Approved: 2/15/93
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Vice-Chairperson Mike Harris at 8:00 a.m. on January 26, 1993 in Room 123-S of the Capitol.

Members present: Senators Burke, Downey, Feleciano, Jr., Gooch, Harris, Hensley, Kerr, Petty, Ranson, Reynolds, Steffes and Vidricksen

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Ann Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Mary Jane Holt, Committee Secretary

Conferees appearing before the committee: Murlene Priest, Auditor, Legislative Division of Post Audit
Bill Dempsey, Supervising Attorney, Kansas Workers Compensation Fund, Kansas Insurance Department

Others attending: See attached list

Senator Mike Harris, Vice Chairman, opened the meeting.

The Committee viewed a video film on workers compensation produced by the National Conference of State Legislatures on Workers Compensation.

The Chairman called members' attention to a National Conference of State Legislature Workers Compensation Blue Ribbon Advisory Panel report on five cost driving issues: the delivery of medical services, permanent partial disability, administration of the system, insurance economics, and workplace health and safety.

Murlene Priest, Auditor, Legislative Division of Post Audit, reviewed a Legilsative Post Audit performance audit of the Workers Compensation Fund completed in November 1992. In her background report she explained the Fund was originally established in 1945 and was called the second injury fund. The Fund's purpose was to encourage employers to hire veterans who were disabled during war-time service, or others who were disabled as a result of a previous industrial accident. The Fund was expanded in 1961. The employee no longer had to be missing a body part, and the work-related accident did not have to result in a permanent, total disability. The Legislature established a list of 16 preexisting conditions. The last major change to Fund coverage occurred in 1974 when the Legislature added a 17th category defined as "any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment". This category has been one of the major reasons for the large increase in the number of claims over the years. The 1974 Legislature also made the Fund liable for workers compensation claims when the employer was insolvent or could not be located, and reimbursing workers compensation insurance companies when the company paid claims they were later determined not liable for. At this time, the Second Injury Fund was renamed the Workers Compensation Fund and administration was transferred from the Division of Workers Compensation to the Kansas Insurance Department. From 1983 to 1992 expenditures from the Fund increased from $8 million to more than $32.5 million. Compensation, payments for medical care, and attorney's fees are the largest expenditure categories. All of the expenditures from the Fund are paid by assessments against insurance companies that write workers compensation insurance in Kansas and assessments against group-funded or self-insured employers.

Ms. Priest stated the audit addressed the following questions: 1. Why have expenditures from the Workers Compensation Fund increased in recent years? 2. Is the Workers Compensation Fund being administered efficiently? She said the answer to the first question is that claims against the Fund have increased more than 200 percent over the years, but the claims the Fund is able to close each year have not kept pace. This has resulted in an ever-expanding pool of open claims for which expenditures may be incurred. Medical costs and compensation costs have also increased dramatically. The 17th category with its

broad wording has created an open doorway for all types of physical and mental conditions. Judicial decisions have redefined some provisions of the law and expanded other provisions, allowing people easier access to or greater benefits from the Fund. Economic conditions have encouraged employers and insurance companies to shift claims to special use funds like the Workers Compensation Fund. Administrative law judges may be too claimant oriented and there are no deterrents to fraud in the Kansas workers compensation system. The Post Audit findings on the second question is that the Fund is operating more efficiently now than in 1985; however, most of the efficiencies that have developed are because of the increase in the number of claims.

The Legislative Division of Post Audit recommended the Insurance Department and the Division of Workers Compensation should jointly develop a database that provides accurate and sufficiently detailed information about workers compensation claims for the Legislature. To control attorney costs for the Workers Compensation Fund the Insurance Department should seek a change to state law or regulations that would require "impleading by particularity". The Legislature should consider revising the mechanism for setting assessment rates so assessments are more closely tied to insurance companies' and employers' actual use of the Fund. The Division of Workers Compensation should determine whether the forms employers file on employees' pre-existing conditions serve a purpose in the current workers compensation environment in Kansas. If this filing procedure does not serve a purpose, the Division should seek to have the provision removed from State law, see Attachment 1.

Ms. Priest stated a second Workers Compensation Fund audit is underway and should be completed by the week of February 15.

In answer to Committee questions, Ms. Priest replied some other states have a longer waiting period before a person can attempt to receive benefits from the Fund. Kansas allows receiving medical benefits for life. In some states receiving medical benefits is limited. Some states also stop or cut benefits when a person becomes eligible for social security or retirement benefits.

Bill Dempsey, Supervising Attorney, Kansas Workers Compensation Fund, Kansas Insurance Department, distributed copies of "An Overview of the Workers Compensation Fund and How It Operates", see Attachment II.

