABLE OF CONTENTS.—The table of contents is as follows:

House Labor and Industry
Attachment 6
9-1-93

SB 575

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) during the past two decades progress has been made in reducing workplace deaths, injuries, and exposure to toxic substances through efforts of Federal agencies, States, employers, employees, and employee representatives;

(2) despite the progress described in paragraph (1), work-related injuries, illnesses, and deaths continue to occur at rates that are unacceptable and that impose a substantial burden upon employers, employees, and the Nation in terms of lost production, wage loss, medical expenses, compensation payments, and disability;

(3) employers and employees are not sufficiently involved in joint efforts to identify and correct occupational safety and health hazards;

(4) employers and employees require better training to identify safety and health problems;

(5) mandatory regulation is necessary to protect employees from health and safety hazards but Federal agency standard setting has not kept pace with knowledge about such hazards;

(6) enforcement of occupational safety and health standards has not been adequate to bring about timely abatement of hazardous conditions or to deter violations of occupational health and safety standards;

(7) millions of employees exposed to serious occupational safety and health hazards are excluded from full coverage under the Occupational Safety and Health Act of 1970; and

(8) the lack of accurate data and information on work-related deaths, injuries, and illnesses has impeded efforts to prevent such deaths, injuries, and illnesses.

(b) PURPOSES.—The purposes of this Act are to—

(1) increase the joint participation of employers and employees in identifying and correcting occupational safety and health hazards, by requiring the establishment of employer safety and health programs, joint employer-employee safety and health committees, and training and education programs;

(2) improve and expedite the setting of occupational safety and health standards;

(3) strengthen Federal and State agency enforcement of violations of safety and health standards;

(4) assure that all employees are afforded full coverage and protection from safety and health hazards under the Occupational Safety and Health Act of 1970 or other Federal laws; and

(5) improve information and data on work related injuries, illnesses and fatalities for purposes of enhancing occupational safety and health.

TITLE I—SAFETY AND HEALTH PROGRAMS

SEC. 101. SAFETY AND HEALTH PROGRAMS.

Section 27 (29 U.S.C. 676) is amended to read as follows:

"SEC. 27. SAFETY AND HEALTH PROGRAMS.

"(a) ESTABLISHMENT OF PROGRAM.—

"(1) IN GENERAL.—Each employer shall, in accordance with this section, establish and carry out a safety and health program to reduce or eliminate hazards and to prevent injuries and illnesses to employees.

"(2) MODIFICATIONS TO SAFETY AND HEALTH PROGRAMS.—The Secretary may by regulations issued under subsection (c)(1) modify the requirements of this section with respect to classes of employers where the Secretary determines that, in light of the nature of the risks faced by the employers' employees, such a modification would not reduce the employees' safety and health protection.

"(3) DEFINITION OF WORKSITE.—As used in this section and section 28, the term 'worksite' means a single physical location where business is conducted or where operations are performed by employees of one or more employers.

"(b) REQUIREMENTS.—A safety and health program established and carried out under subsection (a) shall be a written program that shall include—

"(1) methods and procedures for identifying, evaluating, and documenting safety and health hazards;

"(2) methods and procedures for correcting the safety and health hazards identified under paragraph (1);

"(3) methods and procedures for investigating and recording work-related deaths, injuries, and illnesses;

"(4) methods and procedures for providing occupational safety and health services, including emergency response and first aid procedures;

"(5) methods and procedures for employee participation in the implementation of the employer's safety and health program, including (where applicable) participation through a safety and health committee established under section 28;

"(6) methods and procedures for providing a timely response in writing to the recommendations of the safety and health committee, where applicable;

"(7) methods and procedures for providing safety and health training and education to employees and to members of a safety and health committee established under section 28 (where applicable);

"(8) the designation of one or more representatives of the employer who have the qualifications and responsibility to identify safety and health hazards and the authority to initiate corrective action where appropriate;

"(9) in the case of a worksite where employees of two or more employers work, procedures for each employer to protect employees at the worksite from hazards under the employer's control, including procedures to provide information on safety and health hazards to other employers and employees at the worksite; and

"(10) such other provisions as the Secretary requires to effectuate the purposes of this Act.

"(c) REGULATIONS ON EMPLOYER SAFETY AND HEALTH PROGRAMS.—

"(1) IN GENERAL.—Within 1 year of the date of enactment of the Comprehensive Occupational Safety and Health Reform Act, the Secretary shall issue final regulations on employer safety and health programs required by subsection (a), which shall take effect no later than 18 months after such date of enactment.

"(2) REGULATIONS ON TRAINING AND EDUCATION.—The regulations of the Secretary under paragraph (1) with respect to an employer's safety and health program shall—

"(A)(i) provide for training and education of employees at the time of employment, in a manner that is readily understood by such employees, concerning safety and health hazards, control measures, and the employer's safety and health program;

"(ii) provide for the dissemination of information to employees at the time of employment, in a manner that is readily understood by such employees, regarding employee rights and applicable laws and regulations; and

"(iii) provide for training and education of employees who are selected to be safety and health committee members, at the time of their selection, that is necessary to enable such employees to carry out the activities of the committee under section 28; and

"(B) require that refresher training and dissemination of information be provided on at least an annual basis and that additional training and dissemination of information be provided to affected employees and to safety and health committee members when there are changes in conditions or operations that may expose such employees to new or different safety or health hazards or when there are changes in safety and health regulations or standards under this Act that apply to the employer.

"(3) COORDINATION OF PROGRAMS.—The regulations of the Secretary under paragraph (1) shall provide that any specific program or training requirements imposed by regulations under section 6 may be combined or coordinated with an employer's safety and health program.

"(4) NO LOSS OF PAY.—The time during which employees are participating in training and education provided in accordance with the regulations of the Secretary shall be considered hours worked for purposes of

Published by THE BUREAU OF NATIONAL AFFAIRS, INC., Washington, D C. 20037

6-2

SB 575

wages, benefits, and other terms and conditions of employment. The training and education shall be provided by the employer at no cost to the employer's employees.".

TITLE II—SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES

SEC. 201. SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES.

Section 28 is amended to read as follows:

"SEC. 28. SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES.

"(a) PURPOSE.—The purpose of this section is to bring employees and employers together in a nonadversarial, cooperative effort to promote safety and health in each worksite. A safety and health committee established under subsection (b) is intended to assist the employer and make recommendations regarding methods of addressing safety and health hazards.

"(b) SAFETY AND HEALTH COMMITTEE ESTABLISHMENT.—Each employer who has 11 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year shall establish a safety and health committee (hereafter in this section referred to as the 'safety and health committee') at each worksite of the employer, except as provided in subsection (e)(2).

"(c) RIGHTS OF COMMITTEE AND COMMITTEE MEMBERS.—

"(1) IN GENERAL.—Each safety and health committee shall have the right, within reasonable limits and in a reasonable manner, to—

"(A) review the employer's safety and health program established under sections 27 and 31 (where applicable);

"(B) review incidents resulting in work-related deaths, injuries, and illnesses and complaints regarding safety or health hazards by employees or safety and health committee members;

"(C) review, upon a request made to the employer by any safety and health committee member, the employer's work injury and illness records, other than personally identifiable medical information, and other reports or documents relating to occupational safety and health;

"(D) conduct inspections of the worksite at least once every 3 months and in response to complaints regarding safety or health hazards by employees or safety and health committee members;

"(E) conduct interviews with employees in conjunction with inspections of the worksite;

"(F) conduct meetings at least once every 3 months and maintain written minutes of such meetings;

"(G) observe the measurement of employee exposure to toxic materials and harmful physical agents; and

"(H) establish procedures for exercising the rights of the safety and health committee; to the employer for improvements in the employer's safety and health program and for the correction of hazards to employee safety or health.

"(2) RECOMMENDATIONS.—Each safety and health committee and each member of the committee shall have the right to—

"(A) make recommendations to the employer for improvements in the employer's safety and health program and for the correction of hazards to employee safety or health; and

"(B) receive from the employer a timely written response to any such recommendation.

Recommendations under this paragraph shall be advisory only and the employer shall retain full authority to manage the worksite.

"(3) TIME FOR COMMITTEE ACTIVITIES.—The employer shall permit members of the safety and health committee to take such time from work as is reasonably necessary to exercise the rights of the committee, without suffering any loss of wages, benefits, and other terms and conditions of employment for time spent on duties of the committee.

"(d) COMMITTEE MEMBERSHIP.—

"(1) MEMBERSHIP.—Each safety and health committee shall consist of the employee safety and health representatives selected or appointed under paragraph (3) and up to an equal number of employer representatives.

"(2) EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES.—Except as provided in subsection (e)(2), each safety and health committee shall, at a minimum, include—

"(A) one employee safety and health representative at each worksite where the average number of nonmanagerial employees of the employer during the year ending January 1 was more than 10, but less than 51;

"(B) two representatives where the number of such employees was more than 50 but less than 101; and

"(C) an additional employee safety and health representative for each additional 100 such employees, up to 6 employee safety and health representatives.

"(3) SELECTION.—The employer's nonmanagerial employees shall select employee safety and health representatives by and from among themselves as follows:

"(A) Where none of the employer's employees at a worksite are represented by an exclusive bargaining representative, the employees shall select employee safety and health representatives.

"(B) Where the employer's employees are represented by a single exclusive bargaining representative, the bargaining representative shall designate the employee safety and health representatives.

"(C) Where the employer's employees are represented by more than one exclusive representative or where some but not all of the employees are represented by an exclusive representative, each bargaining unit of represented employees (and any residual group of unrepresented employees) shall have a proportionate number of employee safety and health representatives based on the number of employees in each bargaining unit or group, except that each such unit or group of 11 or more employees shall have at least one representative. The selection process shall be conducted in accordance with the provisions of subparagraph (A) or (B) as applicable.

"(4) PROTECTION OF EMPLOYEE RIGHT.—An employee's right to seek to be an employee safety and health representative and to otherwise participate in the selection process without being subject to penalties, discipline, employer interference, or reprisal of any kind shall be protected.

"(e) REGULATIONS.—Within 1 year of the date of enactment of the Comprehensive Occupational Safety and Health Reform Act, the Secretary shall issue regulations on safety and health committees. Such regulations shall be effective within 18 months of the date of enactment. Such regulations shall include provisions on—

"(1) the functioning of committees, including selection of employee safety and health representatives, the terms of such representatives, and the maintenance of records; and

"(2) the functioning of committees, including the number and selection of employee safety and health representatives—

"(A) where an employer's employees do not primarily report to or work at a fixed location;

"(B) with regard to worksites where less than 11 employees of a covered employer are employed; and

"(C) with regard to worksites where employees of more than one employer are employed.

"(f) ADDITIONAL RIGHTS.—The rights and remedies provided to employees and employee safety and health representatives by this section are in addition to, and not in lieu of, any other rights and remedies provided by contract, by other provisions of this Act, or by other applicable law, and are not intended to alter or affect such rights and remedies.".

"(g) CONSTRUCTION.—A safety and health committee established under and operating in conformity with this section shall not constitute a labor organization within the meaning of section 2(5) of the National Labor Relations Act or a representative within the meaning of section 1, sixth, of the Railway Labor Act.".

SEC. 202. EMPLOYEE PARTICIPATION IN INSPECTIONS.

Section 8(e) (29 U.S.C. 657(e)) is amended to read as follows:

"(e) Subject to regulations issued by the Secretary, a representative of the employer and a designee of the employee safety and health representatives shall be given an opportunity to accompany the Secretary or the Secretary's authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where no employee safety and health representatives have been selected, a representative authorized by the employer's employees shall be given an opportunity to accompany the Secretary in lieu of the designee of the employee safety and health representatives. Where there is no authorized employee representative, the Secretary or the Secretary's authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.".

TITLE III—COVERAGE

SEC. 301. EXTENSION OF COVERAGE TO PUBLIC EMPLOYEES.

(a) DEFINITION OF EMPLOYER.—Section 3(5) (29 U.S.C. 652(5)) is amended by striking out "but does not include" and inserting in lieu thereof "including".

(b) CONFORMING AMENDMENTS.—

(1) Section 19 (29 U.S.C. 668) is repealed.

(2) Section 410(b) of title 39, United States Code, is amended by striking out paragraph (7) and inserting in lieu thereof the following new paragraph:

"(7) the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.);".

SEC. 302. APPLICATION OF ACT.

Section 4(b) (29 U.S.C. 653(b)(1)) is amended—

(1) by redesignating paragraphs (2), (3), and (4) as paragraphs (5), (6), and (7), respectively; and

(2) by striking out paragraph (1) and inserting in lieu thereof the following new paragraphs:

"(b)(1) Where a Federal agency has promulgated and is enforcing standards or regulations affecting occupational safety or health of some or all of the employees within that agency's regulatory jurisdiction, and the Secretary determines that such a standard or regulation as promulgated and the manner in which the standard or regulation is being enforced provides protection to those employees that is at least as effective as the protection provided to those employees by the Secretary's enforcement of this Act, the Secretary may publish a notice in the Federal Register setting forth that determination and the reasons for the determination and certifying that the Secretary has ceded

6-3

S 6525

jurisdiction to that Federal agency with respect to the specified standards or regulations affecting occupational safety and health. In determining whether to cede jurisdiction to a Federal agency, the Secretary shall seek to avoid duplication of, and conflicts between, health and safety requirements. Such certification shall remain in effect unless and until rescinded by the Secretary.

"(2) The Secretary shall, by regulation, establish procedures by which any person who may be adversely affected by a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1) may petition the Secretary to rescind a certification under paragraph (1). Upon receipt of such a petition, the Secretary shall investigate the matter and shall, within 90 days after receipt of the petition, publish a decision with respect to the petition in the Federal Register.

"(3) Any person who may be adversely affected by—

"(A) a decision of the Secretary certifying that the Secretary has ceded jurisdiction to another Federal agency pursuant to paragraph (1); or

"(B) a decision of the Secretary denying a petition to rescind such a certification,

may at any time prior to the sixtieth day after such decision is published in the Federal Register file a petition challenging such decision with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business for judicial review of such decision. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary's decision shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(4) Nothing in this Act shall apply to working conditions covered by the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.).".

SEC. 303. APPLICATION OF OSHA TO DOE NUCLEAR FACILITIES.

Paragraph (6) of section 4(b) (29 U.S.C. 653(b)(6)) (as so redesignated by section 302(1)) is amended to read as follows:

"(6) Notwithstanding paragraph (1), this Act shall apply with respect to employment performed in the Federal nuclear facilities under the control or jurisdiction of the Department of Energy.".

SEC. 304. EXTENSION OF EMPLOYER DUTIES TO ALL EMPLOYEES WORKING AT A PLACE OF EMPLOYMENT.

Paragraph (1) of section 5(a) (29 U.S.C. 654(a)(1)) is amended to read as follows:

"(1) shall furnish employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to the employees of the employer or to other employees at the place of employment.".

TITLE IV—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

SEC. 401. TIME FRAMES FOR SETTING STANDARDS.

(a) RECOMMENDATIONS AND PETITIONS FOR STANDARDS.—Paragraph (2) of section 6(b) (29 U.S.C. 655(b)(2)) is amended to read as follows:

"(2)(A) If the Secretary receives—

"(i) a recommendation of an advisory committee, the Secretary of Health and Human Services, or the Administrator of the Environmental Protection Agency; or

"(ii) a petition from an interested person which sets forth with reasonable particularity the facts which the person claims establish that an occupational safety or health standard should be promulgated, modified or revoked;

the Secretary shall, within 90 days of the receipt of the recommendation or petition, publish in the Federal Register a response stating whether the Secretary intends to publish a proposed rule promulgating, modifying or revoking such standard.

"(B) If the Secretary's response states that the Secretary does not intend to publish a proposed rule, the Secretary shall set forth the reasons for that decision. In all other cases, the Secretary shall, within 12 months of the decision, publish in the Federal Register a proposed rule promulgating, modifying, or revoking the standard cited in the petition or recommendation.".

(b) PROCEDURE FOR COMMENT AND HEARING.—Paragraph (3) of section 6(b) (29 U.S.C. 655(b)(3)) is amended—

(1) by redesignating such paragraph as subparagraph (B);

(2) by striking out "under paragraph (2)"; and

(3) by inserting immediately before subparagraph (B) (as so redesignated) the following new subparagraph:

"(3)(A) Where information developed by the Secretary or submitted to the Secretary indicates that a rule should be proposed promulgating, modifying, or revoking an occupational safety or health standard, the Secretary shall publish such a proposed rule in the Federal Register and shall afford interested persons a period of at least 30 days after publication to submit written data or comments.".

(c) TIME FRAME FOR ISSUING RULES.—Section 6(b)(4) (29 U.S.C. 655(b)(4)) is amended by striking out "Within" and all that follows through "paragraph (3)" and inserting in lieu thereof "Within 18 months of publication of a proposed rule under paragraph (2)(B)".

(d) REVIEW OF SECRETARY'S FAILURE OR REFUSAL TO ISSUE RULES.—Section 6 (29 U.S.C. 655) is amended by adding at the end thereof the following new subsection:

"(h)(1) Any person who may be adversely affected by a determination by the Secretary under subsection (b)(2) not to propose a rule promulgating, modifying, or revoking a standard may at any time prior to the sixtieth day after such determination is published in the Federal Register file a petition seeking review of such determination with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary's determination shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(2) Any person who may be adversely affected by a failure of the Secretary to take any action required by this section within the time period prescribed therefor by this section may at any time after such period of time has elapsed file a petition for review stating that such action has been unlawfully withheld or unreasonably delayed. Such petition may be filed with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The reviewing court shall compel the Secretary to take any action that is found to have been unlawfully withheld or unreasonably delayed. The Secretary's desire to confer with, or to receive approval from any other Federal agency or Federal executive official, shall not justify the withholding or delaying of action by the Secretary, except where such consultation or solicitation of approval is required by statute and has been pursued in a timely fashion.".

(e) JUDICIAL REVIEW.—Section 6(f) (29 U.S.C. 655(f)) is amended—

(1) by inserting after the first sentence the following new sentence: "However, no contention that the standard is infeasible may be entertained in such petition unless the contention and evidence to support the contention were presented to the Secretary in the rulemaking proceeding wherein the challenged standard was promulgated."; and

(2) by adding at the end thereof the following new sentence: "The procedures under this subsection shall be the exclusive means of challenging the validity of any occupational safety or health standard and the validity of any such standard may not be raised in an enforcement action under section 10 or 11.".

SEC. 402. BASIS FOR STANDARDS.

Paragraph (8) of section 3 (29 U.S.C. 652(8)) is amended to read as follows:

"(8) The term 'occupational safety and health standard' means a standard which addresses a significant risk to the safety or health of employees by requiring conditions, or the adoption or use of one or more practices, means, methods, operations, or processes that most adequately assure, to the extent feasible, safe and healthful employment and places of employment.".

SEC. 403. RECORDING OF WORK RELATED ADVERSE MEDICAL CONDITIONS.

Section 8(b)(7) (29 U.S.C. 657(b)(7)) is amended by inserting after the third sentence the following new sentence: "The standard shall also prescribe requirements for recording or reporting work-related adverse medical conditions determined as a result of medical examinations or tests conducted under the standard.".

SEC. 404. PUBLIC DISCLOSURE OF ALL COMMUNICATIONS ON STANDARDS.

Section 6(b) (29 U.S.C. 655(b)) is amended by adding at the end thereof the following new paragraph:

"(3) The Secretary shall place all written comments and communications and a summary of all verbal communications with parties outside the Department of Labor (including communications with executive branch officials but not including communications with the President) regarding the promulgation, modification, or revocation of a standard under this section in the public record not later than 10 working days after the receipt of such communications.".

SEC. 405. REVISION OF PERMISSIBLE EXPOSURE LIMITS.

Section 6 (29 U.S.C. 655) (as amended by section 401(d)) is further amended by adding at the end thereof the following new subsection:

"(i) In addition to other health and safety standards promulgated under subsection (b), the Secretary shall, in cooperation with the Secretary of Health and Human Services, modify and establish exposure limits for toxic materials and harmful physical agents on a regular basis in the following manner and in accordance with the requirements of subsection (b)(5):

"(1) The Secretary of Health and Human Services, acting through the National Institute for Occupational Safety and Health, shall regularly evaluate available scientific evidence, data, and information to determine if exposure limits for toxic materials and harmful physical agents promulgated under subsections (a) and (b) should be modified or if exposure limits for other toxic materials and harmful physical agents should be established to protect exposed employees from material impairment of health or functional capacity. Such evaluation shall include a review of the scientific literature, standards of private and professional organizations, national consensus standards, standards adopt-

5-4

SB575

in the complaint of the filing of the complaint.

