

MINUTES OF THE HOUSE COMMERCE & ECONOMIC DEVELOPMENT COMMITTEE

The meeting was called to order by Chairman Anthony R. Brown, at 1:30 p.m. on February 7, 2011, in Room 785 of the Docking State Office Building.

All members were present.

Committee staff present:

Renae Jefferies, Office of the Revisor of Statutes  
Ken Wilke, Office of the Revisor of Statutes  
Reed Holwegner, Kansas Legislative Research Department  
Raney Gilliland, Kansas Legislative Research Department  
Joyce Bishop, Committee Assistant

Conferees appearing before the Committee:

Karin Brownlee, Secretary, Kansas Department of Labor  
Bob Tomlinson, Assistant Commissioner, Kansas Insurance Department  
Larry Karns, Attorney, Glenn, Cornish, Hanson & Karns  
John Ostrowski, Attorney, McCulough, Warehiem & LaBunker

Others attending:

See attached list.

Representative Ruiz moved, seconded by Representative Billinger, to accept the minutes from January 24, 25, 26 & 27, 2011 as received. The motion passed on a voice vote.

Chairperson Brown asked for introduction of bills.

Representative Billinger moved, seconded by Representative Kleeb, to introduce a bill regarding contractor licensing, pertaining to HVAC. The motion passed on a voice vote.

Representative Brown moved, seconded by Representative Mesa, to introduce a bill regarding contractor and subcontractor relationships. The motion passed on a voice vote.

Representative Slattery moved, seconded by Representative Finney, to introduce a bill regarding promoting efficiency and transparency in government. The motion passed on a voice vote.

Representative Slattery moved, seconded by Representative Garber, to introduce a bill regarding payday loans. The motion passed on a voice vote.

Representative Kleeb moved, seconded by Representative Schwab, to introduce a bill regarding Kansas employer e-verification responsibility. The motion passed on a voice vote.

Representative Kleeb moved, seconded by Representative Mesa, to introduce a bill regarding equal access to school employee information. The motion passed on a voice vote.

Representative Kleeb moved, seconded by Representative Scapa, to introduce a bill regarding a constitutional amendment concerning secret balloting in the work place. The motion passed on a voice vote.

Chairperson Brown opened the hearing on **HB 2134, amending the workers compensation act.**

Renae Jefferies gave the Revisor's overview regarding the bill (Attachment 1).

Chairperson Brown requested testimony from proponents of the bill, and the following individuals made presentations:

Secretary of Labor, Karin Brownlee (Attachment 2)

Bob Tomlinson, Assistant Commissioner, Kansas Insurance Department (Attachment 3)

## CONTINUATION SHEET

The minutes of the Commerce & Economic Development Committee at 1:30 p.m. on February 7, 2011, in Room 785 of Docking State Office Building.

Larry Karns, Attorney, Glenn, Cornish, Hanson & Karns (Attachment 4).

John M. Ostrowski, Attorney, McCulough, Warehiem & LaBunker, representing Kansas AFL-CIO (Attachment 5).

The following individuals provided written testimony only as proponents of the bill:

Eric Stafford, Senior Director Government Affairs, Kansas Business Coalition for Worker's Compensation Reform (Attachment 6).

Kevin McFarland, President, KAHSA Insurance Group (Attachment 7).

Bernie Koch, Executive Director, Kansas Economic Progress Council (Attachment 8).

Roy Artman, Legal Counsel, Kansas Building Industry Worker's Compensation Fund (Attachment 9).

Chairperson Brown requested testimony from opponents of the bill and there were none.

Chairperson Brown appointed a subcommittee regarding the bill. Members assigned to this subcommittee were Representatives Suellentrop (Chairperson), Schwab, Kleb, Bruchman, Hedke, Slattery, and Tietze.

The meeting adjourned at 2:38 p.m.