Mr. Dempsey informed the Committee the Fund may be required to relieve an employer of liability, wholly or in part, if the employer knowingly hired or retained an employee after gaining knowledge of a handicap or impairment. If the employer is insolvent, the Fund may be required to pay compensation, both medical and disability, to an injured employee. The Fund may also be required to reimburse employers who have paid compensation, either voluntarily or pursuant to a preliminary award, that is later overturned; reimburse employers who have paid compensation under a formal award which is later overturned or reduced by an appeal to the district court, court of appeals or supreme court; and to reimburse employers who have paid compensation pending appeal and after the appeal it is determined that the amount paid exceeded actual liability.

The Committee meeting was adjourned at 9:00 a.m.

The next meeting is scheduled for January 27, 1993.

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE DATE: 1/25/93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Mary E. Turlington	Topeka	Ks. Motor Carriers Assn
Jeffrey Sonnenberg	Topeka	KS Medical Society
Bill Morrissey	"	KDHR/Work Comp
George Gomez	"	DHR/ Work Comp.
Dick Brock	"	Ins Dept
Ray Rathert	"	" "
Bill Wempe	"	" "
Cameron Brewer	Topeka	KTLA
Janet Stubbs	"	KBAK
Bill Curtis	Topeka	Ks. Assoc. of School Bds
Christy Young	Topeka	Gr. Topeka Cha of Com
Jacque Coles	"	KIADA
Marla Rutter	"	Dept. of Admin.
Billy Newman	"	"
Bill Dempsey	"	Ks. Ins. Dept.
Leland Smith	Wichita	WIBA
George Puckett	Wichita / Topeka	KS Restaurant & Hospty Assn
Patrick Nichols	Topeka	Self
Mark Burgess	Topeka	KDOCH
Joe Turjanic	Topeka	KCA
Dave Coles	"	KCOVE
Eddie Estes	Dodge City	WKMA
Bernie Koch	Wichita	Wichita Chamber
Hal Hudson	Topeka	NFIB/Kansas
Jim Allen	"	PRM Inc

GUEST LIST

COMMITTEE: SENATE COMMERCE COMMITTEE DATE: 1/26/93

NAME (PLEASE PRINT)	ADDRESS	COMPANY/ORGANIZATION
Robin Lehman	Topeka	Ks Gov Consulting
Mike Steele	"	Harris News
Russ Frey	Topeka	KVMA
Bob Totten	Topeka	Ks Contractors Assoc.

PRESENTATION:

WORKERS' COMPENSATION FUND AUDIT

TO: SENATE COMMERCE COMMITTEE
Chairperson: Senator Alicia Salisbury

Date: January 26, 1993
By: Murlene Priest
Legislative Division of Post Audit

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Thank you Senator and members of the Committee.

In November 1992 Legislative Post Audit completed a performance audit of the Workers' Compensation Fund. In this audit we were asked to answer the following questions:

1. Why have expenditures from the Workers' Compensation Fund increased in recent years? and,
2. Is the Workers' Compensation Fund being administered efficiently?

Before I go into the answers to these questions, I might provide a little background on the Workers' Compensation Fund. The Fund was originally established in 1945 and was called the Second-Injury Fund. At that time the Fund had a very narrow purpose which was to encourage employers to hire veterans who were disabled during war-time service, or others who were disabled as a result of a previous industrial accident. The idea was that employers might be less reluctant to hire handicapped individuals because the Fund would pick up the tab for workers' compensation claims made by those individuals. To be eligible to file a claim a worker had to have lost a body part (arm, foot, hand, eye or the like) before becoming employed, and then must have become totally and permanently disabled as a result of the work-related accident. Under these narrow definitions, few claims were filed against the Fund from 1945 to 1960.

Beginning in 1961, the Legislature expanded coverage of the Fund. To be eligible for benefits from the Fund, the employee no longer had to be missing a body part, and the work-related accident did not have to result in a permanent, total disability. Instead, the Legislature established a list of 16 preexisting conditions including diabetes, arthritis, cardiac disease and the like which could qualify an individual to make a claim against the Fund. The 16 conditions are listed in the box on page 4. As part of the 1961 changes, the work-related injury could have been caused by the handicap, or the handicap could make the injury worse, in either case the individual could qualify for benefits from the Fund.

The last major change to Fund coverage occurred in 1974 when the Legislature added a 17th category to the list of 16 conditions that qualified for coverage. That 17th category was very loosely defined as *"any other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."* This category can include things like stress and alcoholism. This 17th category has been one of the major reasons for the large increase in the number of claims over the years. In 1974, the Legislature also

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made the Fund liable for workers' compensation claims when the employer was insolvent or could not be located, and reimbursing workers' compensation insurance companies when the company paid claims they were later determined not liable for. At this same time, the Second Injury Fund was renamed the Workers' Compensation Fund and administration was transferred from the Division of Workers' Compensation to the Kansas Insurance Department.

One thing that is important to note before we move into the answers to the audit questions is that all expenditures from the Fund are paid by assessments against insurance companies that write workers' compensation insurance in Kansas and assessments against group-funded or self-insured employers. Although the State has appropriated a maximum of $4 million to the Fund each year since 1982, in recent years the appropriation has served as an operating loan that is repaid usually during the second quarter of the fiscal year.