"(4)(A)(i) Not later than 60 days after the receipt of a complaint filed under paragraph (3), the Secretary shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit. During the investigation, the Secretary shall notify the person named in the complaint of the charges made in the complaint, shall provide such person with an opportunity to meet with the inspector conducting the investigation, to submit a response to such charges, and to present witnesses to rebut such charges. The Secretary shall also consider the result of any collectively-bargained grievance proceeding which may have been held with respect to such charges. Upon completion of the investigation, the Secretary shall notify the complainant and the respondent of the complaint of the Secretary's findings. Where the Secretary has concluded that there is reasonable cause to believe that a violation has occurred, the Secretary's findings shall be accompanied by a preliminary order providing the relief prescribed by subparagraph (B).

"(ii) After the Secretary has made findings, either the respondent or the complainant may, within 30 days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. If the Secretary does not issue findings with respect to a complaint within 90 days of the receipt of the complaint, the complainant may request a hearing on the record on the complaint.

"(iii) A hearing requested under clause (ii) shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary shall issue a final order within 120 days. In the interim, such proceedings may be terminated at any time on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person named in the complaint.

"(B) If, in response to a complaint filed under paragraph (3), the Secretary determines that a violation of paragraphs (1) or (2) has occurred, the Secretary shall order—

"(i) the person who committed such violation to correct the violation;

"(ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment; and

"(iii) compensatory damages.

If such an order is issued, the Secretary, at the request of the complainant, may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

"(5)(A) Any person adversely affected or aggrieved by an order issued after a hearing under paragraph (4)(A) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred, or the circuit in which such person resided on the date of such violation. The petition for review must be filed within 60 days from the issuance of the Secretary's order. Such review shall be in accordance with the provisions of chapter 7 of title 5, United States Code, and shall be heard and decided expeditiously.

"(B) Whenever a person has failed to comply with an order issued under paragraph (4)(A), the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur in order to enforce such order. In actions brought under this subparagraph, the district court shall have jurisdiction to grant all appropriate relief, including injunctive relief, reinstatement, and compensatory damages.

"(6) The legal burdens of proof set forth in section 1221(e) of title 5, United States Code, shall govern adjudication of protected activities under this subsection.".

SEC. 303. POSTING OF EMPLOYEE RIGHTS.

Section 8(c)(1) (29 U.S.C. 657(c)(1)) is amended by adding at the end thereof the following new sentence: "Such regulations shall include provisions requiring employers to post for employees the protections afforded under section 11(c).".

TITLE VII—OSHA TRAINING AND EDUCATION

SEC. 701. TECHNICAL ASSISTANCE TO EMPLOYERS AND EMPLOYEES.

Section 21 (29 U.S.C. 670) is amended by adding at the end thereof the following new subsections:

"(d) The Secretary shall develop and disseminate, directly or by grants or contracts, model curricula, model programs and other information and materials to assist employers in complying with the requirements for safety and health programs and employee safety and health training and education under section 27, with the requirements for safety and health committees under section 28, with the requirements of section 5, including the requirements of standards issued under section 6, and other requirements of the Act.

"(e) The Secretary shall establish and implement a program to provide technical assistance and consultative services for employers and employees, either directly or through grants or contracts, concerning worksite safety and health and compliance with this Act. Such assistance and consultation shall be targeted at small employers, high hazard worksites, and high hazard industries.

"(f) The Secretary shall award grants for the establishment and functioning of regional or State safety resource councils or centers. Such councils or centers shall identify safety and health resources within the State or region that employers and employees can utilize—

"(1) to improve safety and health;

"(2) to assist with the development of industry-specific projects to promote safety and health; and

"(3) to assist employers and employees with the development of safety and health programs.

Such councils or centers shall be not-for-profit organizations, and shall include representatives from State agencies, employers and labor organizations.

"(g) The Secretary shall establish a program under which the Secretary may annually recognize employers with outstanding safety and health records by presenting such employers with a safety and health excellence award. The Secretary may annually recognize other organizations through the presentation of such awards in recognition of the outstanding efforts of such organization to promote occupational safety and health."

SEC. 702. OSHA ASSISTANCE FUND.

Section 7 (29 U.S.C. 656) is amended by adding at the end thereof the following new subsection:

"(d)(1) There is established in the Treasury of the United States a revolving fund, to be known as the 'OSHA Assistance Fund' (hereinafter in this subsection referred to as the 'Fund'). The Fund shall be used to offset the costs of implementing section 21 (including administrative and personnel expenses). Monies in the Fund shall be available without fiscal year limitation to the Secretary for such purpose.

"(2)(A) The Secretary is authorized to charge fees in accordance with this paragraph for technical assistance and consultative services provided under section 21. Such fees—

"(i) shall be imposed on a uniform basis on persons receiving such assistance or services under section 21;

"(ii) shall not exceed the cost of implementing section 21; and

"(iii) with respect to each person receiving such assistance or services, shall bear a reasonable relationship to the cost of providing such assistance or services to such person.

"(B) Fees received by the Secretary under this subsection shall be deposited in the Fund.

"(C) The Secretary shall report with respect to each fiscal year to the Congress on the operation of the Fund.

"(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Secretary, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.".

TITLE VIII—RECORDKEEPING AND REPORTING

SEC. 801. DATA COLLECTED BY SECRETARY.

Section 24(a) (29 U.S.C. 673) is amended—

(1) by designating the first through third sentences as paragraphs (1) through (3), respectively and margining such paragraphs accordingly; and

(2) by adding at the end the following new paragraphs:

"(4)(A) For the purpose of setting safety and health standards, targeting inspections to individual establishments, evaluating standard setting and enforcement programs, and for other purposes, the Secretary shall collect such information as may be necessary and conduct analyses that identify—

"(i) industries, employers, establishments, processes, operations, and occupations that have a high rate of injury or illness;

"(ii) factors that cause or contribute to injuries and illnesses;

"(iii) workers' compensation and other costs associated with the injuries and illnesses; and

"(iv) employee exposures to toxic substances and harmful physical agents.

"(B) Data collected under this subsection shall be publicly available in a form suitable for further statistical analysis.

"(5) The Secretary shall issue regulations that require each employer covered by this Act to report to the Secretary each work-related death of an employee of the employer immediately upon knowledge of the employer and to report each serious incident that results in the hospitalization of two or more employees within 24 hours of the incident.".

SEC. 802. EMPLOYEE REPORTED ILLNESSES.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by striking out "deaths, injuries, and illnesses other than" and inserting in lieu thereof "deaths, injuries, illnesses, suspected work-related illnesses reported by an employee or an employee's physician unless the employer makes a reasonable determination that the illness is not work-related, and adverse medical conditions determined as a result of a medical examination or test conducted under an occupational safety or

6-5

103D CONGRESS, 1ST SESSION
H.R. 1280
IN THE HOUSE OF REPRESENTATIVES

Mr. Ford of Michigan introduced the following bill; which was referred jointly to the committees on Education and Labor and House Administration.

A BILL

To revise the Occupational Safety and Health Act of 1970.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; REFERENCE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the "Comprehensive Occupational Safety and Health Reform Act."

(b) Reference.—Except as otherwise specifically provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.).

(c) Table of Contents.—The table of contents is as follows:

SECTION 2. FINDINGS.

Congress finds that—

(1) during the past two decades progress has been made in reducing workplace deaths, injuries, and exposure to toxic substances through efforts of Federal agencies, States, employers, employees, and employee representatives;

(2) despite the progress described in paragraph (1), work-related injuries, illnesses, and deaths continue to occur at rates that are unacceptable and that impose a substantial burden upon employers, employees, and the Nation in terms of lost production, wage loss, medical expenses, compensation payments, and disability;

(3) employers and employees are not sufficiently involved in working together in joint efforts to identify and correct occupational safety and health hazards;

(4) employers and employees require better training to identify safety and health problems;

(5) mandatory regulation is necessary to protect employees from health and safety hazards but Federal agency standard setting has not kept pace with knowledge about such hazards;

(6) enforcement of occupational safety and health standards has not been adequate to bring about timely abatement of hazardous conditions or to deter violations of occupational safety and health standards.

(7) millions of employees exposed to serious occupational safety and health hazards are excluded from full coverage under the Occupational Safety and Health Act of 1970; and

(8) the lack of accurate data and information on work-related deaths, injuries, and illnesses has impeded efforts to prevent such deaths, injuries, and illnesses.

TITLE I—SAFETY AND HEALTH PROGRAMS

SEC. 101. SAFETY AND HEALTH PROGRAMS.

(a) IN GENERAL.—Section 27 (29 U.S.C. 676) is amended to read as follows:

"SEC. 27. SAFETY AND HEALTH PROGRAMS.

"(a) In General.—

"(1) Purpose.—Each employer shall establish and carry out in accordance with this section a safety and health program to reduce or eliminate hazards and to prevent injuries and illnesses to employees.

"(2) Modifications to Safety and Health Programs.—The Secretary may, by regulations issued under subsection (c)(1), modify the requirements of this section on classes of employers where the Secretary determines that in light of the nature of the risks faced by the employers' employees, such a modification would not adversely affect employee safety and health.

"(3) Worksite Definition.—As used in this section and section 28, the term 'worksite' means a single physical location where business is conducted or operations are performed by employees of an employer.

"(b) REQUIREMENTS.—Each employer covered by this section shall establish and carry out a written safety and health program that includes

"(1) methods and procedures for identifying, evaluating, and documenting safety and health hazards, including investigating and recording work-related illnesses, injuries, and deaths;

"(2) methods and procedures for correcting the safety and health hazards identified under paragraph (1);

"(3) methods and procedures for providing emergency response first-aid and other occupational health services;

"(4) methods and procedures for employee participation in the implementation of the employer's safety and health program, including participation through a safety and health committee established under section 28, where applicable;

"(5) methods and procedures for providing safety and health training and education to employees and to members of a safety and health committee established under section 28;

HB 1280

"(6) the designation of representatives of the employer who have the qualifications and responsibility to identify safety and health hazards and the authority to initiate corrective action where appropriate;

"(7) in the case of a worksite where employees of two or more employers work, procedures for each employer to protect employees at the worksite from hazards under the employer's control, including procedures to provide information on safety and health hazards to other employers and employees at the worksite; and

"(8) such other provisions as the Secretary requires to effectuate the purposes of this Act.

"(c) REGULATIONS ON EMPLOYER SAFETY AND HEALTH PROGRAMS.—

"(1) In General.—The Secretary shall within one year of the effective date of the Comprenensive Occupational Safety and Health Reform Act issue final regulations on employer safety and health programs required by subsection (a) which shall take effect no later than 18 months after such effective date.

"(2) REGULATIONS ON TRAINING AND EDUCATION.—The regulations of the Secretary under paragraph (1) respecting an employer's safety and health program shall—

"(A)(i) provide for training and education of employees at the time of employment, in a manner that is readily understood by such employees, concerning safety and health hazards, control measures, and the employer's safety and health program;

"(ii) provide for the dissemination of information to employees at the time of employment, in a manner that is readily understood by such employees, regarding employee rights and applicable laws and regulations; and

"(iii) provide for training and education of employees who are selected to be safety and health committee members, at the time of their selection, to enable such employees to carry out the activities of the committee under section 28; and

"(B) require that refresher training be provided on at least an annual basis and that additional training be provided to employees and to safety and health committee members when there are changes in conditions or operations that may expose employees to new or different safety or health hazards or when there are changes in safety and health regulations or standards under this Act that apply to the employer.

"(3) COORDINATION OF PROGRAMS.—The regulations of the Secretary under paragraph (1) shall provide that any specific program or training requirements imposed by regulations issued under section 6 may be combined or coordinated with an employer's safety and health program.

"(4) NO LOSS OF PAY.—The time during which employees are participating in training and education provided in accordance with the regulations of the Secretary shall be considered hours worked for purposes of wages, benefits, and other terms and conditions of employment. The training and education shall be provided by an employer at no cost to the employer's employees.".

TITLE II—SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES

SEC. 201. SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES.

(a) IN GENERAL.—Section 28 is Amended To Read as Follows:

"SEC. 28. SAFETY AND HEALTH COMMITTEES AND EMPLOYEE SAFETY AND HEALTH REPRESENTATIVES.

"(a) PURPOSE.—The purpose of this section is to bring employees and employers together in a nonadversarial, cooperative effort to promote safety and health in each worksite. A safety and health committee established under subsection (b) assists the employer and makes recommendations regarding methods of addressing safety and health hazards.

"(b) SAFETY AND HEALTH COMMITTEE ESTABLISHMENT.—Each employer of 11 or more employees shall establish a safety and health committee at each worksite of the employer except as provided in subsections (e) and (g) (hereinafter in this section referred to as the 'safety and health committee'). For purposes of this section, the term 'employee' means an employee who is employed by an employer an average of 20 or more hours per week.

"(c) COMMITTEE RIGHTS.—

"(1) IN GENERAL.—Each safety and health committee shall have the right, within reasonable limits and in a reasonable manner, to—

"(A) review any safety and health program established under section 27;

"(B) review incidents resulting in work-related deaths, injuries, and illnesses and complaints regarding safety or health hazards by employees or safety and health committee members;

"(C) review, upon request to the employer by any safety and health committee member, the employer's work injury and illness records, other than personally identifiable medical information, and other reports or documents relating to occupational safety and health;

"(D) conduct inspections of the worksite at least once every 3 months and in response to complaints regarding safety or health hazards by employees or safety and health committee members;

"(E) conduct interviews with employees in conjunction with inspections of the worksite;

"(F) conduct meetings at least once every 3 months and maintain written minutes of such meetings;

"(G) observe the measurement of employee exposure to toxic materials and harmful physical agents;

"(H) establish procedures for exercising the rights of the safety and health committee; and

"(I) make, and receive a response from the employer to—

"(i) recommendations on behalf of the safety and health committee (including the separate views of any member of the committee), or

"(ii) recommendations on behalf of the employer or employee representatives on such safety and health committee, to the employer for improvements in the employer's safety and health program and for the correction of hazards to employee safety or health.

Recommendations under subparagraph (I) shall be advisory only and the employer shall retain full authority to manage the worksite.

"(2) TIME FOR SAFETY AND HEALTH COMMITTEE ACTIVITIES.—The employer shall permit members of the safety and health committee to take such time from work as is reasonably necessary to exercise the rights of the committee, without suffering any loss of wages, benefits, and other terms and conditions of employment for time spent on duties of the committee.

"(d) SAFETY AND HEALTH COMMITTEE.—

"(1) Membership.—Each safety and health committee shall consist of the employee safety and health representatives selected or appointed under paragraph (3) and up to an equal number of employer representatives.

"(2) Employee safety and health representatives.—The safety and health committee shall include—

"(A) 1 employee safety and health representative at each worksite where the average number of nonmanagerial employees of the employer during the year ending January 1 was more than 10, but less than 50;

"(B) 2 representatives where the number of employees is at least 50 but less than 100; and

"(C) an additional employee safety and health representative for each additional 100 such employees, up to a maximum of 6 employee safety and health representatives.

"(3) SELECTION.—The employer's nonmanagerial employees shall select employee safety and health representatives by and from among themselves as follows:

"(A) Where none of the employer's employees at a worksite are represented by an exclusive bargaining representative, the employees shall select employee safety and health representatives.

"(B) Where the employer's employees are represented by a single exclusive bargaining representative, the bargaining representative shall designate the employee safety and health representatives.

"(C) Where the employer's employees are represented by more than one exclusive representative or where some but not all of the employees are represented by an exclusive representative, each bargaining unit of represented employees (and any residual group of unrepresented employees) shall have a proportionate number of employee safety and health representatives based on the number of employees in each bargaining unit or group, except that each such unit or group of 11 or more employees shall have at least one representative. The selection process shall be conducted in accordance with subparagraph (A) or (B), as applicable.

"(4) Each employee's right to seek to be an employee safety and health representative and to otherwise participate in the selection process without being subject to penalties, discipline, employer interference, or reprisal of any kind shall be protected.

"(e) REGULATIONS.—The Secretary shall, within 1 year of the effective date of the Comprehensive Occupational Safety and Health Reform Act, issue regulations on safety and health committees. Such regulations shall be effective within 18 months of the effective date. Such regulations shall include provisions on—

"(1) the functioning of committees, including the selection of employee safety and health representatives, the terms of employee safety and health representatives, and maintenance of records; and

"(2) the functioning of committees, the method of selection, and the number of employee safety and health representatives—

"(A) where an employer's employees do not primarily report to or work at a fixed location;

"(B) with regard to worksites with less than 11 employees of a covered employer; and

"(C) where employees of more than 1 employer are employed.

"(f) ADDITIONAL RIGHTS.—The rights and remedies provided to employees and employee safety and health representatives by this section are in addition to, and not in lieu of, any other rights and remedies provided by contract, by other provisions of this Act, or by other applicable law, and are not intended to alter or affect such rights and remedies.

"(g) ALTERNATIVE MECHANICS FOR EMPLOYEE PARTICIPATION.—Upon application of the employer, the Secretary may approve the establishment of a mechanism for employee participation in safety and health decision making which differs in form from the safety and health committee if the alternative ensures that employees may meaningfully participate in safety and health activities at the worksite. An application to establish an alternative mechanism for employee participation may not be approved by the Secretary unless—

"(1) the mechanism for employee participation provides for the free and fair selection of employee participants by and from among the employer's nonmanagerial employees in a manner that ensures that employees will not be subject to penalties, discipline, employer interference, or reprisals of any kind;

"(2) the mechanism for employee participation ensures that the rights under subsection (c) may be exercised by the employee participants; and

"(3) the mechanism for employee participation contains such other provisions as the Secretary may require.

The Secretary shall not approve an application unless the employer's nonmanagerial employees have received notice and have been provided at least 60 days in which to comment on the application.

0095-3237/93/$0+$1.00

"(h) A safety and health committee established under and operating in conformity with section 28 shall not constitute a labor organization within the meaning of section 2(5) of the National Labor Relations Act or a representative within the meaning of section 1, sixth, of the Railway Labor Act.".

(b) EMPLOYEE PARTICIPATION IN INSPECTIONS.—Section 8(e) (29 U.S.C 657(e)) is amended to read as follows:

"(e) Subject to regulations issued by the Secretary, a representative of the employer and a designee of the employee safety and health representatives shall be given an opportunity to accompany the Secretary or the Secretary's authorized representative during the physical inspection of any workplace under subsection (a) for the purpose of aiding such inspection. Where no employee safety and health representatives have been selected, a representative authorized by an employer's employees shall be given an opportunity to accompany the Secretary in lieu of the designee of the employee safety and health representative. Where there is no authorized employee representative, the Secretary or the Secretary's authorized representative shall consult with a reasonable number of employees concerning matters of health and safety in the workplace.".

TITLE III—COVERAGE

SEC. 301. EXTENSION OF COVERAGE TO PUBLIC EMPLOYEES.

Section 3(5) (29 U.S.C. 652(5) is amended by inserting ", including any State or political subdivision of a State" after "who has employees" and by striking out "or any State or political subdivision of a State".

SEC. 302. CONGRESSIONAL COVERAGE.

(a) HOUSE ACTIONS.—The Committee on House Administration of the House of Representatives shall establish and maintain an effective and comprehensive occupational safety and health program to protect the health and safety of congressional employees (as defined in section 2107 of title 5, United States Code, but not including an employee who is paid by the Secretary of the Senate). The program shall provide—

(1) for compliance with section 5(a)(1) of the Occupational Safety and Health Act of 1970 (referred to in this subsection as the "Act"), the occupational health and safety standards issued under section 6 of the Act, and the regulations issued under section 8 of the Act;

(2) for the development of written health and safety programs consistent with section 27 of the Act and the establishment of joint health and safety committees consistent with section 28 of the Act; and

(3) for the establishment of an effective enforcement mechanism to ensure compliance with the requirements of the health and safety programs developed under this section.

Under the program, if a willful violation of a standard issued under section 6 results in the death or serious bodily injury of an employee, such violation may be referred to the Attorney General for prosecution.

(b) COMMITTEE ON HOUSE ADMINISTRATION.—In connection with the program established under subsection(a), the Committee on House Administration of the House of Representatives shall—

(1) acquire, maintain, and require the use of engineering controls, work practice controls, safety equipment, personal protective equipment, and other devices reasonably necessary to protect employees; and

(2) employ, as appropriate, individuals qualified by education and experience to identify occupational safety and health hazards and to recommend corrective actions.

(c) RULEMAKING.—The provisions of this section are enacted by the House of Representatives as an exercise of the rulemaking power of the House of Representatives with full recognition of the right of the House to change its rules in the same manner and to the same extent as in the case of any other rule of the House.

SEC. 303. APPLICATION OF ACT.