# HOUSE COMMERCE & ECONOMIC DEVELOPMENT COMMITTEE

1:30pm,

Room 785, Docking State Office Building

## GUEST LIST

DATE: February 7, 2011

NAME	REPRESENTING
John OSTROWSKI	KD AFL-CIO
Roy T. Artman	KBIWF
Janet J. Stubbs	"
RJ Wilson	ICSAT/KOSE
Kerri Spielman	KATA
Heslie Kaufman	Ks Coop Council
Ron Suckow	KGFA/KARA
Ed Radomom	Ks AFF
Joe Ewers	KRHSO
Kevin McFarland	KING
Mick Orba	Kansas Gas Sum
Hayin Browder	KDOL
Hattie Sparks	" "
Carol Cest	KDOL
Annettaught	KDOL
David Shriver	KASB
Liz Maiberg-Clan	ICASB

NAME	REPRESENTING
Eric Seiford	KS Chamber
DAN MORGAN	Builders Assn.
Cheryl Caldwell	Leawards Chamber
Larry Kamm	KS Chamber et al
Nicole Plouffe Aiken	LKM
Jennifer Findley	KHA
Ty E Drago	United Teachers Union
Scott Heidner	KSIA
Rob Mealy	KEANER Assoc.
Ashley Shevard	Leawards Chamber
Callie Hill Denton	KS Assn for Justice
Natalie Briggs	KS SHRM
David Hanson	PC Insurance
Chad Austin	KHA



Office of Revisor of Statutes  
300 S.W. 10<sup>th</sup> Avenue  
Suite 24-E, Statehouse  
Topeka, Kansas 66612-1592  
Telephone (785) 296 -2321 FAX (785) 296-6668

MEMORANDUM

To: House Committee on Commerce and Economic Development  
From: Renae Jefferies, Assistant Revisor  
Date: February 7, 2011  
Subject: HB 2134

HB 2134 amends 21 statutes in the Workers Compensation Act and repeals 2 more outright.

Section 1, page 1, provides a new section which provides that the act shall be liberally construed and puts the burden of proof on the claimant.

Section 2, pages 1 through 7, amends K.S.A. 44-405 to lay out when a claim will be disallowed; provisions regarding drug and alcohol testing; and reduction of compensation paid based on prior settlement or award or a preexisting condition.

Section 3, page 7, amends K.S.A. 44-503a to address the employee who works multiple employments and how such employee's employers will divide up paying such employee's claim, if awarded.

Section 4, pages 7 through 13 amends K.S.A. 44-508 to provide definitions for the act.

Section 5, pages 13 through 16, amends K.S.A. 44-510b to deal with situations where the employee dies from an injury. If required, the employer shall pay the costs of a court appointed conservator up to \$1,000.

Section 6, pages 16 through 18, amends K.S.A. 44-510c to address situations where death does not occur and the types of disability that can be awarded and how they shall be computed. Additionally the amendment provides that the claimant "shall not be eligible to receive more than one award of workers compensation permanent total disability in such workers life time"; shall not receive benefits if the employee refuses accommodated work within the work restrictions

prescribed for such claimant; or when the claimant is receiving unemployment benefits.

Section 7, pages 18 through 21, amends K.S.A. 44-510d which deals with loss of a scheduled member and computation of compensation for permanent partial disability.

Section 8, pages 21 through 25, amends 44-510e sets out the computations for temporary or permanent partial general disability and when an employee may be eligible to receive permanent partial general disability in excess of the percentage of functional impairment.

Section 9, pages 25 through 26, amends K.S.A. 44-510f to raise the cap on permanent total disability to \$155,000; for permanent or temporary partial disability to \$130,000; and for permanent partial disability where functional impairment only is awarded, \$75,000.

Section 10, pages 26 through 28, amends K.S.A. 44-510h to add subsection (e) which deals with an employer's obligation to provide medical services.

Section 11, pages 28 through 29, amends K.S.A. 44-510k, to set forth procedures for a post-award hearing for a claimant who had an award which included future medical benefits.

Section 12, pages 29 through 35, amends K.S.A. 44-511 to include new language regarding determining a claimant's weekly wage for purposes of receiving benefits under the act.