A workers' compensation claim paid by the Fund is essentially the same as any other claim for workers' compensation benefits. The only difference is who will ultimately pay the claim. Most functions of the workers' compensation system in Kansas are handled by the Division of Workers' Compensation in the Department of Human Resources.

The Workers' Compensation Fund is brought into a claim by one of the parties to the claim - the injured worker, employer, or insurance company - when one of the parties alleges the Fund is responsible for all or part of the claim. Based on evidence submitted during hearings, the administrative law judge must then decide if the Fund is or is not responsible for any part of the claim, and then determine what portion of the claim should be paid by the Fund.

From 1983 to 1992 expenditures from the Fund increased from $8 million to more than $32.5 million. Compensation, payments for medical care, and attorney's fees are the largest expenditure categories. The table on page 7 provides a breakdown of the expenses in 1983 and 1992. The table shows that medical expenditures have increased the most; however, compensation is the largest part of total expenditures from the Fund. Appendix A provides similar information for each fiscal year from 1983 to 1992.

The first question we were asked to answer in this audit is: Why have expenditures from the Workers' Compensation Fund Increased in recent years? The short answer is: Claims against the Fund have increased more than 200 percent over the years, but the claims the Fund is able to close each year have not kept pace. This has resulted in an ever-expanding pool of open claims for

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which expenditures may be incurred.

So why have the number of claims handled by the Fund increased? We found several possible explanations.

- We found that there has been a 71 percent increase in the number of industrial accidents during the past decade. With more accidents and more workers' compensation claims in general, you would expect to see more claims against the Fund.

- The 1974 legislative enactment has allowed anyone with a chronic condition who has a work-related accident that is either caused by the condition or made worse by the condition to be eligible for benefits from the Fund. The 17th category with its broad wording has created an open doorway for all types of physical and mental conditions.

- Judicial decisions have redefined some provisions of the law, as well as expanded other provisions, to allow people easier access to or greater benefits from the Fund.

- Much of the literature we reviewed during this audit indicated the economic conditions of the last several years have also increased the number of workers' compensation claims, as well as encouraged employers and insurance companies to try to control rising claim and premium costs, by shifting claims to special use funds like the Workers' Compensation Fund.

- Several officials we interviewed during the audit indicated the system, and the administrative law judges, were too claimant oriented. In their opinion, the judges were granting benefits when none were due, or allowing claimants to receive greater benefits than they were eligible for.

- Finally, there are no deterrents to fraud in the Kansas workers' compensation system.

While the number of claims has increased significantly, we also found that medical costs and compensation costs have also increased dramatically.

The table on page 13 shows a breakdown of average costs-per-active claim. As you can see, medical costs have increased the most, while the other cost components have shown smaller

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increases. The chart at the top of page 14 sheds a little more light on the changes in expenditures over the past decade. Medical expenditures have taken a larger piece of the pie in 1992 than in 1983, while compensation and legal expenditures have taken a smaller portion of total expenditures.

We also found that some judicial decisions may have allowed higher benefits in some specific types of cases like carpal tunnel syndrome and nearly all cases involving permanent disability.

Although other expenditures, like vocational rehabilitation costs, have not made a significant impact on expenditures yet, these costs are likely to have dramatic increases in the future.

Compared with six other states we contacted, Kansas has a very liberal and inclusive second-injury fund. (We contacted officials in Arizona, Missouri, Nebraska, Ohio, Oklahoma, and South Dakota.) We found three basic differences in the Kansas Fund as compared to the other States.

1. It is easier to file a claim against the second injury fund in Kansas than in some other states.
2. It is easier to qualify for benefits from the Fund in Kansas than in some other states because the 17th category is essentially a "catch-all" category.
3. Benefits tend to be more liberal in Kansas because many states limit the time period for receiving benefits or require the disability to be of a specific degree.

The expenditure trends that have occurred over the last several years are likely to continue into the future. Based on recent budget documents the Fund will spend an estimated $46.2 million by the end of this fiscal year, and may spend as much as $83 million in fiscal year 1997 if the Fund is left to operate as it is now. The Americans' with Disability Act went into effect July 1992. There is no consensus on what impact it will have on the Second Injury Fund. The box on page 24 has additional information about this act.

There may be alternatives available to slow the expenditure increases from the Kansas Workers' Compensation Fund. During our interviews of officials in other states we found that several have enacted a number of comprehensive workers' compensation cost control measures including things like:

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a. limiting benefits to only physical conditions - behavioral conditions like drug and alcohol abuse and mental illness would not be covered
b. using only primary care physicians
c. using standardized disability rating systems to limit argument about the degree of disability
d. using reimbursement schedules
e. and reducing litigation by not allowing discovery through deposition or interrogatories in workers' compensation cases

The problem is Kansas is not in a position to undertake most of these cost control avenues because of a lack of basic information about the cost of various types of claims. A key to knowing how to control costs is to be able to identify where those costs are being incurred. For example, basic information about which industries or employers file the most claims, what types of injuries occur most frequently and are most costly, what are the most frequent causes of injuries, and how these factors have changed over time would be essential to making an informed decision about how to limit the number of claims being filed, or how to control cost increases.