Section 4(b)(1) (29 U.S.C. 654(b)(1)) is amended to read as follows:

"(1)(A) Where another Federal agency exercises statutory authority to prescribe or enforce a standard or regulation affecting occupational safety and health which applies to working conditions of employees, the Secretary shall defer to such other Federal agency's exercise of statutory authority with respect to such standard or regulation unless the Secretary determines that enforcement of this Act is necessary to protect affected employees from recognized hazards that are causing or are likely to cause death or serious physical harm.

"(B) Prior to exercising enforcement authority under subparagraph (A), the Secretary shall—

"(i) consult with such other Federal agency;

"(ii) make a determination that such other Federal agency has not initiated or will not initiate appropriate action to protect affected employees from recognized hazards that are causing or are likely to cause death or serious physical harm; and

"(iii) notify such other Federal agency of such determination and the reasons therefor.

"(C) The Secretary shall coordinate with other Federal agencies described in subparagraph (A) in order to—

"(i) identify the criteria to be used by the Secretary in determining whether to exercise enforcement authority under this Act;

"(ii) clarify, where appropriate, which Federal agency shall exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health hazard which apply to working conditions of employees;

"(iii) avoid duplicative or conflicting requirements on employers and employees; and

"(iv) promote occupational safety and health.

The Secretary shall enter into agreements with other Federal agencies to implement the requirements of this subparagraph.

"(D) Nothing in this subsection shall apply to working conditions covered by the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.)."

SEC. 304. APPLICATION OF OSHA TO DOE NUCLEAR FACILITIES.

Paragraph (3) of section 4(b) (29 U.S.C. 653(b)(6)) is amended to read as follows:

"(3) Notwithstanding paragraph (1) of this subsection, this Act shall apply with respect to employment performed in the Federal nuclear facilities under the control or jurisdiction of the Department of Energy."

SEC. 305. EXTENSION OF EMPLOYER DUTIES TO ALL EMPLOYEES WORKING AT A PLACE OF EMPLOYMENT.

Section 5(a)(1) (29 U.S.C. 654(a)(1)) is amended—

(1) by striking "each of his employees" and inserting "each employee"; and

(2) by striking "to his employees" and inserting "to employees at the place of employment."

TITLE IV—OCCUPATIONAL SAFETY AND HEALTH STANDARDS

SEC. 401. TIME FRAMES FOR SETTING STANDARDS.

(a) RECOMMENDATIONS AND PETITIONS FOR STANDARDS.-Paragraph (2) of section 6(b) (29 U.S.C. 655(b) (2)) is amended to read as follows:

"(2)(A) If the Secretary receives—

(i) a recommendation of an advisory committee, the Secretary of Health and Human Services, or the Administrator of the Environmental Protection Agency, or

"(ii) a petition from an interested person which petition sets forth with reasonable particularity the facts which the person claims establish that an occupational safety or health standard should be promulgated, modified or revoked,

the Secretary shall, within 90 days after receipt of the recommendation or petition, publish in the *Federal Register* a response stating whether the Secretary intends to publish a proposed rule promulgating, modifying or revoking such standard.

"(3) If the Secretary's response states that the Secretary does not intend to publish a proposed rule, the Secretary shall set forth the reasons for that decision. In all other cases, the Secretary shall, within 12 months following the decision, publish in the *Federal Register* a proposed rule promulgating, modifying, or revoking the standard cited in the petition or recommendation.".

(b) PROCEDURE FOR COMMENT AND HEARING.—

Paragraph (3) of section 6(b) (29 U.S.C. 655(b) (3)) is amended—

(1) by designating the present language as subparagraph (B) and by striking out "under paragraph (2)"; and

(2) by inserting at the beginning the following:

"(3)(A) When information developed by the Secretary or submitted to the Secretary indicates that a rule should be proposed promulgating, modifying, or revoking an occupational safety or health standard, the Secretary shall publish such a proposed rule in the *Federal Register* and shall afford interested persons a period of at least 30 days after publication to submit written data or comments."

(c) TIME FRAME FOR ISSUING RULES.—Section 6(b)(4) (29 U.S.C. 655(b)(4)) is amended by striking "Within" and all that follows through "paragraph (3)," and inserting "Within 18 months following publication of a proposed rule under paragraph (2)(B),".

(d) REVIEW OF SECRETARY'S FAILURE OR REFUSAL TO ISSUE RULES.—Section 6 (29 U.S.C. 655) is amended by adding at the end the following:

"(h)(1) Any person who may be adversely affected by a determination by the Secretary under subsection (b)(2) not to propose a rule promulgating, modifying, or revoking a standard may at any time prior to the sixtieth day after such determination is published in the *Federal Register* file a petition seeking review of such determination with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary's determination shall be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

"(2) Any person who may be adversely affected by a failure of the Secretary to take any action required by this section within the time period prescribed therefor by this section may at any time after such period of time has elapsed file a petition for review stating that such action has been unlawfully withheld or unreasonably delayed. Such petition may be filed with the United States court of appeals for the circuit wherein such person resides or such person has a principal place of business. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The reviewing court shall compel the Secretary to take any action that is found to have been unlawfully withheld or unreasonably delayed. The Secretary's desire to confer with or to receive approval from any other Federal agency or Federal executive official, shall not justify the withholding or delaying of

serious impairment of health resulting from the circumstances. In order to qualify for protection, the employee, when practicable, must have sought from his employer, and have been unable to obtain, correction of the circumstances causing the refusal to perform the employee's duties.

"(3) Any employee who believes that the employee has been discharged, disciplined, or otherwise discriminated against by any person in violation of paragraph (1) or (2) may, within 180 days after such alleged violation occurs, file (or have filed by any person on the employee's behalf) a complaint with the Secretary alleging such discharge, discipline, or discrimination violates paragraph (1) or (2). Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.

"(4)(A)(i) Within 60 days of receipt of a complaint filed under paragraph (3), the Secretary shall conduct an investigation and determine whether there is reasonable cause to believe that the complaint has merit. During the investigation, the Secretary shall notify the respondent to the complaint of the charges made in the complaint, shall provide the respondent with an opportunity to meet the investigator conducting the investigation, to submit a response to such charges, and to present witnesses to rebut such charges. The Secretary shall also consider the result of any collectively bargained grievance proceeding which may have been held with respect to such charges. Upon completion of the investigation, the Secretary shall notify the complainant and the respondent to the complaint of the Secretary's findings. Where the Secretary has concluded that there is reasonable cause to believe that a violation has occurred, the Secretary's findings shall be accompanied by a preliminary order providing the relief prescribed by subparagraph (B).

"(ii) After the Secretary has made findings either the person alleged to have committed the violation or the complainant may, within 30 days, file objections to the findings or preliminary order, or both, and request a hearing on the record, except that the filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. If the Secretary does not issue findings with respect to a complaint within 90 days of the receipt of the complaint, the complainant may request a hearing on the record on the complaint.

"(iii) A hearing requested under clause (ii) shall be expeditiously conducted. Where a hearing is not timely requested, the preliminary order shall be deemed a final order which is not subject to judicial review. Upon the conclusion of such hearing, the Secretary shall issue a final order within 120 days. In the interim, such proceedings may be terminated at any time on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation.

"(B) If, in response to a complaint filed under paragraph (3), the Secretary determines that a violation of paragraphs (1) or (2) has occurred, the Secretary shall order—

"(i) the person who committed such violation to correct the violation,

"(ii) such person to reinstate the complainant to the complainant's former position together with the compensation (including back pay), terms, conditions, and privileges of the complainant's employment, and

"(iii) compensatory damages.

If such an order is issued, the Secretary, at the request of the complainant, may assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

"(5)(A) Any person adversely affected or aggrieved by an order issued after a hearing under paragraph (4)(A) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred, or the circuit in which such person resided on the date of such violation. The petition for review must be filed within 60 days from the issuance of the Secretary's order. Such review shall be in accordance with the provisions of chapter 7 of title 5, United States Code, and shall be heard and decided expeditiously.

"(B) Whenever a person has failed to comply with an order issued under paragraph (4)(A), the Secretary shall file a civil action in the United States district court for the district in which the violation was found to occur in order to enforce such order. In actions brought under this subparagraph, the district court shall have jurisdiction to grant all appropriate relief, including injunctive relief, reinstatement, and compensatory damages.

"(6) In determining whether a violation of paragraph (1) or (2) has occurred, the legal burdens of proof are as follows:

"(A) A violation of paragraph (1) or (2) may be determined to have occurred only if the complainant demonstrates that the exercise of a right protected by such paragraph was a contributing factor in the discharge or discrimination alleged in the complaint.

"(B) Relief may not be ordered if the employer named in the complaint demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable action against the complainant in the absence of the complainant's exercise of such protected rights."

SEC. 602. POSTING OF EMPLOYEE RIGHTS.

Section 8(c)(1) (29 U.S.C. 657(c)(1)) is amended by adding at the end the following: "Such regulations shall include provisions requiring employers to post for employees the protections afforded under section 11(c)."

TITLE VII—TECHNICAL ASSISTANCE AND TRAINING

SEC. 701. TECHNICAL ASSISTANCE TO EMPLOYERS AND EMPLOYEES.

Section 7 (29 U.S.C. 656) is amended by adding at the end the following:

"(d)(1) The Secretary shall develop and disseminate, directly or by grant or contract, training curricula, model programs, and other information and materials designed to assist employers in complying with—

"(A) the requirements for safety and health programs and employee safety and health training and education under section 27,

"(B) the requirements for safety and health committees under section 28,

"(C) the requirements of section 5, including the requirements of standards issued under section 6, and

"(D) other requirements of this Act.

"(2) The Secretary shall establish and implement a program to provide technical assistance and consultative services for employers and employees, either directly or by grant or contract, concerning worksite safety and health and compliance with this Act. Such assistance and consultative services shall be targeted at small employers, high hazard worksites, and high hazard industries.

"(e)(1) There is established in the Treasury of the United States a revolving fund to be known as the 'OSHA Assistance Fund' (hereinafter in this subsection referred to as the 'Fund'). The Fund shall be used to pay the costs of implementing subsection (d) (including administrative and personnel expenses). Monies in the Fund shall be available, without fiscal year limitation, to the Secretary for such purpose.

"(2)(A) The Secretary shall charge fees in accordance with this paragraph to offset the cost of implementing sub-section (d). Such fees—

"(i) shall be imposed on a uniform basis on persons receiving assistance under subsection (d);

"(ii) shall not exceed the cost of implementing subsection (d); and

"(iii) with respect to each person receiving such assistance, shall bear a reasonable relationship to the cost of providing such assistance to such person.

"(B) Fees received by the Secretary under this subsection shall be deposited in the Fund.

"(C) The Secretary shall report with respect to each fiscal year to the Congress on the operation of the Fund and shall include in such report—

"(i) a summary of the assistance which the Secretary has provided under subsection (d) with monies in the Fund in the fiscal year for which such report is prepared;

"(ii) the cost to the Secretary to provide such assistance; and

"(iii) the amount of any fee received by the Secretary for such assistance.

"(3) The Secretary of the Treasury shall invest the portion of the Fund not required to satisfy current expenditures from the Fund, as determined by the Secretary, in obligations of the United States or obligations guaranteed as to principal by the United States. Investment proceeds shall be deposited in the Fund.

"(4) There is transferred to the Fund $30,000,000 from the Salaries and Expenses appropriation of the Secretary for fiscal year 1994."

TITLE VIII—RECORDKEEPING AND REPORTING

SEC. 801. DATA COLLECTED BY SECRETARY.

Section 24(a) (29 U.S.C. 673) is amended—

(1) by designating the first through third sentences as paragraphs (1) through (3), respectively; and

(2) by adding at the end the following:

"(4)(A) For the purpose of setting safety and health standards, targeting inspections to individual establishments, evaluating standard setting and enforcement programs, and for other purposes, the Secretary shall collect such information as may be necessary and conduct analyses that identify—

"(i) industries, employers, establishments, processes, operations, and occupations that have a high rate of injury or illness;

"(ii) factors that cause or contribute to injuries and illnesses;

"(iii) workers' compensation and other costs associated with the injuries and illnesses; and

"(iv) employee exposures to toxic substances and harmful physical agents.

"(B) Data collected under subparagraph (A) shall be publicly available in a form suitable for further statistical analysis.

"(C) The Secretary shall issue regulations that require each employer covered by this Act to report to the Secretary each work-related death of an employee of the employer immediately upon knowledge of the employer and to report each serious incident that results in the hospitalization of 2 or more employees of the employer within 24 hours of the incident."

SEC. 802. EMPLOYEE REPORTED ILLNESSES.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by striking "injuries and illnesses other than minor injuries requiring only first aid treatment and" and inserting "injuries, illnesses, a work-related illness reported by an employee or an employee's physician unless the employer makes a reasonable determination that the illness is not work related, and an adverse medical condition determined as a result of a medical examination or test conducted under an occupational safety and health standard. Records and reports shall not be required for minor injuries requiring only first aid treatment and".

SEC. 803. EMPLOYEE ACCESS.

Section 8(c)(2) (29 U.S.C. 657(c)(2)) is amended by adding at the end the following: "The records and reports required under this section shall be made available to the Secretary, to the Secretary of Health and Human Services, to employees, and to employee representatives."

TITLE IX—NIOSH

SEC. 901. HAZARD EVALUATION REPORTS.

Section 20(a)(6) (29 U.S.C. 669(a)(6)) is amended—

(1) in the second sentence, by inserting ", whether any potentially hazardous condition or harmful physical agent found in the place of employment poses a risk to exposed employees" after "as used or found"; and

(2) by inserting after the second sentence the following: "If a determination is not made within 6 months of the request, the Secretary shall provide the employer and employees with an interim report on the known or suspected hazards, a recommendation for control, and an estimate of the time that a final determination will be made."

SEC. 902. SAFETY RESEARCH.

Section 20(a) (29 U.S.C. 669(a)) is amended by adding at the end the following:

"(8) The Secretary of Health and Human Services shall identify major factors contributing to occupational injuries and deaths through accident investigations and epidemiological research."

SEC. 903. CONTRACTOR RIGHTS.

Section 20(b) (29 U.S.C. 669(b)) is amended in the first sentence by inserting after "Secretary of Health and Human Services" the following: "or the Secretary's designees or contractors".

SEC. 904. NATIONAL SURVEILLANCE PROGRAM

Section 20 (29 U.S.C. 669) is amended by adding at the end the following:

"(f)(1) The Secretary of Health and Human Services, acting through the National Institute for Occupational Safety and Health, shall (in cooperation with other agencies of the Department of Health and Human Services and the Secretary of Labor), within 2 years of the date of the enactment of the Comprehensive Occupational Safety and Health Reform Act, establish a national surveillance program to identify cases of occupational illnesses, deaths, and serious injuries. In conducting the national surveillance program, the Secretary of Health and Human Services shall coordinate the activities of the Secretary with State health agencies and Federal and State workers' compensation agencies.

"(2)(A) The Secretary of Health and Human Services shall collect data each year on the number and characteristics of all occupational deaths, selected occupational illnesses, and selected occupational injuries.

"(B) In selecting occupational illnesses and injuries for the collection of data under subparagraph (A), the Secretary of Health and Human Services shall consider the known frequency of the disorder, the severity of the disorder, and the size of the population at risk.

"(3) The Secretary of Health and Human Services shall prepare reports and analysis of deaths, occupational illnesses, and injuries collected under the national surveillance program and transmit the information to the Secretary of Labor, State health agencies, employers, employees, and other interested parties.

"(4) The Secretary of Health and Human Services may issue regulations to require an employer, through a physician or other health professional employed by or under contract to the employer, to report information on occupational deaths, illnesses and injuries in order to carry out the provisions of this subsection.

SEC. 905. ESTABLISHMENT OF NIOSH AS A SEPARATE AGENCY WITHIN PUBLIC HEALTH SERVICE.

The second sentence of section 22(b) (29 U.S.C. 671(b)) is amended by inserting after "The Institute shall be" the following: "established as a separate agency within the United States Public Health Service and be".

SEC. 906. CONFORMING AMENDMENTS CHANGING REFERENCES FROM HEW TO HHS.

The Occupational Safety and Health Act of 1970 is amended by striking out "Health, Education, and Welfare" each place it appears in sections 6 through 8 (29 U.S.C. 655 through 657), sections 20 through 26 (29 U.S.C. 669 through 675), and section 27(c)(1) (29 U.S.C 676(c)(1) and inserting in lieu thereof "Health and Human Services".

SEC. 907. NIOSH TRAINING.

Section 21(a) (29 U.S.C. 670(a)) is amended by inserting after "education programs to provide an adequate supply of qualified personnel to carry out the purposes of this Act," the following: "including education programs for employees and members of safety and health committees, as appropriate,"

TITLE X—STATE PLANS

SEC. 1001. STATE PLAN COMMITTEES AND PROGRAMS.

Section 18(c) (29 U.S.C. 667(c)) is amended—

(1) by striking "and" at the end of paragraph (7);

(2) by striking the period at the end of paragraph (8) and inserting a comma; and

(3) by adding at the end the following:

"(9) provides for the development of safety and health programs and safety and health committees and training programs that are at least as effective as those required under sections 27 and 28, and".

SEC. 1002. ACCESS TO INFORMATION: EMPLOYEE RIGHTS.

Section 18(c) (29 U.S.C. 667(c)) (as amended by section 1001) is amended by adding at the end the following:

"(10) provides for reporting requirements, protection of employee rights, and access to information that are at least as effective as those required under this Act or other Federal laws which govern access to information related to this Act.".

SEC. 1003. APPLICATION OF FEDERAL STANDARDS.

Section 18 (29 U.S.C. 667) is amended by adding at the end the following:

"(i) In the event a State, within 6 months after the promulgation of a safety and health standard by the Secretary under section 6, fails to adopt or promulgate a standard which is at least as effective as the Secretary's standard, the State shall enforce the Secretary's standard until a State standard which is at least as effective as such standard is in effect."

SEC. 1004. COMPLAINTS AGAINST A STATE PLAN.

Section 18 (29 U.S.C. 667) (as amended by section 1003) is amended—

(1) in the third sentence of subsection (e), by inserting after "preceding sentence" the following: "except as provided in subsections (f) and (j)"; and

(2) by adding at the end the following:

"(j)(1) If the Secretary receives a written complaint from an employer, employee, or employee representative that a State is deficient in its compliance with a provision of its State plan and the Secretary determines that there are reasonable grounds to believe that such deficiency exists, the Secretary shall promptly investigate any such complaint, except that complaints which allege a deficiency in an enforcement action by a State shall be investigated within 30 days of the receipt of the complaint.

"(2) The Secretary shall, within 30 days of completion of any investigation, transmit the findings in writing to the State and to the complainant, which findings include recommendations to correct any deficiency which is identified. If the Secretary determines there are no reasonable grounds to believe that a deficiency exists, the Secretary shall notify the complainant in writing of such determination.

"(3) Within 30 days of the receipt of a finding issued under paragraph (2), the State shall respond to the Secretary in writing as to what action the State has taken in response to the Secretary's findings and recommendations.

"(4) If after receipt of the response of the State the Secretary believes a serious violation of this Act exists for which the State has failed to issue a citation, the Secretary with reasonable promptness shall issue a citation. Section 9(c) shall not apply with respect to a citation issued under this paragraph."

SEC. 1005. ACTION AGAINST STATE PLAN.

Section 18(f) (29 U.S.C 667(f)) is amended—

(1) by designating the first sentence as paragraph (1);

(2) by redesignating the second sentence as paragraph (3); and

(3) by inserting after paragraph (1) (as so designated) the following new paragraph:

"(2)(A) If the Secretary determines at any time that there are reasonable grounds for concluding there is a failure to comply substantially with any provision of the State plan (or any assurance contained therein), the Secretary shall give notice to the State of the deficiencies which, in the Secretary's view, warrant such withdrawal of approval, and shall allow 6 months for the correction of the deficiencies.

"(B) If after 6 months the Secretary determines that the State has not corrected the deficiencies and that grounds for withdrawing approval of the State plan still exist, the Secretary shall institute proceedings pursuant to paragraph (3) for the withdrawal of approval of the plan, unless the Secretary determines in writing that exceptional circumstances exist that justify a decision not to institute such proceedings.

"(C) During the pendency of proceedings pursuant to paragraph (3), the Secretary shall exercise jurisdiction, concurrent with the State, over the safety and health issues that are subject to the State plan."

SEC. 1006. STATE PLAN CONFORMING AMENDMENTS.

Section 18 (29 U.S.C. 667) (as amended by section 1004) is amended by adding the end the following:

"(k)(1) Each State which is exercising authority to operate a State safety and health plan under this section shall within one year of the effective date of the Comprehensive Occupational Safety and Health Reform Act modify the plan to conform with the requirements of this Act.