Section 13, pages 35 through 37, amends K.S.A. 44-515 to provide that a claimant's benefits shall be suspended if the claimant refuses to submit to an examination requested by the employer.

Section 14, page 37, amends K.S.A. 44-516 regarding what shall be done if at least two medical opinions disagree as to the percentage of functional impairment of the claimant.

Section 15, pages 37 through 38, amends K.S.A. 44-520 regarding when notice of injury must be given to the employer and how it may be given.

Section 16, pages 38 through 41, amends K.S.A. 44-523 to provide procedures to for applying for dismissal of the claim for lack of prosecution.

Section 17, pages 41 through 42, amends K.S.A. 44-525 to provide that no award shall include the right to future medical treatment unless the claimant can prove that it is "more probable than not that future medical treatment" will be required.

Section 18, pages 42 through 43, amends K.S.A. 44-528 to allow for modification of an award by an administrative law judge

Section 19, pages 43 through 44, amends K.S.A. 44-531 to provide the parties can make agree to a compromise lump-sum settlement for either permanent total or permanent partial

disability cases with approval of the administrative law judge.

Section 20, pages 44 through 45, amends K.S. A. 44-534a to replace the word "accidental" with "accident, repetitive trauma or resulting" injury.

Section 21, pages 45 through 48, amends K.S.A. 44-536 regarding attorney fees to provide that if the attorney's services result in a denial of additional compensation or other benefits and it is determined the attorney engaged in a frivolous prosecution of the claim, the employer and insurance carrier shall not be liable for any portion of the fees incurred in such claim.

Section 22, pages 48 through 50, amends K.S.A. 44-5a01 to provide that: "In no circumstances shall an occupational disease be construed to include injuries caused by repetitive trauma".

The bill if passed would become effective upon publication in the statute book.

House Commerce and Economic Development

February 7, 2011

Testimony on HB 2134 Workers Compensation

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Chairman Brown and Committee Members,

Thank you for allowing us to speak on HB 2134 as we are appearing as proponent for the bill as it is currently drafted. We find the proposed bill provides answers to many of the court decisions that have currently come down and provides much needed clean-up language in the statutes. The following is a brief outline of the bill. Please go to page three as we are requesting two amendments.

44-500 Construction of Act – Added repetitive trauma and occupational disease

44-501 Preexisting impairment and Cleanup – Clarifies probable cause for the employer, drug testing remains the same, adds language for calculating benefits for preexisting conditions and adds a definition, adds language for social security offsets, limits benefits to life expectancy to 4% per year.

44-508 Definitions-- Accident is redefined to include prevailing factor which will play a huge part on compensability. Prevailing factor must be the primary cause of the accident. Arising out of and in the course of employment are defined. Functional impairment is defined and authorized treating physician is defined

44-510b Employer shall pay for court appointed conservator not to exceed \$1000. Death benefit cap has been increased to \$300,000 from \$250,000.

44-510c (new section) expert evidence shall be required to prove PTD (permanent Total Disability) an injured worker is now limited to one PTD per life time.

44-510d Addresses Casco v. Armour Swift – Eckrich. Bilateral is now treated as scheduled injuries and it changes back to whole body. Defines how to calculate scheduled injuries.

44-510e Clean up, adds new definitions for task loss and wage loss. Wage loss definition now says capable of earning after the injury not what they might earn.

44-510f Raises the disability caps

44-510h Once the employee reaches maximum medical improvement, the employer no longer has to pay for transportation for medical care

44-510K The employer can make application to close medical after 2 years from the original award.

44-511 simplifies calculations of average weekly wages.

44-515 This clarifies the term or suspension of benefits for non-compliance in examination.

44-516 ALJ can select an independent health care provider

44-520 Changes the notice for employee reporting accident or injury from 10 days to 30 days (calendar days). It takes the 75 day just cause and the 200 day written notice requirement out. It puts the burden on the employee to report to the appropriate employer designee.

44-523 Changes the 5 year rule for keeping an application open for hearing to 3 years if hasn't been any activity.