We found that neither the Insurance Department nor the Division of Workers' Compensation had complete information about workers' compensation claims that involved the Fund. The Workers' Compensation Division maintains computerized information about the employer, accident and injuries sustained, the attorneys involved in the case, and the like, but the Division does not have expenditure information. The Insurance Department generally only keeps computerized information about expenditures from the Fund, but little about the background or nature of the claim.

It took us several weeks to put together information about claims closed in 1989 and 1992 and in some instances we have concerns about the accuracy of the computer generated information we received from the Division of Workers' Compensation. What we did find shows that:

- two-thirds of the claims closed in 1992 were in manufacturing, services, and retail trade industries
- multiple injuries and back injuries were by far the most common
- half the claims closed in 1992 were for lifting objects, falling on the same level,

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or had no explanation

Now to question two: Is the Workers' Compensation Fund Being Administered Efficiently? We did find that the Fund is operating more efficiently now than in 1985; however, most of the efficiencies that have developed are because of the increase in number of claims.

We found that administrative costs as a percent of total cost have declined over the years. However, it was not possible to compare Kansas Fund operation with other states because of the differences between the states and the size of the funds. Because of this problem, we used percent of total-fund costs, cost-per-active claim, and number of claims-per-employee as measures of efficiency for the Fund.

Before we continue this discussion let me define administrative costs. Administrative costs include those costs the Insurance Department must pay in salaries to operate the Fund, attorneys fees, and court costs. Costs were compared for 1985 to 1992 because the the Insurance Department started paying Fund administration from the Fund in 1985. Before that, administrative expenditures had been a part of Insurance Department operations.

- We found that during 1992, about 12 percent of the Fund's expenditures were for administrative costs, compared with a little more than 18 percent in 1985.

- Average Administrative costs per active claim were essentially unchanged from 1985 to 1992. Administrative costs were $480 per claim in 1985 and $477 per claim in 1992; however, there have been some changes in the distribution of administrative costs - Court costs and salaries decreased as a percent of total administrative expenditures for 1985 to 1992 while attorneys fees increased about four percent as a percentage of total administrative expenditures.

- And finally, we found that Insurance Department Staff are handling more claims per employee now than in the past. Employees handled 728 claims per employee in 1985 and 1207 claims per employee in 1992.

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The Insurance Department has taken steps to control Administrative Costs in the Fund; however, they could still use better claims information to help control overall costs of the Fund. The Department has audited attorney billings and their findings resulted in some changes in what services attorneys can bill the Fund for and the way attorneys submit billings to the Fund. Also, the Department has automated some procedures for employees working with the Fund to increase efficiency. However, we found that generally, officials with the Department do not have information which would allow them to make knowledgeable attorney assignments or assess the costs of various types of cases

In conclusion, we cannot say it is necessarily bad that expenditures from the Fund have increased so dramatically over the years. From its origination through the latest legislative changes, the Fund has served as an incentive for employers to hire handicapped workers by relieving the employer of the cost of some handicapped workers on-the-job injuries. As it currently operates, insurance companies, self-funded and group-funded pools pay an annual assessment into the Fund, and in turn can draw from the Fund when paying claims for a handicapped worker. Some employers and insurance companies are able to shift a number of claims to the Fund while others may not shift as many claims to the Fund. Both the employer and insurance company can benefit from sending claims to the Fund since claims paid by the Fund do not count toward an employers' workers' compensation premium nor does it count towards the claims payments for the insurers annual assessment.

As it currently operates, the Fund is very liberal, but limiting the Fund or even doing away with it would not save State General Fund money since the Fund has been required to pay back the appropriations it has received in recent years. If the Fund did not pay these claims, they would be paid by the insurance companies or the employers themselves. The Fund is simply another checkbook to pay the escalating costs of workers' compensation as a whole and any real costs savings will have to develop in general workers' compensation through reforms of workers' compensation law, increased workplace safety, and tighter control of frivolous and fraudulent claims.

The recommendations for this audit are listed on page 33.

At this point, I can either answer questions you might have about the Workers' Compensation Fund or discuss what we are examining in the second workers' compensation audit which is underway now and proceeding on schedule. We plan to have this audit

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completed by the week of February 15.

The second workers' compensation audit will answer the following questions:

1. How do Kansas' workers' compensation benefits and premiums compare with other states?

2. Have the changes in Federal and State law over the years contributed to the rising cost of premiums?

3. What cost-containment measures have other states enacted to help control the rising costs of workers' compensation insurance?

4. What types of management information systems have other states implemented to help identify and control workers' compensation costs?