"(2) In the case of a State which the Secretary identifies as—

"(A) requiring State legislation (other than legislation appropriating funds) to modify the State safety and health plan to conform to the requirements of this Act, and

"(B) having a legislature which is not scheduled to meet within 1 year of the effective date of the Comprehensive Occupational Safety and Health Reform Act in legislative session in which such legislation may be considered,

the State shall modify the plan to conform to the requirements of this Act within 1 year or by the first day of the first calendar quarter beginning after the close of the first legislative session of the State legislature that begins after the effective date of the Comprehensive Occupational Safety and Health Reform Act, whichever is later. For purposes of the previous sentence, in the case of a State that has a 2-year legislative session, each year of such session shall be deemed to be a separate session of the State legislature."

SEC. 1007. VALIDITY OF STATE LAWS.

Section 18 (29 U.S.C. 667) (as amended by section 1006) is amended by adding at the end the following:

"(l) Nothing in this section shall prevent any State from enacting or enforcing State public safety and health laws which are not limited to providing safe and healthful employment or places of employment, including—

"(1) laws that regulate employees or places of employment as a means of protecting the safety and health of both non-employee members of the public and employees, and

"(2) laws that license individuals to perform particular types of work."

0095-3237/93/$0+$1.00

REMARKS BEFORE THE HOUSE LABOR & INDUSTRY INTERIM COMMITTEE
REVIEW OF NEW WORKER'S COMPENSATION ACT
AND
WORKPLACE SAFETY ISSUES
SEPTEMBER 1, 1993

Mr. Chairman, Members of the Committee

As Mr. Bruner mentioned, the Industrial Safety and Health Section has administered State Law in the area of occupational safety and health for many years. These programs had been in effect prior to my joining the Section in January 1974. Administration of these Laws remains basically the same today as they did in 1974. However, philosophical changes have occurred among safety professionals regarding the role of safety programs as an effective method of reducing injuries and illnesses in the workplace. Although safety and health programs are not new in larger industries, they have not been promoted enough in smaller industries and businesses. In fact, many of the trainers hired by OSHA to train compliance officers at the OSHA Training Institute in Des Plaines, Illinois come from those larger industrial facilities. I met one recruiter in May 1974 at OTI from Boeing Airplane Company.

OSHA is now starting to promote safety and health programs through the On-site Consultation Program administered by the states. On February 16, 1993, we received a draft manuscript of "Managing Worker Safety and Health" from the OSHA National Office for review. Many of the elements of what persons in the profession consider an effective safety and health program are included in OSHA's proposal.

New Section 10 of Senate Bill 307 requires "each insurance or group-funded self-insurance plan providing worker's compensation insurance coverage in Kansas" to offer accident prevention programs to their insured. These programs must be "adequate". We view that as meaning it must be a program that will reduce the frequency and severity of injuries to employees in the workplace. The Secretary of Human Resources may conduct inspections as he/she deems necessary to determine the adequacy of the programs offered by the worker's compensation insurance carrier, or group-funded self-insured.

The method discussed to comply with New Section 10 of SB 307 is to conduct on-site audits of employer's establishments by personnel trained in the elements of an adequate safety and health program. Field staff performing the audits will be trained to recognize the unsafe conditions and unsafe acts that cause injury and illness, make recommendations for corrective action, and conduct follow-up visits to determine progress made in establishing adequate safety and health programs.

The OSHA type inspection to determine unsafe conditions is only one element of an effective safety and health program. There are many elements in addition to inspection that

House Labor and Industry
Attachment 9
9-1-93

must be in place before a program can be considered effective. The most important is management commitment. Without this important element the program will not be effective. Management must provide the financial resources to establish a program, provide the organizational development, encourage employee involvement, set examples, be sincere in their desire to provide a safe and healthful work environment, set goals, plan and design for change and show concrete signs of action.

Other elements are training and education of management, supervision and production personnel, assignment of responsibility, establishing rules and regulations to be followed, establish fair and equal disciplinary procedures, reward where appropriate, establish inspection procedures, and provide personal protective equipment. If a safety committee is established give direction and assign responsibility.

Through our efforts in the on-site consultation program, we complete a program evaluation on every comprehensive survey that we conduct. The employer is then provided a written report with recommendations that are to assist them in improving their safety and health program. Our plans are to continue to conduct on-site visits in exactly the same manner as currently conducted. If the results of the walkthrough indicate that the program is not adequate a review of the Worker's Compensation Carrier's Program will be reviewed and recommendations made.

Because we have limited resources and staff we have not promoted safety and health programs to the extent we would like for two reasons: (1) The program is funded with 90% federal and 10% state funds; guidelines that we are evaluated on by OSHA emphasize the inspection of and compliance with OSHA rules and regulations; and (2) because we have a backlog of approximately 225 requests (four months work), restrictions under the consultation program on the time spent per consultation and the time required to assist with programs, we can only provide employers information they need to comply with OSHA and provide sample programs, etc. Expansion of the consultation program, whereby the consultants could assist the employer by staying on-site longer and providing guidance, reviewing programs and recommend strengthening where necessary, especially with the smaller employers, we could be more successful in our efforts.

In our promotional brochure we list "other benefits from the consultation visit". The first one we have listed is "the potential for reduction in worker's compensation claims". We firmly believe this and the information has been in the brochure for 12 years. We encourage employers to provide safety and health programs. The problem that we have had, in our opinion, is that employers have good intentions and begin a program only to see it discontinued because of various changes within the organization, i.e. personnel changes, business cycles, etc.

In summary, as stated earlier, we recognize the problem that employers have in continuing their safety and health programs. Many of them recognize the need to provide safe and healthful workplaces. Employers that are making an effort, recognize the benefits and work

to provide their employees safe and healthful workplaces can attest to these benefits. Our efforts should be directed at those that need our assistance, make us available to provide adequate service and promote benefits of an "adequate" safety and health program. Thank You.

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice) -- 913-296-5044 (TDD)
913-296-4065 (Fax)

September 2, 1993

TO: House Committee on Labor and Industry

FROM: Sharon Huffman
Legislative Liaison

SUBJECT: Workers Compensation and the Americans with Disabilities Act (ADA)

I. INTRODUCTION

Since the members of this committee received a briefing on the ADA at the beginning of the 1993 Legislative Session I will not linger on the basics of the Act. Attachment 1 contains excerpts from the Equal Employment Opportunity Commission (EEOC) Final Rule on Title I, the employment provisions of the ADA that specifically refer to workers compensation. What I have been asked to speak about are the problems associated with the workers compensation records being open to the public.

Approximately two years ago the Kansas Commission on Disability Concerns (KCDC) began investigating the Kansas laws regarding open records after we received numerous telephone inquiries from consumers about potential violation of the ADA when they were denied employment based on their prior workers compensation claim. (Several consumers indicated that they were not asked, or did not tell the potential employer about their history of on-the-job injury.) What we found was K.S.A. 44-550b which says that all the workers compensation records are open to the public. We also discovered that the Division of Workers Compensation operated a computer Dial-Up system that allowed unrestricted access to all claim files. This solved the mystery of how employers were finding out about previous claims without asking the applicant directly.

House Labor and Industry
Attachment 8
9-2-93

II. EEOC AND KHRC COMPLAINTS

Kansas Human Rights Commission (KHRC)

In the time period from July 1, 1991 (when the amendments to the Kansas Act Against Discrimination were implemented making it comparable to the ADA) to April 21, 1992 approximately 10% of the employment discrimination based on physical handicap and disability claims either directly mentioned workers compensation or on-the-job injury as the basis for the discrimination. Attachment 2 gives two examples of actual claims filed with KHRC along with copies of their workers compensation claims as found on the Dial-Up system.

Equal Employment Opportunity Commission (EEOC)

According to the August 1993 BNA's Americans With Disabilities Act Manual, as of July 13 the EEOC has reported over 11,500 charges alleging disability-based employment discrimination since July 26, 1992, the effective date of the ADA's employment provisions covering employers of 24 or more workers. BNA also reports that Kansans have filed the most Title I charges so far measured on a per capita basis -- 0.41 charges per 1,000 members of the state labor force. Back impairments continued to form the basis for the largest number of ADA charges, with 18.5 percent of the charging parties citing some sort of back problem as a disability, followed by mental illness, 9.8 percent; heart impairments a little over 4 percent; neurological disorders, 4 percent; and diabetes, 3.5 percent. Discharges were the employment actions most frequently complained about, with fully 50 percent of the charges alleging discriminatory termination. These were followed by failure to make reasonable accommodations, 20 percent; failure to hire, 13 percent; harassment, 10 percent; and discipline, 7.2 percent.

III. The ADA and Medical Inquiries

Title I of the ADA prohibits employers from making medical inquiries prior to offer of employment (29 CFR Section 1630.13(a)). This includes using a third party to obtain the information (ie. previous employer, insurance company or State Workers Compensation Division). An inquiry about previous workers compensation claims or on-the-job injuries is considered to be a medical inquiry.

Employers who obtain information about a job applicant's workers compensation history prior to offer of employment are breaking the law! Many employers have

changed their application forms to eliminate any medical inquiries, but they continue to make use of Index Bureaus or the Division of Workers Compensation to obtain the same information that they recognize they cannot legally ask the applicant. Unfortunately the job applicants are unaware of this illegal practice, so many of them don't file a complaint with KHRC or EEOC.

IV. Title II

Title II of the ADA prohibits discrimination on the basis of disability by public entities. Specifically, 28 CFR Part 35, Section 35-130(b)(1)(v) states that a public entity, in providing any aid, benefit, or service, may not aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program. Attachment 3 is a letter from Richard D. Charlton, Sr., Attorney at Law to Bruce Kent, General Counsel for Kansas Department of Human Resources requesting that the workers compensation records be closed to persons who do not have written consent or court order.

V. Open Records Laws in Other States

In February of 1993 KCDC sent a survey out to all 50 states asking about their policies regarding workers compensation records being released to the public. Attachment 4 includes a sample response letter summarizing the results, a table showing individual results, and excerpts from various state laws that were sent along with the survey replies. I have recently learned that Kentucky does not allow unrestricted access to their records, so that means only two out of 38 states allow unrestricted access.

VI. 1993 Session Activity

K.S.A. 44-550b was amended at the end of the session. The amendment would have made the workers compensation records subject to the Kansas Open Records Act providing for much more restriction than currently exists. In the Governor's veto message this restriction was specifically mentioned as something she did not agree with. She did, however, instruct the Director of Workers Compensation to restrict access to the records and he is currently in the process of developing the necessary programs to carry out this task.

VII. Conclusion

It is our understanding that the Division of Workers Compensation is currently undergoing some changes that will not only restrict access to claimant records, but will also provide a method whereby the claimant will be notified that his or her records were requested or viewed by someone. When the claimant is notified about the records being accessed, they will also be told about their rights under the KAAD and the ADA and give the telephone numbers for the KHRC and the EEOC. Consumers that KCDC has spoken with consider this to be somewhat of a band-aid approach because it only provides a method to catch the violators rather than a means of stopping them. Injured workers would prefer that their medical history be kept private until their is a legitimate need for someone to obtain them. The only way to stop access to workers compensation claim files is to repeal K.S.A. 44-550b or to amend it to require written authorization from the claimant prior to release of information.

Excerpts from 29 CFR Part 1630 - Equal Employment Opportunity for Individuals With Disabilities; Final Rule (The Americans With Disabilities Act, Title I)

Overview of Regulations, p. 35726-35727

To assist us in the development of this guidance, the Commission requested comment in the NPRM from disability rights organizations, employers, unions, state agencies concerned with employment or workers compensation practices, and interested individuals on specific questions about insurance, workers' compensation, and collective bargaining agreements. Many commenters responded to these questions, and several commenters addressed other matters pertinent to these areas. The Commission has considered these comments in the development of the final rule and will continue to consider them as it develops further ADA guidance.

In the NPRM, the Commission raised questions about a number of insurance-related matters. Specifically, the Commission asked commenters to discuss risk assessment and classification, the relationship between "risk" and "cost," and whether employers should consider the effects that changes in insurance coverage will have on individuals with disabilities before making those changes. Many commenters provided information about insurance practices and explained some of the considerations that affect insurance decisions. In addition, some commenters discussed their experiences with insurance plans and coverage. The commenters presented a wide range of opinions on insurance-related matters, and the Commission will consider the comments as it continues to analyze these complex matters.

The Commission received a large number of comments concerning inquiries about an individual's workers' compensation history. Many employers asserted that such inquiries are job related and consistent with business necessity. Several individuals with disabilities and disability rights organizations, however, argued that such inquiries are prohibited pre-employment inquiries and are not job related and consistent with business necessity. The Commission has addressed this issue in the interpretive guidance accompanying section 1630.14(a) and will discuss the matter further in future guidance.

There was little controversy about the submission of medical information to workers' compensation offices. A number of employers and employer groups pointed out that the workers' compensation offices of many states request medical information in connection with the administration of second-injury funds. Further,

House Labor and Industry
Attachment 9
9-2-93

they noted that the disclosure of medical information may be necessary to the defense of a workers' compensation claim. The Commission has responded to these comments by amending the interpretive guidance accompanying section 1630.14(b). This amendment, discussed below, notes that the submission of medical information to workers' compensation offices in accordance with state workers' compensation laws is not inconsistent with section 1630.14(b). The Commission will address this area in greater detail and will discuss other issues concerning workers' compensation matters in future guidances, including the policy guidance on pre-employment inquiries.

With respect to collective bargaining agreements, the Commission asked commenters to discuss the relationship between collective bargaining agreements and such matters as undue hardship, reassignment to a vacant position, the determination of what constitutes a "vacant" position, and the confidentiality requirements of the ADA. The comments that we received reflected a wide variety of views. For example, some commenters argued that it would always be an undue hardship for an employer to provide a reasonable accommodation that conflicted with the provisions of a collective bargaining agreement. Other commenters, however, argued that an accommodation's effect on an agreement should not be considered when assessing undue hardship. Similarly, some commenters stated that the appropriateness of reassignment to a vacant position should depend upon the provisions of a collective bargaining agreement while others asserted that an agreement cannot limit the right to reassignment. Many commenters discussed the relationship between an agreement's seniority provisions and an employer's reasonable accommodation obligations.

In response to comments, the Commission has amended section 1630.2(n)(3) to include "the terms of a collective bargaining agreement" in the types of evidence relevant to determining the essential functions of a position. The Commission has made a corresponding change to the interpretive guidance on section 1630.2(n)(3). In addition, the Commission has amended the interpretive guidance on section 1630.15(d) to note that the terms of a collective bargaining agreement may be relevant to determining whether an accommodation would pose an undue hardship on the operation of a covered entity's business.

The divergent views expressed in the public comments demonstrate the complexity of employment-related issues concerning insurance, workers' compensation, and collective bargaining agreement matters. These highly complex issues require extensive research and analysis and warrant further consideration. Accordingly, the Commission has decided to address the issues in depth in future Compliance Manual sections and policy guidances. The Commission will consider the public

comments that it received in response to the NPRM as it develops further guidance on the application of title I of the ADA to these matters.

The Commission has also decided to address burdens-of-proof issues in future guidance documents, including the Compliance Manual section on the theories of discrimination. Many commenters discussed the allocation of the various burdens of proof under title I of the ADA and asked the Commission to clarify those burdens. The comments in this area addressed such matters as determining whether a person is a qualified individual with a disability, job relatedness and business necessity, and undue hardship. The Commission will consider these comments as it prepares further guidance in this area.

A discussion of other significant comments and an explanation of the changes made in part 1630 since publication of the NPRM follows.

Section-by-Section Analysis of Comments and Revisions

Section 1630.1 Purpose, applicability, and construction

The Commission has made a technical correction to section 1630.1(a) by adding section 506(e) to the list of statutory provisions implemented by this part. Section 506(e) of the ADA provides that the failure to receive technical assistance from the federal agencies that administer the ADA is not a defense to failing to meet the obligations of title I.

Some commenters asked the Commission to note that the ADA does not preempt state claims, such as state tort claims, that confer greater remedies than are available under the ADA. The Commission has added a paragraph to that effect in the Appendix discussion of sections 1630.1(b) and (c). This interpretation is consistent with the legislative history of the Act. See H.R. Rep. No. 485 Part 3, 101st Cong., 2d Sess. 69-70 (1990) [hereinafter referred to as House Judiciary Report].

In addition, the Commission has made a technical amendment to the Appendix discussion to note that the ADA does not automatically preempt medical standards or safety requirements established by Federal law or regulations. The Commission has also amended the discussion to refer to a direct threat that cannot be eliminated "or reduced" through reasonable accommodation. This language is consistent with the regulatory definition of direct threat. (See section 1630.2(r), below.)

Section 1630.2 Definitions

Section 1630.2(h) Physical or mental impairment

The Commission has amended the interpretive guidance accompanying section 1630.2(h) to note that the definition of the term "impairment" does not include characteristic predisposition to illness or disease.

In addition, the Commission has specifically noted in the interpretive guidance that pregnancy is not an impairment. This change responds to the numerous questions that the Commission has received concerning whether pregnancy is a disability covered by the ADA. Pregnancy, by itself, is not an impairment and is therefore not a disability.

Section 1630.2(j) Substantially limits

The Commission has revised the interpretive guidance accompanying section 1630.2(j) to make clear that the determination of whether an impairment substantially limits one or more major life activities is to be made without regard to the availability of medicines, assistive devices, or other mitigating measures. This interpretation is consistent with the legislative history of the ADA. See S. Rep. No. 116, 101st Cong., 1st Sess. 23 (1989) [hereinafter referred to as Senate Report]; H.R. Rep. No. 485 Part 2, 101st Cong., 2d Sess. 52 (1990) [hereinafter referred to as House Labor Report]; House Judiciary Report at 28. The Commission has also revised the examples in the third paragraph of this section's guidance. The examples now focus on the individual's capacity to perform major life activities rather than on the presence or absence of mitigating measures. These revisions respond to comments from disability rights groups, which were concerned that the discussion could be misconstrued to exclude from ADA coverage individuals with disabilities who function well because of assistive devices or other mitigating measures.

In an amendment to the paragraph concerning the factors to consider when determining whether an impairment is substantially limiting, the Commission has provided a second example of an impairment's "impact." This example notes that a traumatic head injury's affect on cognitive functions is the "impact" of that impairment.

Many commenters addressed the provisions concerning the definition of "substantially limits" with respect to the major life activity of working (section 1630.2(j)(3)). Some employers generally supported the definition but argued that it should be applied narrowly. Other employers argued that the definition is too broad. Disability rights groups and individuals with disabilities, on the other hand,

argued that the definition is too narrow, unduly limits coverage, and places an onerous burden on individuals seeking to establish that they are covered by the ADA. The Commission has responded to these comments by making a number of clarifications in this area.

The Commission has revised section 1630.2(j)(3)(ii) and the accompanying interpretive guidance to note that the listed factors "may" be considered when determining whether an individual is substantially limited in working. This revision clarifies that the factors are relevant to, but are not required elements of, a showing of a substantial limitation in working.

Disability rights groups asked the Commission to clarify that "substantially limited in working" applies only when an individual is not substantially limited in any other major life activity. In addition, several other commenters indicated confusion about whether and when the ability to work should be considered when assessing if an individual has a disability. In response to these comments, the Commission has amended the interpretive guidance by adding a new paragraph clarifying the circumstances under which one should determine whether an individual is substantially limited in the major life activity of working. This paragraph makes clear that a determination of whether an individual is substantially limited in the ability to work should be made only when the individual is not disabled in any other major life activity. Thus, individuals need not establish that they are substantially limited in working if they already have established that they are, have a record of, or are regarded as being substantially limited in another major life activity.

The proposed interpretive guidance in this area provided an example concerning a surgeon with a slight hand impairment. Several commenters expressed concern about this example. Many of these comments indicated that the example confused, rather than clarified, the matter. The Commission, therefore, has deleted this example. To explain further the application of the "substantially limited in working" concept, the Commission has provided another example (concerning a commercial airline pilot) in the interpretive guidance.

In addition, the Commission has clarified that the terms "numbers and types of jobs" (see section 1630.2(j)(3)(ii)(B)) and "numbers and types of other jobs" (see section 1630.2(j)(3)(ii)(C)) do not require an onerous evidentiary showing.

In the proposed Appendix, after the interpretive guidance accompanying section 1630.2(l), the Commission included a discussion entitled "Frequently Disabling Impairments." Many commenters expressed concern about this discussion. In

response to these comments, and to avoid confusion, the Commission has revised the discussion and has deleted the list of frequently disabling impairments. The revised discussion now appears in the interpretive guidance accompanying section 1630.2(j).