44-525 to receive future medical treatment it must be proven must be proven more probable than not medical treatment is needed for the work related injury.

44-528 Language clean-up

44-531 Language clean-up. Provides flexibility in lump sum payments.....this is retroactive

44-536 language clean-up

44-5a01 Occupational disease cannot be repetitive trauma.

However, we do request, what I believe are two friendly amendments.

K.S.A. 44-0508 (t) be amended to allow the term "mail" as used in the act to include the use of the United States Postal Service or other land based delivery service and/or by transmission through electronic means, including delivery by fax, email or other electronic delivery method designated by the director. We currently have an Attorney General's letter stating that mail does not include email because it is not specified in the statute.

Second, if a self insured becomes bankrupt and the bond money is completely depleted, there is no one to cover the claim. It is the position of the Department of Labor that the Kansas Insurance Department should cover it if it were an uninsured insolvent.

44-532a. Liability of workers compensation fund for uninsured insolvent employers; cause of action against such employers.

(a) If an employer has no insurance to secure the payment of compensation *or has insufficiently funded a self-insurance bond*, as provided in subsection (b) (1) *and* (b)(2) of K.S.A. 44-532 and amendments thereto, and such employer is financially unable to pay compensation to an injured worker as required by the workers compensation act,

Thank you again, I will now stand for questions.



**TESTIMONY ON  
HB 2134**

**HOUSE COMMERCE AND ECONOMIC DEVELOPMENT COMMITTEE**

**FEBRUARY 7, 2011**

Chairman and Members of the Committee:

I am Bob Tomlinson, the Assistant Commissioner of the Kansas Insurance Department. I am testifying today to propose an amendment to HB 2134.

In Kansas, general contractors are liable for workers' compensation claims by subcontractors, unless a subcontractor has workers' compensation coverage. As such, general contractors typically require subcontractors, including single independent contractors, to obtain workers' compensation coverage. However, a single independent contractor, who is not required by law to have workers' compensation coverage, often does not want to go to the expense of obtaining workers' compensation coverage. This leads many single independent contractors to purchase minimum premium workers' compensation policies, known as certificates of insurance. A certificate of insurance precludes a general contractor from liability for workers' compensation claims by a subcontractor, but provides no real coverage for the subcontractor and costs \$1,000.

The proposed amendment to HB 2134 will allow an independent contractor to execute an Affidavit of Exempt Status from worker's compensation coverage. An independent contractor that executes an Affidavit of Exempt Status will not be considered an "employee" for the purpose of Kansas workers' compensation law, and the individual or company that takes possession of the executed Affidavit will not be responsible for workers' compensation claims made by the independent contractor that executes the Affidavit. This will eliminate the incentive for general contractors to require independent contractors to obtain workers' compensation coverage. In turn, independent contractors will not need to obtain expensive "certificates of insurance" that provide little benefit, lifting an unnecessary financial burden.

Thank you for the opportunity to appear in support of this bill amendment. I am happy to stand for questions at this time.

Bob Tomlinson  
Assistant Commissioner  
Kansas Insurance Department

1 payments have been made on account of any disablement from which  
 2 death shall thereafter result such payments shall be deducted from the  
 3 amount of liability provided by law in case of death. The time limit  
 4 prescribed by this section shall not apply in the case of an employee  
 5 whose disablement or death is due to occupational exposure to ionizing  
 6 radiation.

7 (d) Where an occupational disease is aggravated by any disease or  
 8 infirmity, not itself compensable, or where disability or death from any  
 9 other cause, not itself compensable, is aggravated, prolonged, accelerated  
 10 or in any wise contributed to by an occupational disease, the  
 11 compensation payable shall be reduced and limited to such proportion  
 12 only of the compensation that would be payable if the occupational  
 13 disease were the sole cause of the disability or death, as such  
 14 occupational disease, as a causative factor, bears to all the causes of such  
 15 disability or death, such reduction in compensation to be effected by  
 16 reducing the number of weekly or monthly payments or the amounts of  
 17 such payments, as under the circumstances of the particular case may be  
 18 for the best interest of the claimant or claimants.