To answer these questions we will:

- compare premiums and benefits in other states to those in Kansas, review major changes in Federal and State laws as well as judicial decisions that have changed either access to or benefits from workers' compensation

- contact underwriters, administrative law judges, and employers to find out their perception of workers' compensation and what needs to be done to control costs to the system

- contact a number of other states to determine how the state controls costs in their workers' compensation system as well as review any new cost containment strategies states are employing to control growth in their systems.

Legislative Post Audit Committee Rules prohibit me from further discussing this audit at this time.

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AN OVERVIEW OF THE WORKERS COMPENSATION FUND
AND HOW IT OPERATES
TESTIMONY PRESENTED TO THE KANSAS SENATE
CONFERENCE COMMITTEE

BILL DEMPSEY, SUPERVISING ATTORNEY
KANSAS WORKERS COMPENSATION FUND
KANSAS INSURANCE DEPARTMENT
RON TODD
COMMISSIONER OF INSURANCE

I. HISTORICAL ANALYSIS

Since 1945, the Kansas legislature has been concerned with the employment of "handicapped" employees under the workers' compensation laws. In 1945, the "Second Injury Fund", the forerunner of the Workers' Compensation Fund was created. The statute was designed to encourage hiring "handicapped employees" by relieving the employer of liability for compensation on second injuries. However, the statute severely limited the availability of money from the Second Injury Fund. To be entitled to reimbursement, the employer was required to show:

(1) previous impairment of an eye, arm, hand or foot;
(2) a second injury to the same or different member of the body;
(3) resulting permanent total disability.

Only "specific members" of the body were included within the statute and, therefore, back injuries, heart attacks and mental disorders did not come within the coverage of the statute. Obviously, very few cases resulted in liability against the Second Injury Fund.

The legislature liberalized the statute in 1961 allowing for contribution by the Second Injury Fund where there was only an increase in impairment, not merely in cases where there was permanent total disability. Further, contribution

was allowed for spinal, back, heart and emotional disorders. This statute was the predecessor of the modern Kansas Workers' Compensation Fund.

II. CREATION OF THE WORKERS' COMPENSATION FUND

Since the creation of the Second Injury Fund which was followed by the Kansas Workers' Compensation Fund (the "Fund"), the main purpose of the statute has been to encourage the hiring and retention of handicapped employees by relieving employers of all or a portion of the liability for the worker's compensation claim. The fund is authorized by K.S.A. 44-566(a) which provides for administration by the commissioner of insurance, receipt of revenue, assessments against insurance companies and self-insurers, and administration of the Fund.

The commissioner of insurance who is responsible for the administration of the Fund, oversees the receipt of revenue which originates from essentially two sources:

(1) K.S.A. 44-566a (b), assessments against insurance carriers, self insurers and group-funded workers' compensation pools.

(2) K.S.A. 44-570, non-dependent death case payments by employers to the Fund.

K.S.A. 44-566a(b) formerly provided for funding via a four million dollar general fund entitlement until 1991. This money had been "loaned" to the Fund in July of each year since 1991 and repaid from assessment revenue in October of each year.

1. THE EMPLOYER KNOWINGLY HIRES OR RETAINS A HANDICAPPED EMPLOYEE - K.S.A. 44-567

The Fund may be required to relieve an employer of liability, either wholly or in part, when the employer hired or retained a handicapped employee with knowledge of the pre-existing condition and the employee suffers an injury resulting in disability contributed to or caused by the pre-existing impairment.

2. KNOWING MISREPRESENTATION OF A HANDICAPPED CONDITION BY THE EMPLOYEE - K.S.A. 44-567(c)

The Fund may be required to relieve an employer of liability, either wholly or in part, if the employee knowingly misrepresented his health with

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regard to pre-existing impairments, disability, accidents, injury and diseases or facts regarding his physical condition.

3. INSOLVENT EMPLOYER - K.S.A. 44-532(a)

The Fund may be required to pay compensation, both medical and disability, to an injured employee under the following conditions:

(a) the employer has no insurance, and

(b) the employer is financially unable to pay, or

(c) the employer cannot be located.

4. COMPENSATION PAID UNDER A PRELIMINARY AWARD - K.S.A. 44-534 (a)

The Fund may be required to reimburse employers who have paid compensation, either voluntarily or pursuant to a preliminary award, that is later overturned or reduced.

5. COMPENSATION PAID PURSUANT TO A FINAL AWARD - K.S.A. 44-556(d)

The Fund may be required to reimburse employers who have paid compensation under a formal award which is later overturned or reduced on appeal to the district court, court of appeals or supreme court.

6. REIMBURSEMENT OF COMPENSATION PAID AN EMPLOYEE DURING AN APPEAL - K.S.A. 44-556(d)

The Fund may be required to reimburse employers who have paid compensation pending appeal and after the appeal it is determined that the amount paid exceeded actual liability.

IV. RECOGNIZING POTENTIAL FOR CONTRIBUTION BY THE FUND UNDER K.S.A. 44-567

By far, most cases against the Fund arise in cases where the employer knowingly hired or retained a handicapped employee.