Section 1630.2(l) Is regarded as having such an impairment

Section 1630.2(l)(3) has been changed to refer to "a substantially limiting impairment" rather than "such an impairment." This change clarifies that an individual meets the definition of the term "disability" when a covered entity treats the individual as having a substantially limiting impairment. That is, section 1630.2(l)(3) refers to any substantially limiting impairment, rather than just to one of the impairments described in sections 1630.2(l)(1) or (2).

The proposed interpretive guidance on section 1630.2(l) stated that, when determining whether an individual is regarded as substantially limited in working, "it should be assumed that all similar employers would apply the same exclusionary qualification standard that the employer charged with discrimination has used." The Commission specifically requested comment on this proposal, and many commenters addressed this issue. The Commission has decided to eliminate this assumption and to revise the interpretive guidance. The guidance now explains that an individual meets the "regarded as" part of the definition of disability if he or she can show that a covered entity made an employment decision because of a perception of a disability based on "myth, fear, or stereotype." This is consistent with the legislative history of the ADA. See House Judiciary Report at 30.

Many individuals with disabilities and disability rights groups asked the Commission to emphasize that the determination of whether a person is a qualified individual with a disability must be made at the time of the employment action in question and cannot be based on speculation that the individual will become unable to perform the job in the future or may cause increased health insurance or workers' compensation costs. The Commission has amended the interpretive guidance on section 1630.2(m) to reflect this point. This guidance is consistent with the legislative history of the Act. See Senate Report at 26, House Labor Report at 55, 136; House Judiciary Report at 34, 71.

1630.13 Prohibited medical examinations and inquiries

In response to the Commission's request for comment on certain workers' compensation matters, many commenters addressed whether a covered entity may

ask applicants about their history of workers' compensation claims. Many employers and employer groups argued that an inquiry about an individual's workers' compensation history is job related and consistent with business necessity. Disability rights groups and individuals with disabilities, however, asserted that such an inquiry could disclose the existence of a disability. In response to comments and to clarify this matter, the Commission has amended the interpretive guidance accompanying section 1630.13(a). The amendment states that an employer may not inquire about an individual's workers' compensation history at the pre-offer stage.

The Commission has made a technical change to section 1630.13(b) by deleting the phrase "unless the examination or inquiry is shown to be job-related and consistent with business necessity" from the section. This change does not affect the substantive provisions of section 1630.13(b). The Commission has incorporated the job-relatedness and business-necessity requirement into a new section 1630.14(c), which clarifies the scope of permissible examinations or inquiries of employees. (See section 1630.14(c), below.)

Section 1630.14(b) Employment Entrance Examinations

Many commenters addressed the confidentiality provisions of this section. They noted that it may be necessary to disclose medical information in defense of workers' compensation claims or during the course of other legal proceedings. In addition, they pointed out that the workers' compensation offices of many states request such information for the administration of second-injury funds or for other administrative purposes.

The Commission has revised the last paragraph of the interpretive guidance on section 1630.14(b) to reflect that the information obtained during a permitted employment entrance examination or inquiry may be used only "in a manner not inconsistent with this part." In addition, the Commission has added language clarifying that it is permissible to submit the information to state workers' compensation offices.

Several commenters asked the Commission to clarify whether information obtained from employment entrance examinations and inquiries may be used for insurance purposes. In response to these comments, the Commission has noted in the interpretive guidance that such information may be used for insurance purposes described in section 1630.16(f).

1630.15 Defenses

The Commission has added a sentence to the interpretive guidance on section 1630.15(a) to clarify that the assertion that an insurance plan does not cover an individual's disability or that the disability would cause increased insurance or workers' compensation costs does not constitute a legitimate, nondiscriminatory reason for disparate treatment of an individual with a disability. This clarification, made in response to many comments from individuals with disabilities and disability rights groups, is consistent with the legislative history of the ADA. See Senate Report at 85; House Labor Report at 136; House Judiciary Report at 71.

Section 1630.2(l) Regarded as Substantially Limited in a Major Life Activity

An individual rejected from a job because of the "myths, fears and stereotypes" associated with disabilities would be covered under this part of the definition of disability, whether or not the employer's or other covered entity's perception were shared by others in the field and whether or not the individual's actual physical or mental condition would be considered a disability under the first or second part of this definition. As the legislative history notes, sociologists have identified common attitudinal barriers that frequently result in employers excluding individuals with disabilities. These include concerns regarding productivity, safety, insurance, liability, attendance, cost of accommodation and accessibility, workers' compensation costs, and acceptance by coworkers and customers.

Therefore, if an individual can show that an employer or other covered entity made an employment decision because of a perception of disability based on "myth, fear or stereotype," the individual will satisfy the "regarded as"part of the definition of disability. If the employer cannot articulate a non-discriminatory reason for the employment action, an interference that the employer is acting on the basis of "myth, fear or stereotype" can be drawn.

Section 1630.13 Prohibited Medical Examinations and Inquiries
Section 1630.13(a) Pre-employment Examination or Inquiry

This provision makes clear that an employer cannot inquire as to whether an individual has a disability at the pre-offer stage of the selection process. Nor can an employer inquire at the pre-offer stage about an applicant's workers' compensation history.

Employers may ask questions that relate to the applicant's ability to perform job-related functions. However, these questions should not be phrased in terms of disability. An employer, for example, may ask whether the applicant has a driver's license, if driving is a job function, but may not ask whether the applicant has a

visual disability. Employers may ask about an applicant's ability to perform both essential and marginal job functions. Employers, though, may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions. See Senate Report at 39; House Labor Report at 72-73; House Judiciary Report at 42-43.

The information obtained in the course of a permitted entrance examination or inquiry is to be treated as a confidential medical record and may only be used in a manner not inconsistent with this part. State workers' compensation laws are not preempted by the ADA or this part. These laws require the collection of information from individuals for state administrative purposes that do not conflict with the ADA or this part. Consequently, employers or other covered entities may submit information to state workers' compensation offices or second injury funds in accordance with state workers' compensation laws without violating this part.

Consistent with this section and with section 1630.16(f) of this part, information obtained in the course of a permitted entrance examination or inquiry may be used for insurance purposes described in section 1630.16(f).

Section 1630.15(a) Disparate Treatment Defense

The "traditional" defense to a charge of disparate treatment under title VII, as expressed in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), and their progeny, may be applicable to charges of disparate treatment brought under the ADA. See Prewitt v. U.S. Postal Service, 662 F.2d 292 (5th Cir. 1981). Disparate treatment means, with respect to title I of the ADA, that an individual was treated differently on the basis of his or her disability. For example, disparate treatment has occurred where an employer excludes an employee with a severe facial disfigurement from staff meetings because the employer does not like to look at the employee. The individual is being treated differently because of the employer's attitude towards his or her perceived disability. Disparate treatment has also occurred where an employer has a policy of not hiring individuals with AIDS regardless of the individuals' qualifications.

The crux of the defense to this type of charge is that the individual was treated differently not because of his or her disability but for a legitimate nondiscriminatory reason such as poor performance unrelated to the individual's disability. The fact that the individual's disability is not covered by the employer's current insurance plan or would cause the employer's insurance premiums or workers' compensation costs to increase, would not be a legitimate

nondiscriminatory reason justifying disparate treatment of a individual with a disability. Senate Report at 85; House Labor Report at 136 and House Judiciary Report at 70. The defense of a legitimate nondiscriminatory reason is rebutted if the alleged nondiscriminatory reason is shown to be pretextual.

Section 1630.15(b) and (c) Disparate Impact Defenses

Disparate impact means, with respect to title I of the ADA and this part, that uniformly applied criteria have an adverse impact on an individual with a disability or a disproportionately negative impact on a class of individuals with disabilities. Section 1630.15(b) clarifies that an employer may use selection criteria that have such a disparate impact, i.e., that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities only when they are job-related and consistent with business necessity.

For example, an employer interviews two candidates for a position, one of whom is blind. Both are equally qualified. The employer decides that while it is not essential to the job it would be convenient to have an employee who has a driver's license and so could occasionally be asked to run errands by car. The employer hires the individual who is sighted because this individual has a driver's license. This is an example of a uniformly applied criterion, having a driver's permit, that screens out an individual who has a disability that makes it impossible to obtain a driver's permit. The employer would, thus, have to show that this criterion is job-related and consistent with business necessity. See House Labor Report at 55.

However, even if the criterion is job-related and consistent with business necessity, an employer could not exclude an individual with a disability if the criterion could be met or job performance accomplished with a reasonable accommodation. For example, suppose an employer requires, as part of its application process, an interview that is job-related and consistent with business necessity. The employer would not be able to refuse to hire a hearing impaired applicant because he or she could not be interviewed. This is so because an interpreter could be provided as a reasonable accommodation that would allow the individual to be interviewed, and thus satisfy the selection criterion.

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the "direct threat" standard in section 1630.2(r) in order to show that the requirement is job related and consistent with business necessity.

Section 1630.15(c) clarifies that there may be uniformly applied standards, criteria and policies not relating to selection that may also screen out or tend to screen out an individual with a disability or a class of individuals with disabilities. Like selection criteria that have a disparate impact, non-selection criteria having such an impact may also have to be job-related and consistent with business necessity, subject to consideration of reasonable accommodation.

It should be noted, however, that some uniformly applied employment policies or practices, such as leave policies, are not subject to challenge under the adverse impact theory. "No-leave" policies (e.g., no leave during the first six months of employment) are likewise not subject to challenge under the adverse impact theory. However, an employer, in spite of its "no-leave" policy, may, in appropriate circumstances, have to consider the provision of leave to an employee with a disability as a reasonable accommodation, unless the provision of leave would impose an undue hardship. See discussion at section 1630.5 Limiting, Segregating and Classifying, and section 1630.10 Qualification Standards, Tests, and Other Selection Criteria.

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION

DOCKET NO. B629DW

On the complaint of

[redacted]

Complainant,

vs.

[redacted] CORPORATION AND ITS REPRESENTATIVES Respondent,

I, [redacted]

residing at [redacted] Wichita, Kansas 67208

charge [redacted] Corporation and its representatives

whose address is [redacted] Wichita, Kansas 67206

With an unlawful practice within the meaning of:

[X] The Kansas Act Against Discrimination (Chapter 44, Art. 10, K.S.A.) and specifically within the meaning of subsection (a)(1) of Section 44-1009 of said Act, because of my RACE ( ), RELIGION( ) COLOR ( ), SEX ( ), NATIONAL ORIGIN ( ), ANCESTRY(X), DISABILITY(X), RETALIATION ( ).

[ ] The Kansas Age Discrimination in Employment Act (Chapter 44, Art. 11, K.S.A.) and specifically within the meaning of subsection _____ of Section _____ of said Act, because of my AGE.

Alleged Date of Incident, on or about September 11, 19 91 to September 30, 1991

The aforesaid charges are based on the following facts:

I. I am a Hispanic and am considered disabled by the Respondent.

A. I made application for a position in sheetmetal with the Respondent. On or about September 9, 1991, the Respondent's physician noted on my application that I had filed a previous workers compensation claim. We discussed the injury to my finger. He told me there was no real problem, and that all I needed to do was get the records of the previous injury from my physician. I did so. I was then required to get my complete medical records from my physician. After having done so I was denied employment on the basis that the Respondent felt my worki in sheetmetal would be detrimental to me.

House Labor and Industry
Attachment 10
9-2-93

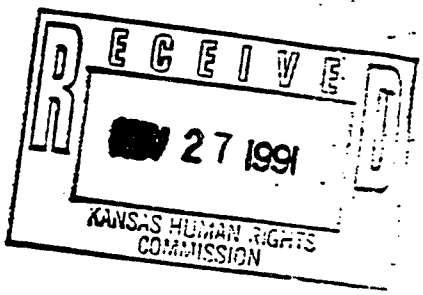
STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION DOCKET NO. 1362-92U

(Continued)

II. I feel this act on the part of the Respondent and its representatives is due to my ancestry and my being regarded as disabled.

III. I hereby charge [redacted] Corporation and its representatives with a violation of the Kansas Act Against Discrimination in that I was denied employment due to my ancestry, Hispanic, and my being regarded as disabled.



I have not commenced any action, civil or criminal, based upon the grievance set forth above, except

STATE OF KANSAS)
) ss:
COUNTY OF)

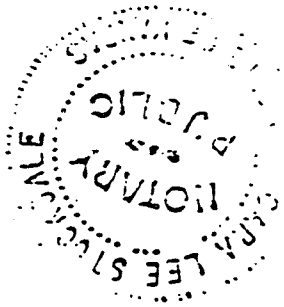
X [redacted]
(SIGNATURE OF COMPLAINANT)

[redacted], being duly sworn, deposes and says that that he is the Complainant herein; that he read the foregoing complaint and knows the contents thereof; that the same is true of h[redacted] own knowledge except as to the matters therein stated on information belief; that as to those matters he believes the same to be true.

X [redacted]
(SIGNATURE OF COMPLAINANT)

Subscribed and sworn to before me this 25th day of November, 1991

Carol Lee Stehle
(SIGNATURE OF NOTARY)



MY COMMISSION EXPIRES:

February 7, 1995

18-2

N

WORKERS COMPENSATION ACCIDENT REPORT

DATE - 10/22/92

SSN: [redacted] MOD: 010 DOA: 06/16/87 CART NO: 334-965
CLAIMANT: [redacted] FILED: 06/16/87 SEX: N-N/A
AGE: 18
[redacted] KS 67801-0000

EMPLOYER: 0000000 SERIAL NOT IN FILE SIC: 07000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
CLAIM NO:

INJURY: YES DISEASE: N - NO REHAB: 0
SEVERITY: 1 - TIME LOSS DEATH DATE: 00/00/00 RTW: 00/00/00
CAUSE: 998 - NO EXPLANATION
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 210 - FRACTURE
MEMBER: 340 - FINGER(S)
COUNTY: 057 - [redacted] DOCKET NO.:

PROC DATE: 06/16/87
SCREEN: AU

Alt-Z FOR HELP| VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE

18-3

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION

DOCKET NO. 13736-92-W

On the complaint of

[redacted]

Complainant,

vs.

[redacted] INDUSTRIES AND ITS REPRESENTATIVES Respondent,

I, [redacted]

residing at [redacted] Wichita, Kansas 67213

charge [redacted]ndustries and its representatives

whose address is [redacted] Wichita, Kansas 67219

With an unlawful practice within the meaning of:

[X] The Kansas Act Against Discrimination (Chapter 44, Art. 10, K.S.A.) and specifically within the meaning of subsection (a) (1) of Section 44-1009 of said Act, because of my RACE ( ), RELIGION( ) COLOR ( ), SEX ( ), NATIONAL ORIGIN ( ), ANCESTRY( ), DISABILITY(X), RETALIATION ( ).

[ ] The Kansas Age Discrimination in Employment Act (Chapter 44, Art. 11, K.S.A.) and specifically within the meaning of subsection _____ of Section _____ of said Act, because of my AGE.

Alleged Date of Incident, on or about November 1, 1991.

The aforesaid charges are based on the following facts:

I. I have a record of previous injuries which resulted in a crushed disc, and the Respondent percieves me to be disabled.

A. On or about November 1, 1991, I was informed I would not be hired on a full-time basis by the Respondent. I had been working for the Respondent through a temporary service for approximately two months. Through the fact that my name was not given to the clinic doing the employment physicals I was not allowed to take the physical. [redacted] then told me that it had come to the Respondent's attention that I had two previous back injuries, and that his supervisor did nc want me working there. However, the back injuries were five years ago.

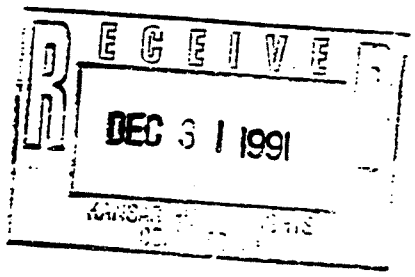
II. I feel this act on the part of the Respondent and its representativ is due to my being percieved as disabled.

10-4

STATE OF KANSAS

KANSAS HUMAN RIGHTS COMMISSION DOCKET NO. BBGAW
(Continued)

III. I hereby charge [redacted] Industries and its representatives with a violation of the Kansas Act Against Discrimination in that I was denied full-time employment due to my being regarded as disabled.



I have not commenced any action, civil or criminal, based upon the grievance set forth above, except

STATE OF KANSAS)
) ss:
COUNTY OF)

X [redacted]
(SIGNATURE OF COMPLAINANT)

[redacted], being duly sworn, deposes and says that: that ___he is the Complainant herein: that ___ he read the foregoing complaint and knows the contents thereof; that the same is true of h is own knowledge except as to the matters therein stated on information belief: that as to those matters ___he believes the same to be true.

Subscribed and sworn to before me

X [redacted]
(SIGNATURE OF COMPLAINANT)

this 27 day of Dec, 1991

Donna J. Waite
(SIGNATURE OF NOTARY)

MY COMMISSION EXPIRES:

DONNA J. WAITE
NOTARY PUBLIC
STATE OF KANSAS
My Appt. Exp. 2-7-95

10-5

WORKERS COMPENSATION ACCIDENT REPORT DATE - 10/22/92

SSN: [redacted] MOD: 020 DOA: 01/04/87 CART NO: 321-492
CLAIMANT: [redacted] FILED: 01/04/87 SEX: N-N/A
AGE: 22
KS 66061-4804

EMPLOYER: 0000000 SERIAL NOT IN FILE SIC: 07000

INSUR NO: 00000-00 INSURANCE CO. UNKNOWN
CLAIM NO:

INJURY: YES DISEASE: N - NO REHAB: 0
SEVERITY: 1 - TIME LOSS DEATH DATE: 00/00/00 RTW: 00/00/00
CAUSE: 121 - LIFTING OBJECTS (LIFTING, PULLING, LOADING INVOLVED)
SOURCE: 9800 - NONCLASSIFIABLE
NATURE: 311 - NOT IN TABLE
MEMBER: 420 - BACK
COUNTY: 091 - [redacted] DOCKET NO.:

PROC DATE: 01/04/87
SCREEN: AU

Alt-Z FOR HELP| VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE
PC N PAGE 01

WORKERS COMPENSATION ACCIDENT REPORT DATE - 10/22/92

SSN: [redacted] MOD: 010 DOA: 08/24/87 CART NO: 344-7
CLAIMANT: [redacted] FILED: 10/02/87 SEX: M-MALE
AGE: 23
KS 66061-4804

EMPLOYER: 2000430 [redacted] SIC: 07392
OVERLAND PARK KS 66214

INSUR NO: 11223-02 AETNA CASUALTY & SURETY CO
CLAIM NO:

INJURY: YES DISEASE: N - NO REHAB: 0
SEVERITY: 0 - NO TIME LOSS DEATH DATE: 00/00/00 RTW: 08/24/87
CAUSE: 121 - LIFTING OBJECTS (LIFTING, PULLING, LOADING INVOLVED)
SOURCE: 6020 - PERSON, OTHER THAN INJURED
NATURE: 310 - SPRAINS, STRAINS
MEMBER: 420 - BACK
COUNTY: 091 - [redacted] DOCKET NO.:

PROC DATE: 10/12/87
SCREEN: AU

Alt-Z FOR HELP| VT102 | FDX | 1200 E71 | LOG CLOSED | PRINT OFF | ON-LINE

10-6

A.D.A.P.T. INC.

ADVOCATES FOR DISABLED ACCESS TO PROGRAMS AND TRAINING INC.

PRESIDENT

RICHARD D CHARLTON, SR
ATTORNEY AT LAW

OFFICE

1951 SW MISSION AVE
TOPEKA KS 66604-3371
(913)271-1213

April 5, 1993

Bruce Kent, General Counsel:
Department of Human Resources
401 SW Topeka Blvd
Topeka, KS 66603

RE:SENATE SUBSTITUTE FOR HOUSE SUBSTITUTE FOR HOUSE BILL NO. 2354 Sec. 46. K.S.A. 44-550b ("Open Records Provisions")

Dear Mr Kent:

On Friday March 26, 1993 in a meeting with Secretary Dick and his staff, the KANSAS COMMISSION ON DISABILITY CONCERNS (KCDC) Staff and Commissioners recommended closing the Workman's Compensation records. During the entire legislative hearings on this issue KCDC has stated that the open records provisions are in direct violation of "THE 1990 AMERICAN DISABILITIES ACT" (ADA). You requested a legal opinion regarding non-compliance with the ADA.

1. My understanding is that your agency has a toll free computer dial up system without any tracking mechanism in place. There is also a written access system which does not keep on file any inquiries which were made about a workers' compensation case records. Therefore, anyone can access the workers' compensation records of any individual without any permanent record or trace, of who, when, or what was accessed.