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1. BURDEN OF PROOF

The burden of proof is always squarely upon the employer to prove every element to establish Fund liability.

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the pre-existing impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge." K.S.A. 44-567(b).

Johnson v. Kansas Neurological Institute, 11 Kan.App.2d 161, 716 P.2d 598 (1986). The burden of proof required to be established by the employer is set forth in K.S.A. 44-508(g).

> "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

2. NECESSARY ELEMENTS OF PROOF TO ESTABLISH FUND LIABILITY

A. HANDICAPPED EMPLOYEE

The employer must establish that the injured claimant was a "handicapped employee" to be entitled to contribution from the Fund, pursuant to K.S.A. 44-567.

A "handicapped employee" is defined by K.S.A. 44-566(b) as follows:

> "'Handicapped employee' means one afflicted with or subject to any physical or mental impairment, or both, whether congenital or due to an injury or disease of such character the impairment constitutes a handicap in obtaining employment or would constitute a handicap in obtaining reemployment if the employee should become unemployed and the handicap is due to any of the following diseases or conditions:
> (1) Epilepsy;

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(2) Diabetes;
(3) Cardiac disease;
(4) Arthritis;
(5) Amputated foot, leg, arm or hand;
(6) Loss of sight of one or both eyes or a partial loss of vision of more than 75% bilaterally;
(7) Residual disability from poliomyelitis;
(8) Cerebral palsy;
(9) Multiple sclerosis;
(10) Parkinson's disease;
(11) Cerebral vascular accident;
(12) Tuberculosis;
(13) Silicosis or asbestosis;
(14) Psychoneurotic or mental disease or disorder established by medical opinion or diagnosis;
(15) Loss of or partial loss of the use of any member of the body;
(16) Any physical deformity or abnormality;
(17) An other physical impairment, disorder or disease, physical or mental, which is established as constituting a handicap in obtaining or in retaining employment."

This list of statutory recognized impairments contained within K.S.A. 44-566(b) does not include spinal and back conditions, nor does it include carpal tunnel syndrome. However, the "catch all" category found in K.S.A.. 44-566(b)(17) has been interpreted by case law to include various back and spinal conditions as handicaps under the statute. Spencer v. Daniel Construction Co., 4 Kan.App.2d 613, 609 P.2d 687 (1980). Arguably, carpal tunnel syndrome would fit within the definition of the "catch all" category as well.

An employee is not a "handicapped employee" if he or she is not at a disadvantage in obtaining or retaining employment because of the impairment. Denton v. Sunflower Electric Cooperative, 12 Kan.App.2d 262, 740 P.2d 98 (1987) aff'd. 242 Kan. 430, 748 P.2d 740 (1988). The court in Denton went on to say that the word "impairment" as used in the phrase "physical or mental impairment" as contained in K.S.A. 44-566(b) and 44-567 connoted limitation of function. The court noted that to be a "handicapped employee", the employee must have functional limitations putting him or her at a disadvantage in obtaining employment or re-employment.

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Whether or not an employee is "handicapped" is a question of fact to be decided on a case by case basis. Hinton v. S.S. Kresge Co., 3 Kan.App.2d 29, 592, P.2d 471 (1978).

The employee need not be denied employment because of his impairment to establish that he or she is a handicapped employee. Grounds v. Triple J Construction Co., 4 Kan.App.2d 325, 606 P.2d 484 (1980). Nor does a handicap need to be demonstrably disabling. Oates v. Post & Danley Truck Lines, 3 Kan.App.2d 337, 594 P.2d 684 (1979); Carter v. Kansas Gas & Electric Co., 5 Kan.App.2d 602, 621 P.2d 448 (1980). Further, there is no requirement that the employee consider himself handicapped in order to establish a "handicap" under the statute. Oates v. Post & Danley Truck Line, 3 Kan.App.2d 337, 594 P.2d 684 (1979).

B. KNOWLEDGE OF HANDICAP

In order for the employer to be relieved of liability, either wholly or in part, the employer must hire or retain the handicapped employee after acquiring knowledge of the handicap. K.S.A. 44-567(b) provides:

> "In order to be relieved of liability under this section, the employer must prove either the employer had knowledge of the pre-existing impairment at the time the employer employed the handicapped employee or the employer retained the handicapped employee in employment after acquiring such knowledge."

Knowledge by the employer may be established by one of two ways:

(1) filing of a Form 88, which creates a rebuttable presumption of knowledge of the prior handicap. K.S.A. 44-567(b);

(2) By any other evidence sufficient to maintain the employer's burden of proof. K.S.A. 44-567(b).

Obviously the Form 88 filing is the preferred method of establishing proof of knowledge of hiring or retaining a handicapped employee. The Form 88 is a form available from the director. The form requires the employer to list the employee's name, social security number and descriptions of the impairment as contained in the list in K.S.A. 44-566. The presumption of knowledge created when a Form 88 is filed can be rebutted where the employer merely lists reported injuries on the form. Knowledge of a prior injury does not constitute knowledge of a prior

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handicap. Johnson v. Kansas Neurological Institute, 240 Kan. 123, 722 P.2d 912 (1986); Carter v. Kansas Gas & Electric Co., 5 Kan.App.2d 602, 621 P.2d 448 (1980).

In Johnson, the claimant suffered a prior injury approximately seven and one-half (7-1/2) years prior to the date of the injury for which she sought compensation. The claimant had returned to her same job without restriction and had exhibited no symptoms prior to the second injury. The court held that the facts did not show a reservation in the mind of the employer in deciding to hire or retain the claimant.

While the reservation concept has been overruled by Denton v. Sunflower Electric Cooperative, 12 Kan.App.2d 262, 740 P.2d 98 (1987) aff'd. 242 Kan. 430, 748 P.2d 420 (1988), the logic used by the Johnson case is still sound. The evidence in Johnson certainly did not support a finding that the claimant had any functional limitation putting her at a disadvantage in obtaining or retaining employment. The most the employer had was knowledge of an injury, which, without more, is insufficient to meet their burden of proof.

Keeping in mind the basic purpose of the Fund, which is to encourage hiring or retention of handicapped employees, shifting all or a portion of the liability to the Fund in Johnson would not further the purpose of the statute.

In Carter v. Kansas Gas and Electric Co., 5 Kan.App.2d 602, 621 P.2d 448, (1980), the respondent asserted it had knowledge of a pre-existing impairment based on prior injuries in 1969 and 1974. In 1975, the claimant suffered a ruptured disc. The only evidence of the respondent's knowledge were medical records that showed the claimant had suffered muscle spasms due to trauma in 1969, and an unknown diagnosis, but a return to full duty in 1974. The court held that it could not be presumed that a single trauma back injury is likely to have recurring effects, particularly when the employee is returned to full duties. Therefore, knowledge of an injury will not in and of itself establish knowledge of a handicap.

An employer should therefore state the specific nature of the handicap such as chronic low back pain or chronic neck pain and avoid merely listing non specific injuries such as neck strain on the Form 88. However, it is not necessary that the employer describe in exact medical terminology the nature of the impairment, so long as the description provided informs the director that the employee is handicapped and the nature of the handicap. Leiker v. Manor House, Inc., 203 Kan. 906, 457 P.2d 107 (1969).

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If a Form 88 is not filed by the employer, the employer may still be able to establish knowledge of a handicap based on other evidence as long as the evidence meets the employer's burden of proof to establish knowledge. Examples of "other evidence" may include: testimony from the claimant that the employer was aware of his pre-existing impairment; information supplied by the employee on an employment application; information obtained from a pre-employment physical after a conditional offer of employment has been extended; testimony from the employer, including foreman and supervisors that were aware of the claimant's prior physical condition and prior workers' compensation claims which have been resolved by trial or settlement with the employee returning to his previous employment.

A sampling of cases where knowledge was established without the use of a Form 88 is helpful in determining the burden of proof necessary to establish knowledge under K.S.A. 44-567(a) which provides "any other evidence sufficient" may be used to establish knowledge.

In Oates v. Post and Danley Truck Lines, 3 Kan.App.2d 337, 594 P.2d 684 (1979), the court determined the evidence necessary to establish knowledge. In Oates, the claimant suffered a cerebral vascular accident in September 1975. The claimant applied for work with the respondent/employer and disclosed the cerebral vascular accident to the employer. The employer questioned the claimant about the condition and his ability to perform the work. The court found that the claimant was a handicapped employee and further found the employer had knowledge of the handicap based on the disclosure at the time of hiring.

In Grounds v. Triple J Construction Co., 4 Kan.App.2d 325, 606 P.2d 484 (1980), rev.denied 227 Kan. 927 (1980), the court found the employer had knowledge of a handicap based on the employer being personally aware the claimant had back trouble prior to the time the employer hired him. The employer was also aware that the claimant had previously had a workers' compensation claim in 1971 and that the claimant was required to wear a back brace.

In Spencer v. Daniel Construction Co., 4 Kan.App.2d 613, 609 P.2d 687 (1980), the court held that the employer had knowledge of a handicap based on a prior injury in July 1975. The claimant returned to work after the July 1975 injury and was advised by his supervisor that he should take it easy and not to bend, stoop or lift. The court affirmed an apportionment against the Fund for a second injury on August 22, 1975 and stated:

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"Here, claimant's employer knew that he had injured his back. Claimant worked regularly with heavy pipe and was required by the very nature of his work to bend stoop and lift heavy objects. He had the classic symptoms of a herniated disc; i.e., low back pain, with pain in his right hip radiating down his right leg. He was under medical treatment and missed three nonconsecutive days' work during the three-week period due to the injury. He was advised by his supervisor not to bend, stoop or lift and to do only light work such as he could. It is unrealistic to say that a worker who does heavy construction work and complains of these symptoms does not have a physical impairment that constitutes a handicap in obtaining or in retaining employment. If he were tell a prospective employer in the heavy construction business about his symptoms, he would not be hired, and his own supervisor warned claimant that he might be terminated if he reported his injury through proper channels."