House Labor and Industry
Attachment H
9-2-93

2. UNITED STATES DEPARTMENT OF JUSTICE rule 28 CFR Part 35 which implements subtitle A of title II of the Americans with Disabilities Act (ADA), Public Law 101-336, which prohibits discrimination on the basis of disability by public entities became effective January 26, 1992. Subtitle A protects qualified individuals with disabilities on the basis of disability in the services, programs, or activities of all State and local governments. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local governments, including those that do not receive Federal financial assistance, and incorporates specific prohibitions of discrimination on the basis of disability from titles I, III, and V of the ADA.
3. The following applicable Rules and Regulations are found in 28CFR Part 35, Subpart B- General Requirements.

Section 35-130 General Prohibitions against discrimination.

(a) No qualified individual with a disability shall, on the basis of disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any public entity.

(b)(1) A public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability ---

(v) Aid or perpetuate discrimination against a qualified individual with a disability by providing significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program;

(3) A public entity may not, directly or through contractual or other arrangements, utilize criteria or methods of administration;

(i) That have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability;

(ii) That have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the public entity's program with respect to individuals with disabilities;

4. Since January 26, 1992, your agency has been in violation of 28CFR; 35-130(b)(1)(v) in aiding or perpetuating discrimination against a qualified individual with a disability by providing significant assistance to an employer that discriminates on the basis of a perceived disability by allowing indiscriminate access to the workers' compensation case records.

5. Since January 26, 1992, your agency has been in violation of 28CFR; 35-130(b)(3) by utilizing criteria or methods of administration that perpetuate the discrimination by employers in their hiring practices.

6. Therefore, it is recommended that workers' compensation cases be closed except when a written release is signed by the claimant or when ordered by the court. Procedures should be initiated immediately, under the current regulations, by installing a tracking system to process and record all requests for information from the workers' compensation case records.

It is requested that your agency immediately discontinue the practice of supplying information via the toll free number and accept only written requests for information concerning workers' compensation cases. Your assistance in bringing Kansas in compliance with ADA would be appreciated.

Sincerely,

Richard D. Charlton, Sr
Attorney At Law

Cc:Senate and House Conference Committee Members Including:
Senator Alicia Salisbury, Chairperson
Senator Mike Harris
Senator David Kerr
Senator Anthony Hensley
Senator Marge Petty
Representative David Heinemann
Representative Al Lane
Representative Tim Carmody
Representative Darrell Webb
Representative Janice Pauls
Other Senators and Representatives
Joan Finney, Governor
Joe Dick, Secretary Human Resources
George Gomez, Director Workers Compensation
Martha Gabehart, Executive Director KCDC
Paralyzed Veterans of America
Mid-America PVA
SunFlower/Mid-America PVA
Director National Rehabilitation Assn
Kansas Rehabilitation Assn
Topeka Rehabilitation Assn
Kansas Trial Lawyers Association
Kansas AFL-CIO

Kansas Department of Human Resources

Joan Finney, Governor
Joe Dick, Secretary

Commission on Disability Concerns
1430 S.W. Topeka Boulevard, Topeka, Kansas 66612-1877
913-296-1722 (Voice) -- 913-296-5044 (TDD)
913-296-4065 (Fax)

July 22, 1993

SAMPLE

Ms. Valerie Salven
General Counsel
Department of Workers' Claims
Perimeter Park West, Building C
1270 Louisville Road
Frankfort, KY 40601

Dear Ms. Salven;

Thank you for your response to my Workers Compensation Survey. The results have been compiled and are enclosed with this letter. The following is a brief summary:

Of the 38 states responding to the survey, 10 indicated that their records were open to public inspection. Out of those 10 states the following 7 states indicated that restrictions apply:

Alabama: Release form required
Alaska: Penalty for illegal use. Tracking system used.
California: Only legal proceedings released, not medical records.
Florida: Release form required for medical records. Tracking system used.
Louisiana: Only trial records open to the public with unnamed limitations.
Maryland: Release required for medical records.
Minnesota: Medical and accident reports require specific authorization. Tracking system used.

In conclusion, in addition to Kansas, only 3 states indicated total unrestricted access to workers compensation records: Iowa, Kentucky and Maine.

As a result of the efforts of our Commission the Workers Compensation Bill that went to the Governor for signature contained an amendment that would subject all workers compensation records to the Kansas Open Records Act. This change would have restricted access considerably and would have significantly benefitted job seekers with workers compensation histories. Unfortunately, the original bill was vetoed. The following statement was made in the Governor's

C:\WP51\WORKCOMP\SVYRSLT.PRI

House Labor and Industry
Attachment 12
9-2-93

veto message, "Delete sections of this bill that would close certain records to public scrutiny. I have already directed the Division of Workers Compensation to take administrative steps to meet the disclosure protection needs of disabled persons under the law. But I cannot condone legislated secrecy in handling of workers compensation when the public has a right to know how public monies are being spent."

At present, a program is being developed to track usage of our computer dial-up link to workers compensation records. In addition to tracking who accesses claimant's files a letter will be mailed to all claimants whose files are accessed informing them of the inquiry. The letter will indicate who made the inquiry, the date of the inquiry, and inform the individual of their rights under the Americans With Disabilities Act.

Thank you for your help with this matter. Please contact me if you desire additional information.

Sincerely,

Sharon Huffman

Sharon Huffman
Legislative Liaison

encl

cc: Joe Dick, Secretary, KDHR
Ann Golubski, Special Assistant
Martha Gabehart, Executive Director, KCDC
George Gomez, Director, Div of Workers Compensation
KCDC Commissioners

C:\WP51\WORKCOMP\SVYRSLT.PRI

	LAW THAT REQUIRES ALL WC RECORDS BE OPEN TO THE PUBLIC?	WHICH RECORDS ARE OPEN TO THE PUBLIC?	DO YOU REQUIRE A RELEASE FROM THE CLAIMANT?	IS THERE A PENALTY FOR ILLEGAL USE OF INFORMATION?	HOW ARE THE RECORDS MADE AVAILABLE TO THE PUBLIC?*	NUMBER OF REQUESTS PROCESSED ANNUALLY?	ANNUAL COST TO PROCESS REQUESTS?	DO YOU USE A TRACKING SYSTEM?	ARE RECORDS AVAILABLE TO OTHER ENTITIES?
ALABAMA	YES	BLANK	YES	BLANK	W		$4 per req	NO	NO
ALASKA	YES	ALL	NO	YES	WCP	1,000		YES	YES
ARKANSAS	NO	ALL	NO	NO	W		25¢/page	NO	NO
CALIFORNIA	YES(NOT MED)	LEGAL[1]	NO	BLANK	BLANK			BLANK	BLANK
D.C.	NO	NONE	YES	NO	N/A			YES	NO
FLORIDA	YES	ACC & LEGAL	FOR MEDICAL	NO	WP	4,900	$21,000	YES	YES[2]
GEORGIA	NO	NONE	N/A	NO	W	9,500		NO	NO
IDAHO	NO	NONE[3]	YES	NO	W	1,700-1,800		YES	NO
ILLINOIS	NO	MED & LEGAL	NO	NO	TWP	75-100/day		YES	NO
IOWA	YES	ALL	NO	NO	TWP	T250,W30,P30		NO	NO
KENTUCKY	YES	ALL	NO[4]	BLANK	TWP			NO	BLANK
LOUISIANA	YES(W/LIMITS)	TRIAL RCDS	NO	NO	WP		$14,000	NO	UNKNOWN
MAINE	YES	ALL	NO	NO	TWP	SEVERAL THOU		NO	NO
MARYLAND	YES	ACC & LEG[5]	FOR MEDICAL	NO	TWP	[6]	$75,000	NO	NO
MASS.	NO	ACC & LEGAL	YES	NO	TWP	[7]		NO	NO
MICHIGAN	NO	LEGAL	NO	NO	W[8]	500/mo		YES	YES[9]
MINNESOTA	YES	LEGAL[10]	YES	YES	W	600/mo	$132,000	YES	NO
MISS.	NO	MED[11],AC,LG	NO	NO	W	5		NO	YES[12]
NEBRASKA	NO[13]	ACC & LEGAL	FOR MEDICAL	NO	WP	5,000	$5 per req	NO	YES[14]
NEVADA	NO	NONE	YES	YES	N/A			N/A	NO
N. HAMPSHIRE	NO	ACC & LEG[15]	YES	NO	W	2,500		YES	NO
NEW JERSEY	NO	ALL[16]	NO	NO	W			NO	NO
NEW MEXICO	NO	EVIDENCE[17]	YES	NO	W	1,500	25¢/page	YES	NO
N. DAKOTA	NO	GENERIC[18]	YES	NO	TWP			NO	NO
OHIO	NO	ACC & LEGAL	NO[19]	NO	WP	HUNDREDS		YES	NO
[illegible]	NO[20]	DECISIONS[21]	YES	NO	W	2,600		YES	NO
RHODE ISLAND	NO	LEGAL	YES	YES	N/A	N/A		YES	YES-NCCI

	LAW THAT REQUIRES ALL WC RECORDS BE OPEN TO THE PUBLIC?	WHICH RECORDS ARE OPEN TO THE PUBLIC?	DO YOU REQUIRE A RELEASE FROM THE CLAIMANT?	IS THERE A PENALTY FOR ILLEGAL USE OF INFORMATION?	HOW ARE THE RECORDS MADE AVAILABLE TO THE PUBLIC?[a]	NUMBER OF REQUESTS PROCESSED ANNUALLY?	ANNUAL COST TO PROCESS REQUESTS?	DO YOU USE A TRACKING SYSTEM?	ARE RECORDS AVAILABLE TO OTHER ENTITIES?
S. CAROLINA	NO	LEGAL	YES[22]	NO	W			NO	NO
S. DAKOTA	NO	LEGAL	YES	NO	W			NO	NO
TENNESSEE	NO	LEGAL	YES	NO	W	5,500	$1,980	NO	YES
TEXAS	NO	NONE	YES	YES	BLANK			NO	BLANK
UTAH	NO	LEGAL	YES	NO	WP	1,200	$8,500	NO	NO
VERMONT	NO	NONE[23]	YES[24]	BLANK	BLANK			NO	NO
VIRGINIA	NO	LEGAL[25]	YES	NO	WP			NO	NO
VIRGIN ISL.	NO	NONE	YES	NO	N/A			NO	NO
WASHINGTON	NO	NONE	YES	NO	N/A			NO	NO
WISCONSIN	NO	ALL[26]	YES	NO	TWP[27]			YES	NO
WYOMING	NO	NONE	YES	YES	N/A			YES	NO

a. T = Telephone, W = Written, C = Computer, P = In person

1. Except working papers of the judge and certain medical records that the judge has ordered sealed

2. Private research companies purchase microfiche records from the Division of Workers Compensation

3. Unless authorized by §9-340[(38)](37) Idaho Code

4. After "formal application for adjustment of claim" has been filed

5. All records/documents except medical

6. T=50,880; W=7,200; P=12,000

7. T=5,000-10,000; W=1,000; P=2,000-3,000

8. With the following information on bureau responses, "The users of this information should be aware of prohibitions against covered entities using this information for pre-employment inquiries as described in Title I of Public Law 101-336, The Americans with Disabilities Act of 1990".

9. Bureau of Safety & Regulation (MIOSHA)

10. Minn Statute, Section 176.231, subds 8 and 9 make medical and accident reports private and therefor only available to parties or those with specific authorization

ntroverted cases only

ississippi Business Information, Inc. which is pre-employment screening service

13. Subject to general public records statutes

formation from our data base is provided to a company called Avert in Colorado. They, in turn, provide information to employers and have also apparently sold the data to at least one other company ıhoma.

15. With the exception of medical reference

16. Open for employer inspection in pending cases only (NJSA 34:15-128)

17. Evidence submitted at a hearing is open to public inspection

18. Under the provisions of NDCC 65-05-32(5) unless requestor is the claimant, the employer, claimant's attorney or authorized medical provider, the following generic information is available: The claimant's name, social security number; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status.

19. Medical not released

20. Except that "all hearings before a referee shall be public"

21. Referee decisions, Workers Compensation Appeal Board and Appellate Court decisions are considered public records.

22. Any party to the action may release

23. We confirm or deny the existence of a cliam upon presentation of a signed release. Otherwise the contents of files are available only to employee and employer (carrier) unless a court subpoenas same.

24. Only confirm or deny the existence of a claim

25. Only transcript of hearings and judicial opinions

26. Except claims files

27. Only public (non claim) records

STATE LAWS REGARDING WORKERS COMPENSATION RECORDS

ALASKA - Sec. 23.30.107. **Release of information.** Upon request, *an employee shall provide written authority to the employer, carrier, rehabilitation provider, or rehabilitation administrator to obtain medical and rehabilitation information relative to the employee's injury.*

Sec. 23.30.247. **Discrimination prohibited.** (a) An employer may not discriminate in hiring, promotion, or retention policies or practices against an employee who has in good faith filed a claim for or received benefits under this chapter. An employer who violates this section is liable to the employee for damages to be assessed by the court in a private civil action.

(b) This section may not be construed to prevent an employer from basing hiring, promotion or retention policies or practices on considerations of the employee's safety practices or the employee's physical and mental abilities; or may this section be construed so as to create employment rights not otherwise in existence.

(c) This section may not be construed to prohibit an employer from requiring a prospective employee to fill out a preemployment questionnaire or application regarding the person's prior health or disability history as long as it is meant to either document written notice for second injury fund reimbursement under AS 23.30.205(c) or determine whether the employee has the physical or mental capacity to meet the documented physical or mental demands of the work. (§ 40 ch 79 SLA 1988)

Effective date - July 1, 1988 *(Please note that this law pre-dates the ADA)*

GEORGIA - 34-9-12. Employer's record of injuries; availability of board records...

(b) *The records of the board, insofar as they refer to accidents, injuries, and settlements, shall not be open to the public but only to the parties satisfying the board of their interest in such records and their right to inspect them.* Under such reasonable rules and regulations as the board may adopt, the records of the board as to any employee in any previous case in which such employee was a claimant shall be open to and made available to such claimant, to an employer or its insurance carrier which is called upon to pay compensation, medical expenses, or funeral expenses, and to any party at interest, except that the board may make such reasonable charge as it deems proper for furnishing information by mail and for copies of records.

AG letter, dated January 25, 1991, RE: All records of the State Board of Workers' Compensation pertaining to accidents, injuries, and settlements are confidential, unless a party can meet the statutory requirements for access or has authority pursuant to the Child Support Recovery Act.

The parties to the claim are the employee, the employer, and the insurer.

FARRELL et al. v. DUNN. Plaintiff's (Farrell) car was struck by Defendant's (Dunn) car. Defendant attempted to obtain certified copies of Plaintiff's workers compensation records but was denied. Defendant filed a motion to compel the Board to produce the records, but was denied based upon OCGA § 34-9-12 because Defendant was not a party in the workers compensation claim.

Idaho - ***(A very good example of what we could do here in Kansas!)*** The following information sheet must accompany all certification forms (requests for information from workers compensation records):

Idaho Code §9-340[(38)](37) exempts from mandatory disclosure under the Idaho Public Records Act "worker's compensation records of the Idaho Industrial Commission" except:

(a) To the parties in any worker's compensation claim and to the industrial special indemnity fund of the state of Idaho; or

(b) To employers and prospective employers subject to the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitations who certify that the information is being requested with respect to a worker to whom the employer has extended an offer of employment and will be used in accordance with the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitation; or

(c) To employers and prospective employers not subject to the provisions of the Americans with Disabilities Act, 42 U.S.C. 12112, or other statutory limitations, provided the employer presents a written authorization from the person to whom the records pertain; or

(d) To others who demonstrate that the public interest in allowing inspection and copying of such records outweighs the public or private interest in maintaining the confidentiality of such records, as determined by a civil court of competent jurisdiction.

If you or your business employ five or more persons or do business with the federal government or receive federal funding, you or your business may be subject to the Americans with Disabilities (42 U.S.C. 12112), the Rehabilitation Act of 1973 (29 U.S.C. 701), or the Idaho Human Rights Act (§67-5901), Idaho

Code. If you have any questions as to whether you are subject to these laws, please consult your attorney.

MARYLAND - AG Letter, dated April 25, 1990, RE: Disclosure of Medical Records concludes that *medical records should be placed in a sealed envelope within the claim file,* or access thereto otherwise restricted, so that these records will not be impermissibly redisclosed when public access to the file is allowed.

The Annotated Code of Maryland, health General Article, §4-302(d), as amended by Senate Bill 584, provides as follows:

A person to whom a medical record is disclosed may not redisclose the medical record to any other person unless the redisclosure is:

(1) authorized by the person in interest;
(2) otherwise permitted by this subtitle;
(3) permitted under Article 88A, §6B of the Code; or
(4) directory information

A claimant's consent to disclosure of medical records by a health care provider is not authorization for redisclosure by any person, including the Commission, to whom the records are disclosed. Thus, medical records within a workers' compensation claim file, under this revised law, are not to be open to public inspection.

MICHIGAN - Letter from Douglas Langham, Administrator, Vocational Rehabilitation Division, Michigan Bureau of Workers Disability Compensation, February 8, 1993

Since July 1992, as a result of the ADA, bureau responses to requests for information include the following information:

> *"The users of this information should be aware of prohibitions against covered entities using this information for pre-employment inquires as described in Title I of Public Law 101-336, The Americans with Disabilities Act of 1990".*

The number of responses to requests from employers for workers compensation information decreased by 71% within the first year.

MINNESOTA - Workers Compensation 176.231 Subd. 8. **No public inspection of reports.** Subject to subdivision 9, *a report or its copy which has been filed with the commissioner of the department of labor and industry under this section is not*

available to public inspection. Any person who has access to such a report shall not disclose its contents to anyone in any manner.

**A person who unauthorizedly discloses a report or its contents to another is guilty of a misdemeanor.*

Subd. 9 **Uses which may be made of reports.** Reports filed with the commissioner under this section may be used in hearings held under this chapter, and for the purpose of state investigations and for statistics. These reports are available to the department of revenue for use in enforcing Minnesota income tax and property tax refund laws, and the information shall be protected as provided in chapter 270B.

The division or office of administrative hearings or workers' compensation court of appeals may permit the examination of its file by the employer, insurer, employee, or dependent of a deceased employee or any person who furnishes written authorization to do so from the employer, insurer, employee, or dependent of a deceased employee.

> ***The following is contained on the Authorization Form:***
> ***"Information concerning disability may not be used to make a job decision unless state or federal law requires use of this information. Any use or distribution of this information beyond that authorized by the subject of this data unless authorized by state or federal law is prohibited. Questions concerning use of disability information may be directed to the Minnesota Department of Human Rights at (612) 296-5663, or toll free in greater Minnesota at 1-800-652-9747."***

NEVADA - NRS 616.192 **Confidentiality and disclosure of information; penalty for use of information for political purposes; privileged communications.**

1. Except as otherwise provided in this section and in NRS 616-193 and 616-550, information obtained from any employer or employee is confidential and may not be disclosed or be open to public inspection in any manner which would reveal the person's identity.

2. Any claimant or his legal representative is entitled to information from the records of the insurer, to the extent necessary for the proper presentation of a claim in any proceeding under this chapter.

*6. If any employee or member of the board of directors or manager or any employee of the manager, in violation of this section, discloses information obtained from the files of claimants or policyholders, or if any person who has

obtained a list of claimants or policyholders under this chapter uses or permits the use of the list for any political purposes, he is guilty of a gross misdemeanor.

NORTH DAKOTA - North Dakota Century Code, Chapter 65-05-32. **Privacy of records and hearings.** *Information contained in the claim files and records of injured employees is confidential and is not open to public inspection,* other than to bureau employees or agents in the performance of their official duties. Providing further that:

1. Representatives of a claimant, whether an individual or an organization, may review a claim file or receive specific information from the file upon the presentation of the signed authorization of the claimant.

2. Employers or their duly authorized representatives may review and have access to any files of their own injured workers.

3. Physicians or health care providers treating or examining workers claiming benefits under this title, or physicians giving medical advice to the bureau regarding any claim may, at the discretion of the bureau, inspect the claim files and records of injured workers.

4. Other persons may have access to and make inspections of the files, if such persons are rendering assistance to the bureau at any stage of the proceedings on any matter pertaining to the administration of this title.

5. The claimant's name; social security number; date of birth; injury date; employer name; type of injury; whether the claim is accepted, denied, or pending; and whether the claim is in active or inactive pay status will be available to the public.

6. At the request of a claimant, the bureau may close the medical portion of a hearing to the public.

NEW JERSEY - Article 9. Inspection of Records. §34:15-128. **Limited right to inspect or copy records**. Notwithstanding any other provision of the chapter to which this act is a supplement or of any other law, *no records maintained by the Division of Workmen's Compensation shall be open to inspection or copying by or on behalf of any person who seeks such inspection or copying for the purpose of selling or furnishing for a consideration to others reports or abstracts or workmen's compensation records or work-injury records pertaining to any individual, except in the case of an investigation by or on behalf of an employer in connection with any pending workmen's compensation case.*

§34:15-59. **Docket; records.** The secretary of the bureau shall keep a docket in which shall be entered the title of each cause, the date of the determination thereof, the date of appeal, if any, and the date on which the record in case of

appeal was transmitted to the appellant. The secretary shall also file the record of each case left with him by the official conducting the hearing, and shall keep a card index of such record in such manner as to afford ready reference thereto. such records shall be open to the inspection of the public.

NEW MEXICO - 52-5-21. **Administration records confidentiality; authorized use.** Unless introduced as evidence in an administrative or judicial proceeding, all records of the administration shall be confidential, provided, however, that, once an accident or disablement occurs, any person who is a party to a claim upon that accident or disablement is entitled to access to all files relating to that accident or disablement and to all files relating to any prior accident, injury or disablement of the worker.
Effective date: January 1, 1991.

NEW YORK - Workers' Compensation Law §125. **Job discrimination prohibited based on prior receipt of benefits.**
1. It shall be unlawful for any employer to inquire into, or to consider for the purpose of assessing fitness or capability for employment, whether a job applicant has filed for or received benefits under this chapter, or to discriminate against a job applicant with regard to employment on the basis of that claimant having filed for or received benefits under this chapter. An individual aggrieved under this subdivision may initiate proceedings in a court of competent jurisdiction seeking damages, including reasonable attorney fees, for violation of this subdivision.
*2. An employer who violates the provisions of subdivision one of this section shall be guilty of a misdemeanor, and upon conviction shall be punished, except as in this chapter or in the penal law otherwise provided, by a fine of not more than one thousand dollars.
3. In addition to the criminal penalty set forth herein, where the chair has determined that an employer has violated the provisions of subdivision one of this section, the chair may, after a hearing, impose a penalty against such employer in an amount not exceeding twenty-five hundred dollars.
Effective date Jan 1, 1992.

OHIO - BWC Internal Memorandum from Law Director to BWC Administrator, Subject: Release of Information to the General Public, Dated November 12, 1992.

"The Bureau's obligation to disclose public information is set forth in Ohio Revised Code §149.43(B) which states the following, in relevant part:

> All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular

business hours. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time.

More specifically, Ohio Revised Code §4123.88 restricts the public availability of information contained in workers' compensation claim files. Section 4123.88 states, in pertinent part:

> *No person shall, without prior authority from the bureau, a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining thereto ... No employee of the bureau or commission ... shall divulge any information in respect of any claim which is or may be filed with the bureau or commission to any person other than members of the commission or to the superior of the employee except upon authorization of the administrator of workers' compensation or a member of the commission or upon authorization of the claimant or employer.*

TEXAS - Texas Workers' Compensation Act, Article 2, Chapter C, §2.31. **Injury information confidential.** (a) *Information in or derived from a claim file regarding an employee is confidential and may not be disclosed by the commission except as provided by this Act.*

(b) Information concerning an employee who has been finally adjudicated of wrongfully obtaining payment under Section 10.04 of this Act or Section 32.51, penal Code, is not confidential.

(c) The commission shall perform and release a record check on an employee, including current or prior injury information, to the parties listed in Subsection (d) of this section if:

(1) the claim is open or pending before the commission, on appeal to a court of competent jurisdiction, or the subject of a subsequent suit where the insurance carrier or the subsequent injury fund is subrogated to the rights of the named claimant; and

(2) the requesting party requests the release on a form developed by the commission for this purpose and provides all required information.

(d) Information on a claim may be released as provided in Subsection (c) of this section to:

(1) the employee or the employee's legal beneficiary;

(2) the employee's or the legal beneficiary's representative;

(3) the employer at the time of injury;

(4) the insurance carrier;

(5) the Texas Certified Self-Insurer Guaranty Association, if established by law and if that association has assumed the obligations of an impaired worker;

(6) the Texas and Casualty Insurance Guaranty Association, if that association has assumed the obligations of an impaired insurance company; or

(7) a third party litigant in a lawsuit in which the cause of action arises from the incident which gave rise to the injury, in which case Subsection (c)(1) of this section does not apply.

§2.33. **Information available to prospective employers.** (a) When a person applies for employment, the prospective employer who has workers' compensation insurance coverage is entitled, on compliance with this chapter, to obtain information on the applicant's prior injuries.

(b) The employer must make the request by telephone or file the request in writing not more than 14 days after the date on which the application for employment is made.

(c) The request must include the applicant's name, address, and social security number.

(d) the employer must obtain written authorization from the applicant before making the request.

(e) If the request is made in writing, the authorization shall be filed simultaneously. If the request is made over the telephone, the employer shall file the authorization not later than the 10th day after the date on which the request is made.

VIRGINIA - §65.2-903. **Records not public.** *The records of the Commission, insofar as they refer to accidents, injuries and settlements, shall not be open to the public but only to the parties satisfying the Commission of their interest in such records and their right to inspect them.*

WASHINGTON - RCW 51.28.070. **Claim files and records confidential.** *Information contained in the claim files and records of injured workers, under the provisions of this title, shall be deemed confidential and shall not be open to public inspection* (other than to public employees in the performance of their official duties), but representatives of a claimant, be it an individual or an organization, may review a claim file or receive specific information therefrom upon the presentation of the signed authorization of the claimant. A claimant may review his or her claim file if the director determines, pursuant to criteria adopted by rule,

that the review is in the claimant's interest. Employers or their duly authorized representatives may review any files of their own injured workers in connection with any pending claims. Physicians tr3eating or examining workers claiming benefits under this title, or physicians giving medical advice to the department regarding any claim may, at the discretion of the department, inspect the claim files and records of injured workers, and other persons may make such inspection, at the department's discretion, when such persons are rendering assistance to the department at any stage of the proceedings on any matter pertaining to the administration of this title.

WISCONSIN - §102.33(2)(a) Except as provided in par. (b), the records of the department related to the administration of this chapter are subject to inspection and copying under s. 19.35(1).

102.33(2)(b), Stats., Notwithstanding par. (a), a record maintained by the department that reveals the identity of an employee who claims worker's compensation benefits, the nature of the employee's claimed injury, the employee's amount, type or duration of benefits paid to the employee or any financial information provided to the department by a self insured employer or by an applicant for exemption under s. 102.28(2)(b) is confidential and not open to public inspection or copying under s. 19.35(1). The department may deny a request made under s. 19.35(1) to inspect and copy a record that is confidential under this paragraph, unless one of the following applies:

1. The requester is the employee who is the subject of the record or an attorney or authorized agent of that employee. an attorney or authorized agent of an employee who is the subject of a record shall provide a written authorization for inspection and copying from the employee if requested by the department.

2. The record that is requested contains confidential information concerning a worker's compensation claim and the requester is an insurance carrier or employer that is a party to the claim or an attorney or authorized agent of that insurance carrier or employer. an attorney or authorized agent of an insurance carrier or employer that is a party to an employee's worker's compensation claim shall provide written authorization for inspection and copying from the insurance carrier or employer if requested by the department.

***WYOMING** - §27-14-805. **Confidentiality of information.** Except as otherwise provided by this act, *information obtained from any employer or covered employee pursuant to reporting requirements under this act shall not be disclosed in a manner which reveals the identity of the employer or employee* except to the employer, the employee, legal counsel for an employer, legal counsel for an

employee or in situations necessary for the division to enforce any of the provisions of this act. The confidentiality limitations of this section do not apply to transfers of information between the divisions of the department of employment so long as the transfer of information is not restricted by federal law, rule or contract. Any employee who discloses information outside of the department in violation of federal or state law may be terminated without progressive discipline.

COPY

RON TODD

COMMISSIONER OF INSURANCE

August 11, 1993

Mr. Edmund F. Kelly, President
Aetna Casualty & Surety Company
Of America
151 Farmington Avenue
Hartford, CT 06156

Dear Mr. Kelly:

The workers compensation insurance market continues to be a problem area but, as I hope you know, there are solid indications of improvement in Kansas. I need your help, however, to ensure a continued healthy, competitive workers compensation insurance industry in Kansas and, more important to demonstrate to legislators, the Governor and employers that workers compensation costs can be controlled through responsible legislation and administration.

Restricted premium volume in the voluntary market started in about 1986 when the residual market burden (assigned risk plan assessment) began to increase from 9.4% in 1986 until it reached 24.1% in 1991. This, of course, prompted a more selective underwriting philosophy by the voluntary market with each succeeding year producing a more restrictive market than its predecessor. I have recently been informed by the NCCI that the assessment has now decreased to about 18% which I assume was triggered by the significant rate increases I approved in 1991 and 1992. Hopefully this trend will continue until we go back to at least the 1986 level.

Kansas workers compensation reform legislation enacted in 1993 through Senate Bill No. 307 requires my approval of rates and rate modifications for the Workers Compensation Plan (Plan) which will reduce the assessment to less than 10% by January 1, 1997. I am encouraged that the assessment has already fallen to 18% without any effect from the new legislation. To reach the assessment level contemplated by the law, however, I have approved an increase in the maximum Assigned Risk Adjustment Program (ARAP) surcharge from 25% to 37%, an additional surcharge of 12 1/2% on all plan policies with $2,250 annual premium or more and a surcharge up to 12.5% on plan policies

House Labor and Industry
Attachment 13
9-2-93

under $2,250. These changes will become effective September 1, 1993. The surcharge on policies with annual premium under $2,250 is applied as the result of only indemnity (lost wages) claims, not medical claims. If there are no claims during the most recent year for which loss information is available, no surcharge is applied. A policy with one claim would receive a 6% surcharge; two or more claims would result in the 12.5% surcharge. The provisions of the reform measure are specifically intended to restore the viability of the voluntary workers compensation insurance market. Should they fail to do so, the legislation provides that this statutorily imposed differential between voluntary and "Plan" businesses will no longer apply if the premium volume written by the "Plan" is not less than 20% of the total Kansas workers compensation premium by December 31, 1998.

Senate Bill No. 307 also included approximately 41 other major changes to the Kansas Workers Compensation Act which will hopefully reduce workers compensation costs. Please refer to the NCCI Kansas cost containment memorandum #CC-93-13 dated May 21, 1993 for specific details about these changes. You may contact my office for a copy of the new legislation or the NCCI memorandum.

I think you will agree that Kansas has historically been a good market for property and casualty insurers, including workers compensation. I am convinced Kansas will be an even better market with the implementation and administration of Senate Bill No. 307. Therefore, I ask you to carefully and conscientiously consider the new law and the already declining residual market burden when evaluating Kansas as a good place to do business.

I would welcome any comments you may care to make regarding your plans to participate in the writing of workers compensation coverage in Kansas.

Very truly yours,

Ron Todd

Ron Todd
Commissioner of Insurance

RT:vwfc
5291bw

13-2

STATE OF KANSAS

KANSAS
INSURANCE DEPARTMENT

420 S.W. 9th
Topeka 66612-1678 913-296-3071

1-800-432-2484
Consumer Assistance
Division calls only

RON TODD
Commissioner

Bulletin 1993-22

TO: All Insurance Companies Authorized to Transact Workers Compensation Insurance in Kansas

FROM: Ron Todd
Commissioner of Insurance

SUBJECT: Senate Bill No. 307

DATE: August 24, 1993

Senate Bill No. 307 was enacted by the 1993 Legislature and New Section 7 of that legislation requires insurers to provide certain workers compensation educational and informational material in both English and Spanish to their insureds.

In response to the new law, I am attaching a camera ready copy of an English version of a brochure developed jointly by the Kansas Insurance Department and the Kansas Department of Human Resources - Division of Workers Compensation. A diskette containing the same information is also available and may be acquired by calling Twila Davidson at (913) 296-7815 or Val Warkentine at (913) 296-2060 without charge. Whichever medium is most convenient to reproduce sufficient copies for your needs may, of course, be used. In addition, the cover page may be modified to include your organization's name and/or logo but the information included in the brochure may not be altered.

As required by the bill and on and after October 1, 1993, this information must accompany every workers compensation insurance policy and any renewal thereof issued or delivered to a Kansas employer. The purpose of the material is to provide Kansas employers and employees full and fair information about their rights and responsibilities under the Workers Compensation Act.

The Division of Workers Compensation is currently translating the brochure's content to Spanish and we will provide you a copy of the Spanish version as soon as possible. You need not and are not to delay distribution of the attached until receipt of its Spanish counterpart, however, because distribution requirements will not be retroactive.

House Labor and Industry
Attachment 14
9-2-93

Workers Compensation Information for Kansas Employers & Employees

July 1993

Kansas Department of Insurance
and the
Kansas Department of Human Resources
Division of Workers Compensation

For information on workers compensation benefits,
employer guidelines and other general information, contact:

THE DIVISION OF WORKERS COMPENSATION
The Kansas Department of Human Resources
800 S.W. Jackson Street, Suite 600
Topeka, Kansas 66612-1227

1-800-332-0353
(913) 296-2996

For information on workers compensation
insurance rates and insurance carrier conduct, contact:

THE KANSAS DEPARTMENT OF INSURANCE
420 S.W. 9th Street
Topeka, Kansas 66612-1678

1-800-432-2484
(913) 296-3071

This guide is based on changes to the Kansas Workers Compensation Act, amended by SB 307,
effective July 1, 1993. All information contained herein is subject to future legislative changes.

Table of Contents

What Is Workers Compensation?

Workers compensation is an insurance plan provided by the employer (by law) to pay employee benefits for job-related disability or death. Benefits are paid at the employer's expense. Coverage begins the first day on the job and covers virtually all employees, including temporary workers and non-citizens.

The present law covers all Kansas employers except for those in certain agricultural pursuits and/or a gross annual payroll of less than $20,000. All payroll is taken into account, including that paid in Kansas or elsewhere. If the employer is a sole proprietor or a partnership, the wages paid to such employer(s) and any family members are not used in the computation of the $20,000 gross.

Employees who are disabled due to a job-related injury or disease are entitled to:

- medical expenses to treat the job-related injury or illness;
- income benefits to replace part of the wages lost due to the disability; and
- survivors' benefits if death results.

Purpose of the Law

Kansas passed its first workers compensation law in 1911. By regulating litigation and benefits, the law is designed to protect the interests of both employers and employees. Employers benefit by substituting a known expense (premiums) for the risk of large, unbudgeted expenses in the event of serious employee disabilities. Employees benefit because everyone is guaranteed some compensation, regardless of one's ability to pay attorney fees. While initially aimed at hazardous jobs, the law now covers virtually all workers, and protects those who claim compensation from firing or harassment.

Elections

Elections are options available to employers or employees that affect their coverage under the Workers Compensation Act. Depending on the circumstances, options may be available for:

- non-covered employers – e.g. those with payrolls under $20,000 or in certain agricultural pursuits;
- corporate employees owning 10% or more of stock;
- individuals, proprietors or partnerships; and
- employers seeking coverage for volunteers and other non-covered workers.

EXAMPLE: A two-person partnership has two employees – a family member and a non-family member – and an annual payroll of $15,000. The partnership may elect to purchase coverage under the Act and to extend such coverage to both employees. The partners are not covered because they are considered employers.

Employer Responsibilities

WORKERS COMPENSATION INSURANCE

Virtually all Kansas employers are required by law to provide for the payment of workers compensation claims, at no expense to the employee. Employers may satisfy this requirement in one of three ways:

- Workers Compensation Insurance: obtained from a licensed insurance carrier; the employer pays the premiums and the insurance company pays the claims. The insurance carriers are regulated by the Kansas Insurance Department.
- Self-Insurance: an individual employer must demonstrate to the State the financial ability to pay any claims that might arise. This program is administered by the Division of Workers Compensation.
- Group-funded Pool: a group of employers meeting certain statutory requirements may form a self-insurance program to jointly insure their ability to pay claims. This program is administered by the Kansas Department of Insurance.

Intentional failure to provide for workers compensation payment in one of the above ways is a class C misdemeanor and subjects the employer to legal penalties.

Employment categories excluded from the law are:

- certain agricultural pursuits;
- realtors who qualify as independent contractors;
- employers with gross annual payrolls of less than $20,000; and
- firefighters belonging to a firefighters relief association which has waived coverage under the workers compensation law.

OTHER REQUIREMENTS

Employers must post written notice, in Spanish and English, of their workers compensation coverage. Free posting notices and other posters are available by calling the Division of Workers Compensation at 1-800-332-0353 or (913) 296-2996.

All employee injuries and deaths must be reported to Workers Compensation within 28 days from the date injury (death), or the date of employer notification. Failure to do so carries legal and financial penalties.

Immediately on learning of an employee's injury or death, employers must furnish written information to the employee or employee's beneficiaries of: available benefits, the claims process, an employer or insurance company contact for workers compensation claims, and other information required by law. This material is available from the Division of Workers Compensation, insurance carrier or group-funded pool.

Employee Rights

Kansas law protects an employee's right and ease in obtaining workers compensation. Specifically:

- Kansas law prohibits an employer from firing or otherwise discriminating against an employee for filing a claim in good faith.
- Employers must post written notice, in Spanish and English, of workers compensation insurance coverage.
- Employers must provide for the payment of workers compensation claims without any charge to employees. Employers cannot deduct from pay or benefits to pay insurance premiums or claims.
- Employers must pay compensation benefits regardless of insurance coverage.
- The State offers free help to both employers and employees in filing or appealing a claim. To obtain assistance contact the Workers Compensation Ombudsman's office at 1-800-332-0353 or (913) 296-2996.
- Employers must provide written material to every injured employee to assist that employee in attaining compensation. This material is available from the Division of Workers Compensation in Topeka, or the employer's insurance carrier. In the event of employee death, such information must be furnished to the employee's beneficiaries.
- The new law provides specific penalties for employer or employee fraud in workers compensation cases. For assistance or more information contact the Workers Compensation Ombudsman's office at 1-800-332-0353 or (913) 296-2996.

Vocational Rehabilitation

Vocational rehabilitation may be provided at the option of the employer or the employer's insurance carrier. General experience has shown that the longer the length of time away from work recovering from an injury, the greater the likelihood that an employee will need vocational rehabilitation to resume suitable work at comparable pay.

If the employer or insurance carrier does not choose to provide for vocational rehabilitation, the employee can ask the rehabilitation administrator for a referral to a provider of such services, at the employee's expense. The employee can also request a referral to the Division of Rehabilitation Services, in the Kansas Department of Social and Rehabilitation Services. For assistance with vocational rehabilitation contact the rehabilitation administrator's office in the Division of Workers Compensation at 1-800-332-0353 or (913) 296-2050.

Rate Information

Rate Information

Workers compensation insurance in Kansas is mandated by state law for most but not all employers. The premiums paid by the employers should be sufficient to cover the claims incurred by their insurance companies. Rates are usually adjusted annually based on the most recent premiums, investment income, and losses reported by the insurance companies. These rates are submitted to the insurance commissioner for approval by the National Council on Compensation Insurance (NCCI).

The NCCI is a ratemaking organization, licensed by the insurance department, whose membership is primarily insurance companies. They develop the annual rate change needed based on the losses and premium reported to them by their member insurance companies.

The Kansas Insurance Department regulates the rates charged in Kansas. Each year, the Insurance Department reviews premiums, claims costs and other relevant data submitted by the NCCI to determine whether a rate change is supported. Currently, about 70¢ of every $1 collected in premiums is projected to cover the cost of paying workers compensation claims. Approximately 27.5¢ of each dollar is used by insurance carriers to cover other costs of doing business – e.g. administrative expenses, salaries and overhead. The margin of profit is projected at 2.5¢ plus the earnings on investments.

The Commissioner of Insurance, after reviewing the rate filing, generally approves an "overall" statewide premium change. This "overall" change is stated as a percentage (for example, a 5% overall increase); however, individual classification base rates may increase or decrease more than the "overall" change. Individual classification base rates must continue to reflect the experience (premiums and losses) of employers in each classification.

PREMIUM COMPONENTS

Workers compensation insurance premiums are calculated based on several factors. The primary factors are:

- **Base Rate:** the starting point in calculating premiums. The base rate or manual rate is expressed as an amount per $100 of payroll. This could change annually based on loss experience of other employers in the same classification.
- **Classification:** a key factor in determining what rate an employer will pay. Classification denotes the employer's type of business; hazardous jobs are more likely to result in substantial and costly claims and, therefore, usually have a higher rate. There are about 600 classifications in use in Kansas.
- **Experience rating:** affects premium based on the frequency and severity of compensation claims of employers with sufficient premium size to be "experience rated." Currently, employers with an annual premium of $2,250 or more are experience rated.