Id at 617.

In Hampton v. Professional Security Co., 5 Kan.App.2d 39, 611 P.2d 173 (1980), the court found knowledge again based on a pre-employment disclosure and questioning by the employer as to the employee's condition and ability to perform the work.

In Denton v. Sunflower Electric Cooperative, 12 Kan.App.2d 262, 740 P.2d 98 (1987) aff'd 242 Kan. 430, 748 P.2d 420 (1988), the court found that the supervisor's knowledge as to missed work because of back problems, and continuing back problems for approximately ten years was sufficient to establish knowlege of a pre-existing handicap.

"Mental reservation" on the part of the employer is not an essential element to establish Fund liability. Denton v. Sunflower Electric Cooperative, 242 Kan. 430, 748 P.2d 420 (1988).

C. CLAIMANT'S MISREPRESENTATION OR CONCEALMENT OF HIS PHYSICAL CONDITION OR HEALTH HISTORY UNDER K.S.A. 44-567(c)

When the employee misrepresents or conceals his physical condition at the time of hiring, the employer will be presumed to have knowledge of the employee's pre-existing condition, if in connection with the hiring or retention, the employee knowingly misrepresents the existence of a handicap or other facts related to his physical condition. The misrepresentation statute under K.S.A. 44-567(c)

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operates as an alternative to knowledge to enable the employer to obtain reimbursement from the Fund and provides as follows:

> "Knowledge of the employee's pre-existing impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability , condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation."

Case law is clear that the employee's misrepresentation must be knowing and not merely negligent. It is inherent in the term, knowingly, that some degree of awareness on the part of the employee be present. Collins v. Cherry Manor Convalescent Center, 7 Kan.App.2d 270, 640 P.2d 875 (1982).

In Collins, the court held that "knowing" as used in 44-567(c) refers to the claimant's state of mind. The claimant responded negatively to a question on the job application form asking whether she had a "physical disability". The court held that the claimant's capacity to understand the question, her actual understanding and her belief in answering were all relevant to whether a knowing misrepresentation was made, and remanded the case.

As with all other elements necessary to establish Fund liability, the employer has the burden of proof in establishing a knowing misrepresentation.

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D. CONTRIBUTION OR CAUSATION OF THE "HANDICAP" TO THE PRESENT INJURY OR DISABILITY - K.S.A. 44-567

The final element the employer must show is that the pre-existing impairment either caused or contributed to the present injury or disability of the claimant. The "but for" test is set forth in K.S.A. 44-567(a)(1) which provides as follows:

> "Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely would not have occurred but for the preexisting physical or mental impairment of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund".

The test is whether the injury or resulting disability, not the "accident", probably would not have occurred "but for" the pre-existing handicap. Barke v. Archer Daniels Midland Co., 223 Kan. 313, 573 P.2d 1025 (1978). In Barke, the court stated:

> "The new statutory test is whether the change in the physical structure of the workman's body (the injury) or the resulting impairment of his ability to perform work (the disability) "probably or most likely would not have occurred" but for the pre-existing physical or mental impairment of the handicapped employee."

Id at 318.

The "but for" rule requires that the pre-existing impairment be the proximated cause of the injury or disability. There is no requirement that medical evidence be used to establish the "but for" element under K.S.A. 44-567(a)(1).

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E. CONTRIBUTION BY PRIOR IMPAIRMENT TO RESULTING DISABILITY UNDER K.S.A. 44-567(a)(2)

The test for contribution is set out in K.S.A. 44-567(a)(2) which provides as follows:

> "Subject to the other provisions of the workers' compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely would have been sustained or suffered without regard to the employees pre-existing physical or mental impairment but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's pre-existing physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund."

The award of contribution need not be based on medial evidence. K.S.A. 44-567 (a)(2). If the handicapped employee's impairment contributes causally to the injury or disability, the Fund may be liable for a portion of the compensation and benefits awarded to the claimant. The apportionment of the award is based on the amount of disability attributable solely to the second injury and the extent that the pre-existing impairment contributes to the second injury. Brozek v. Lincoln County Highway Department, 10 Kan.App.2d 319, 698 P.2d 392 (1985). The award of contribution must be equitable and reasonable and based upon all the evidence.

In cases where apportionment of the award is appropriate, the Fund is entitled to a credit under K.S.A. 44-510a for compensation paid or to be paid to the claimant on a prior accident. The credit statute, sometimes referred to as the anti-pyramiding statute prevents the claimant from receiving double compensation for the same permanent disability. Spencer v. Daniel Construction Co., 4 Kan.App.2d 613, 609 P.2d 687 (1980).

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