More About Premiums

Fewer and less expensive claims mean a lower experience modification factor, which means a lower premium.

- Payroll size: employers with larger payrolls generate more workers compensation annual premium than those with a smaller payroll in the same classification. However, the expenses incurred in issuing and servicing the policy do not increase in direct proportion to the policy premium. Consequently, a premium discount is applied to policies with a larger premium to recognize this factor.

  Also, some employers are subject to fixed payroll amounts: currently, partners and sole proprietors who elect to cover themselves under a workers compensation insurance policy pay premium based on a $22,800 annual payroll. The premium for executive officers of corporations is based on the actual payroll of the officer, subject to the current $200 per week minimum and $1,600 per week maximum.

FACTORS AFFECTING PREMIUMS

Three of the most important factors in reducing premiums are:

1) implementation of an accident prevention program: these programs were mandated by 1993 legislation and are to be made available to employers by all insurance carriers and group-funded pools operating in Kansas. Because accident prevention programs have been shown to reduce the frequency and severity of injuries, they offer employers the potential to reduce premiums. Premium reduction is, of course, only one benefit of accident prevention that employers should consider.

2) assuring the proper classification(s) were used to calculate the premium: the classification used on the policy should, as reasonably and accurately as possible, describe the employer's business and the employee's duties. The use of an inappropriate classification could result in the payment of an incorrect premium. If a classification does not seem to accurately describe a particular job, assistance in verifying that the proper classification was used, or in obtaining a correction is available by calling the Department of Insurance: 1-800-432-2484 or (913) 296-3071.

3) use of deductible: deductibles can be a cost-effective means of reducing premiums and are available in various amounts, with premium credits of up to 25%, on some classifications. Losses paid by the employer under the deductible shall not apply in calculating the employer's experience modification.

Premium Information

HOW TO OBTAIN INSURANCE

Workers compensation insurance coverage may be obtained by contacting a licensed insurance agent. For information on group-funded pools, contact the Kansas Department of Insurance. For information on how an individual employer can self-insure, contact the Division of Workers Compensation.

KANSAS WORKERS COMPENSATION INSURANCE PLAN (ASSIGNED RISK PLAN)

Any employer unable to purchase coverage in the voluntary workers compensation insurance market can obtain coverage in the assigned risk plan. This means an employer is assigned to an insurance carrier who must provide coverage. Assigned risk plan premiums are calculated using the same base rate as if the coverage were purchased in the voluntary market; however, premiums may be higher due to additional surcharges which are based on the employer's size of premium and loss experience.

INSURANCE RATING APPEALS PROCESS

If an employer suspects the wrong classification or other incorrect factor is being used in calculating premium, the rating may be appealed in writing to the insurance carrier from which the coverage was purchased. The employer may also appeal in writing to the Kansas Commissioner of Insurance by outlining the nature of the complaint or appeal.

For additional information, or for assistance in appealing or correcting a classification error or other rate problem, contact the Kansas Insurance Department at 1-800-432-2484 or (913) 296-3071.

ACCIDENT PREVENTION PROGRAMS

Workplace safety and accident prevention is a key element of the new law. This requirement was designed with the idea of reducing claims/losses which would hold down premium for employers. Because rates are based on losses, the prevention of employee accidents through enhanced safety measures is one of the best ways employers can help keep rates down.

By law, insurance carriers and group-funded plans must make accident prevention programs available to their insureds. Notice of such accident prevention programs must appear on the front page of every policy issued after July 1993.

Accident prevention programs may be provided by insurance carriers at no charge, or under a separate contractual arrangement for which there could be a charge. The insurance company programs must be staffed and implemented by trained field safety representatives, who must meet qualifications as outlined by law. Insurance companies and group-funded plans failing to meet this requirement are subject to legal penalties.

Accident Prevention Programs

The programs must be tailored to meet the needs of the various employers and worksites around the state. These programs must include: surveys, recommendations, training programs, consultations, analysis of accident causes, industrial hygiene and industrial health services (adequate to meet the needs of the employer), and other assistance as needed to implement the program.

STATE SUPERVISION OF ACCIDENT PREVENTION PROGRAMS

Accident prevention programs will be supervised by the Division of Labor Management Relations and Employment Standards (913) 296-4386] in the Department of Human Resources. The division will conduct field inspections as needed. At least once a year, each insurance carrier or group-funded plan must submit the type of offered programs to the Division of Workers Compensation for review.

Such information must include:

- the amount of money spent by the insurance carrier or group-funded plan on accident prevention services;
- the number and qualifications of field safety representatives;
- the number of site inspections performed;
- any services available under contractual arrangements;
- specifics regarding the premium size of risks to which accident prevention services were provided;
- evidence of the effectiveness of the accident prevention services; and
- additional information as required by the Director of Workers Compensation.

Ombudsman & Benefit Review

The new law was designed to make it easier for claimants to obtain compensation without hiring an attorney. Attorney fees are costly – up to 25% of the total settlement – and litigation often delays or lengthens the benefit process. Two important features of the new law, the Benefit Review Conference and the Ombudsman program, are designed to help limit the need for litigation in obtaining fair compensation.

When there is litigation, attorney fees are limited to 25% of the first $10,000 in total benefits; 20% of the second $10,000, and 15% of all benefits above $20,000. Attorney fees are prohibited on medical and vocational rehabilitation benefits.

DISPUTE RESOLUTION

Disputes sometimes arise over benefit awards or disability ratings. An important first step in dispute resolution is the Ombudsman's Office (Claims Advisory Section of the Division of Workers Compensation). Other avenues of dispute resolution include:

- Benefit Review Conference: which offers informal mediation, presided over by a Benefit Review Officer;
- Pre-hearing Settlement Conference: presided over by an administrative law judge; and
- Preliminary Hearing: presided over by an administrative law judge, in which evidence and testimony is taken from both parties.

To contact the Ombudsman's Office call 1-800-332-0353 or (913) 296-2996.

BENEFIT REVIEW CONFERENCE

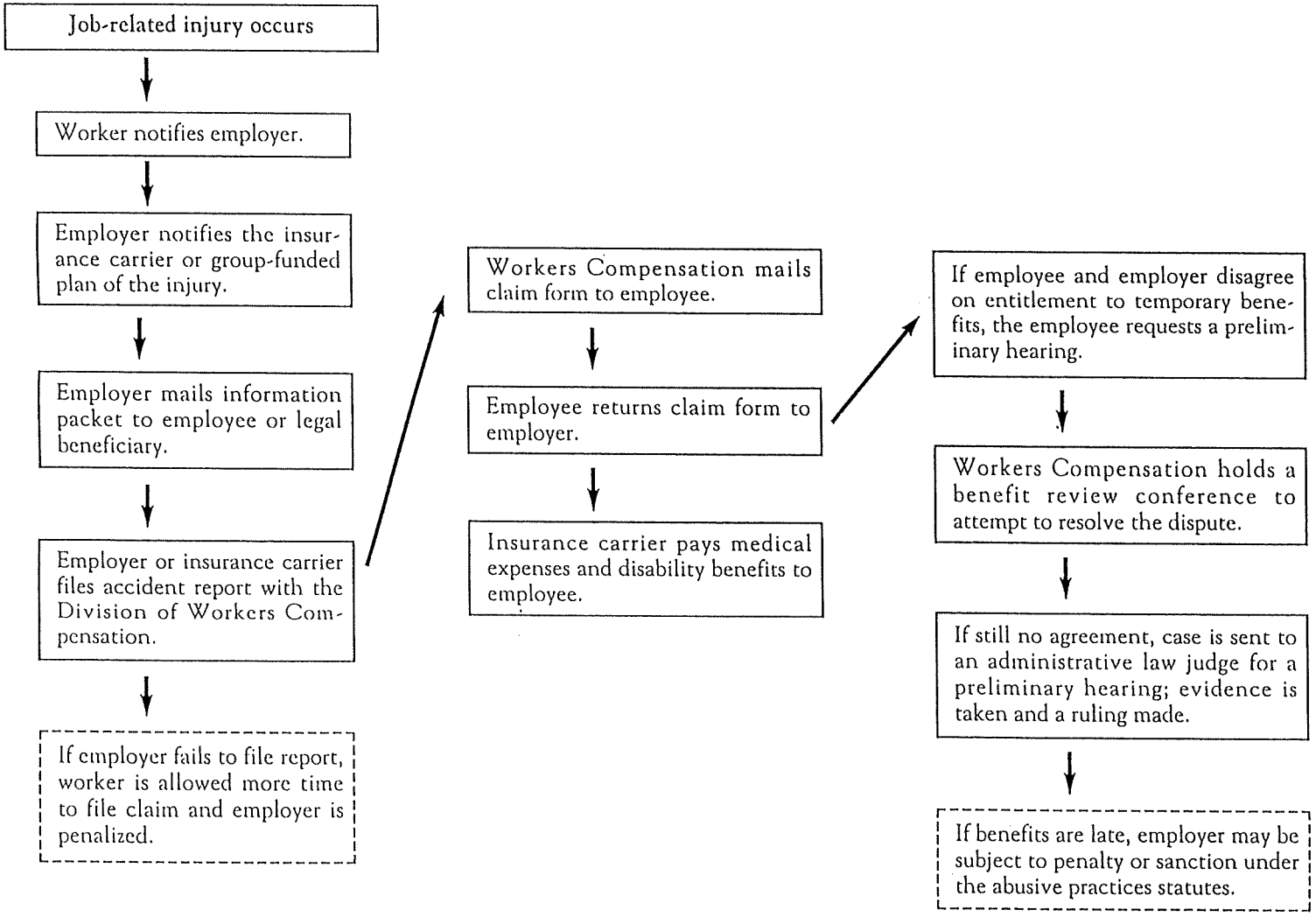
The Benefit Review Conference, a new option implemented in July 1993, is meant to offer both parties a reasonable opportunity to resolve disputes without litigation. All disputed issues can be addressed at this informal session, presided over by a Benefit Review Officer. A claimant may be represented by an attorney at a Benefit Review Conference, but need not be. The absence of an attorney during this process does not mean legal representation cannot be obtained later, if the dispute is not settled in this informal setting.

OMBUDSMAN PROGRAM

The Workers Compensation reform legislation of 1993 establishes an Ombudsman program to assist injured workers and those claiming survivors benefits. Located in the Division of Workers Compensation, the ombudsman will assist claimants in a number of ways:

- assist injured employees and persons claiming survivors' benefits in obtaining compensation;
- explain how to report an injury and file a claim;
- assist claimants in benefit review conferences;
- provide other general information; and
- assist claimants, employers and other parties in protecting their rights under the Workers Compensation Act.

The Claims Process



Division of Responsibilities

Employee

- Verbal notice to employer within 10 days of injury.
- Occupational disease: written notice to employer within 90 days of disability's onset; written claim to the Division of Workers Compensation within 1 year.
- Written compensation claim to employer within 200 days of date of injury or receipt of last medical or temporary benefits.
- Written claim in death cases to employer or insurance carrier within 1 year of employee's death.
- Written claim filed with employer, in person or by certified mail.
- Application for hearing within 3 years of injury, or 2 years of last compensation payment or last medical treatment.

Division of Workers Compensation

- Written claim form mailed to employee after receiving accident report from employer or insurance carrier.

Employer

- Written accident report filed with insurance carrier within 28 days from the date of injury or employee notification.
- Information delivered to employee or legal beneficiary to assist in the claims process. Material is available from the Division of Workers Compensation and must be delivered to employee immediately upon notification of injury.
- Advise insurance carrier or group-funded pool of employee's injury.

Disability Benefits

Temporary Total Disability

Total disability expected to be of a temporary nature. Benefits are paid until the employee is released by a physician to return to work.

Permanent Total Disability

Complete and permanent disability that renders an employee unable to work; OR loss of use of both eyes, both hands, both arms, both feet, or any two such body parts (e.g. a leg and an arm); OR substantial paralysis, insanity or mental disorder. Employees receive benefits for life, unless their condition changes and they are able to return to work.

Permanent Partial Scheduled Disability

Complete or partial loss of use of a body part, such as an arm, due to a job-related injury. Compensation is limited to a percentage of the schedule on page 13.

Permanent Partial General Disability

Any permanent partial disability not specifically covered by schedule. Compensation is based on the percentage of disability after the injury and limited to 415 weeks.

Survivors' Benefits

Benefits paid to an employee's surviving spouse and dependent children. Burial expenses up to $3,300 are also covered.

Total Disability Benefits

TEMPORARY TOTAL DISABILITY

Temporary total disability is paid after the employer-authorized physician confirms an employee's disability, and until the physician releases the employee to return to work.

There is a one week waiting period for benefits unless the disability continues for three consecutive weeks. Employees may collect medical benefits during the first week. [Employees missing three consecutive weeks may then collect for the first week.]

Benefits are 66.67% of an employee's average gross weekly wage; and not less than $25 nor more than 75% of the statutory maximum. Temporary total compensation may not exceed $100,000 per injury.

Vocational rehabilitation, re-education or training does not affect benefits if the employee is not working. Employees may not collect temporary total disability and unemployment for the same weeks.

PERMANENT TOTAL DISABILITY

Permanent total disability is paid when an employee is expected to be – and as long as an employee remains – completely unable to work; OR, for the loss of use of two or more major body parts; OR for significant mental impairment.

Benefits are 66.67% of an employee's average gross weekly wage; and not less than $25 nor more than the statutory maximum. Total compensation may not exceed $125,000 per injury. There is no waiting period.

When an employee's condition improves so that total disability is changed to partial disability, compensation is continued at the partial disability rate.

Partial Disability

TEMPORARY PARTIAL DISABILITY

Benefits are 66.67% of the difference between the employee's average gross weekly wage before the injury and the employee's wage after the injury. Benefits may not exceed the state's statutory maximum. Total compensation may not exceed 415 weeks.

PERMANENT PARTIAL SCHEDULED DISABILITY

Permanent partial scheduled disability is paid according to the following schedule. Additional compensation is available in cases of amputation. There is a one week waiting period for benefits unless the disability continues for three consecutive weeks. Employees may collect medical benefits during the first week. (Employees missing three consecutive weeks may then collect for the first week.)

Benefits are 66.67% of an employee's average gross weekly wage and not less than $25 nor more than the statutory maximum.

Schedule of Disability Compensation

Loss of Use	Weeks Paid
Thumb	60
Index (1st) finger	37
Second finger	30
Third finger	20
Fourth (little) finger	15
Great (big) toe	30
Any other toe	10
Hand	150
Forearm	200

Loss of Use	Weeks Paid
Arm	210
Shoulder	225
Foot	125
Lower leg	190
Leg	200
Eye or sight	120
Hearing in both ears	110
Hearing in one ear	30

Permanent Partial General Disability

Permanent partial general disability is paid for injuries not covered by the preceding schedule. Compensation is based on an employee's reduced ability to work or the percentage of *functional impairment*. Employees are *not* considered to have a work disability if they resume work at wages comparable to what they were earning before the injury.

Calculating Permanent Partial General Disability Benefits

1) Calculate weekly benefit rate by identifying the smaller of these two amounts:

   Gross weekly wage x 66.67%; OR
   the statutory maximum

2) Calculate allowable weeks of compensation:

   Begin with 415 weeks. If employee was paid more than 15 weeks of temporary total disability, subtract weeks in excess of 15 from 415, and multiply the difference by the percentage of disability.

3) Calculate total benefits: multiply weekly benefit rate by allowable weeks of compensation.

Example: Weekly wage is $450. Employee has collected 25 weeks of temporary total disability and has a 25% disability rating.

1) Weekly benefit rate:

   $450 x .6667 = $300.01 (*use lesser amount*)
   statutory maximum $313.00

2) Allowable weeks of compensation:
   415 - [25-15] = 415 - 10 = 405 weeks
   405 weeks x .25 = 101.25 weeks

3) Maximum benefit amount:
   101.25 weeks x $300.01 = $30,376.01

Survivors' Benefits

The law provides for survivors' benefits in the event of an employee's job-related death. Dependents need not be U.S. citizens or reside in the United States to also receive compensation.

Weekly benefits are equal to 66.67% of the employee's average gross weekly wage before death or the statutory maximum. Total compensation may not exceed $200,000 per employee, except for a dependent child under the age of 18. Funeral expenses up to $3,300 and all medical and hospital expenses related to the fatal injury are also covered.

IMMEDIATE FAMILY

If an employee is survived by a spouse but no dependent children, the spouse receives the entire weekly benefit. If an employee is survived by a spouse and children, the weekly benefit is paid half to the spouse and half to the children. If an employee is survived only by children, the weekly benefit is divided equally among the children.

The spouse may collect benefits until remarriage. Upon remarriage the spouse may receive a one-time lump sum payment equal to 100 weeks of benefits. Dependent children receive benefits until age 18, or until age 23 if they are full-time students or mentally or physically disabled.

OTHER DEPENDENTS

In the case of unmarried employees leaving no dependent children, any other beneficiaries who were wholly or partially dependent upon the employee may receive compensation. If survivors' benefits are paid to the spouse and/or children, they may not be paid to any other beneficiaries.

Dependents other than spouse or children may collect benefits until they die, remarry, or receive more than 50% of their support from another source. Maximum benefits to dependents other than spouse or children may not exceed a total of $18,500 per employee.

More Benefit Information

DRUGS AND ALCOHOL

The new law prohibits the awarding of workers compensation benefits if the employee is impaired due to the use of alcohol or drugs and the impairment contributed to the injury or death. This includes the use of prescription or non-prescription medications.

Benefits may be allowed, however, if:

- the drugs or medications were taken in therapeutic doses, and
- the employee had not been impaired on the job from such medications within the past 24 months.

An employee is considered to be impaired from alcohol if the blood alcohol concentration at the time of injury is .04 or more.

An employee's refusal to submit to a chemical test may not be used as evidence of impairment, unless there is probable cause to believe that the employee used, possessed or was impaired by drugs or alcohol while working. If there is probable cause and the employee still refuses to submit to a test, then that employee may jeopardize the right to claim compensation. Any test sample to be used as evidence in the claims process must be collected in a timely manner, by a licensed health care professional, and the test conducted according to legal specifications.

HEART TROUBLE AND STROKE

The law does not provide compensation for heart disease, coronary artery disease or cerebrovascular injury (e.g. stroke), UNLESS it is shown that the exertion of the work that caused the injury was beyond that required by the employee's usual job duties.

PRIOR DISABILITIES

Compensation for any disability may be reduced by the existence of any applicable pre-existing condition(s). Benefits are reduced by the amount by which the first disability increased the latest disability. However, compensation is *only* reduced if:

- the prior disability increased the current disability;
- the employee has collected or is collecting compensation for the prior disability; and
- compensation for the prior disability extends into the weeks claimed for the current disability.

Any reduction is limited to those weeks in which benefits for the old disability overlap benefits for the new disability. Such reduction stops when the overlapping benefit period ends.

Medical Information

Workers compensation will provide and pay for all medical treatment for a job-related injury or disease so long as it is necessary. Here are some general guidelines relating to medical benefits.

WHO PAYS?

Employers are responsible for all medical treatment necessitated by a job-related injury or disease. This includes:

- Services of a licensed health care provider, such as a doctor, chiropractor, or podiatrist;
- Medical, surgical and hospital treatment;
- Medicines, medical and surgical supplies;
- Nursing services;
- Crutches and other medical apparatus; and
- Ambulance services and transportation between the employee's home and the doctor's office or hospital.

If an employer has workers compensation insurance, the insurance carrier is required to pay for all medical expenses. If an employer does not carry workers compensation insurance, the employer is still responsible for the medical bills of covered employees.

Employers are legally entitled to choose the treating physician. If an employee self-selects a physician who is not authorized or agreed upon by the employer, the employer is responsible for only the first $500 in medical bills.

EMPLOYER-ORDERED EXAMINATIONS

After obtaining whatever emergency medical care is necessary, employees shall submit to any reasonable physical examination ordered by the employer. The employer can also require employees to submit to ongoing examinations – up to twice monthly, unless specifically ordered by Workers Compensation. Employees may forfeit the benefits that are available if they refuse to submit to such examinations.

Employees are also entitled to know the results of any physical examination ordered by the employer. At the employee's request, the doctor conducting the examination must furnish employees with an identical copy of the employer's medical report within 15 days of the examination.

All medical examinations ordered by the employer will be at the employer's expense. Employers are responsible for any reasonable charges associated with such examinations, such as transportation between the employee's home and place of examination.

Employees are entitled to have their own doctor present at, and participate in, any medical examination ordered by the employer. If this is not allowed, or if employees are not furnished a copy of the medical report, then the examination ordered by the employer will not be allowed as evidence related to the claim.