19 (e) No compensation for death from an occupational disease shall be  
 20 payable to any person whose relationship to the deceased employee or  
 21 workman arose subsequent to the beginning of the first compensable  
 22 disability save only to afterborn children.

23 (f) The provisions of K.S.A. 44-570, *and amendments thereto*, shall  
 24 apply in case of an occupational disease.

25 Sec. ~~23~~ K.S.A. 44-503a, 44-510a, 44-510c, 44-510d, 44-510e, 44-  
 26 510f, 44-515, 44-516, 44-520, 44-520a, 44-525, 44-528, 44-531, 44-534a,  
 27 44-536 and 44-5a01 and K.S.A. 2010 Supp. 44-501, 44-508, 44-510b, 44-  
 28 510h, 44-510k, 44-511 and 44-523 are hereby repealed.

29 Sec. ~~24~~ This act shall take effect and be in force from and after its  
 30 publication in the statute book.

Kansas Department of Insurance  
 BALLOON AMENDMENT 1

New Sec. 23. (a) Any person who is not required to be covered under a workers compensation insurance policy or other plan for the payment of workers compensation may execute an affidavit of exempt status under the workers compensation act. The affidavit shall be a form prescribed by the secretary of labor. The affidavit shall be available on the web site of the department of labor.

(b) Execution of the affidavit shall establish a rebuttable presumption that the executor is not an employee for purposes of the workers compensation act and that an individual or company possessing the affidavit is in compliance and therefore shall not be responsible for workers compensation claims made by the executor.

(c) The execution of an affidavit shall not affect the rights or coverage of any employee of the individual executing the affidavit.

(d) (1) Knowingly providing false information on a notarized affidavit of exempt status under the workers compensation act shall constitute a misdemeanor punishable by a fine not to exceed \$1,000.

(2) Affidavits shall conspicuously state on the front thereof in at least 10 point, bold-faced print that it is a crime to falsify information on the form.

(3) The secretary of labor shall immediately notify the workers compensation fraud unit in the department of labor of any violations or suspected violations of this section. The secretary shall cooperate with the fraud unit in any investigation involving affidavits executed pursuant to this section.

(e) The department of labor shall have the power to adopt all reasonable rules and regulations necessary to enforce this provision.

24.

25.

Renae Jefferies, Assistant Revisor

HOUSE COMMERCE & ECONOMIC  
 DEVELOPMENT  
 DATE: 2/7/11  
 ATTACHMENT: 3-2

**Testimony by:**  
**Larry G. Karns**  
**Attorney**  
**Glenn, Cornish, Hanson & Karns**  
**800 SW Jackson, Suite 900**  
**Topeka, KS 66612-1259**

**January 31, 2011**

**Testimony before the House Committee on Commerce and Economic Development  
on HB 2134**

Mister Chairman and members of the committee, my name is Larry Karns and I am an attorney with Glenn, Cornish, Hanson & Karns here in Topeka. My practice primarily involves defending workers compensation claims for employers across the state. I have defended workers compensation cases in Kansas for the past 35 years. I am here today on behalf of the Kansas Chamber of Commerce, Kansas Society of Human Resource Management, the Kansas Self-Insurers Association and the Kansas business community.

As one of five attorneys on the negotiating team representing the business community, I am proud to stand here in support of HB 2134 which is a result of long and detailed, but most importantly, successful negotiations between business and labor. This bill is our agreed to compromise which both sides support.

The last significant workers compensation reform took place in 1993. Since that time several court decisions have impacted the Kansas Workers Compensation Act and the 1993 changes. Among those are the *Casco*, *Bergstrom*, *Tyler*, *Fernandez*, *Redd*, *Mitchell* and the *McCready* cases.

Generally under the Workers Compensation Act employers are required to provide workers compensation benefits to injured employees if the injury "arose out of" and occurred during "the course of" their employment. The Act is a no fault law that allows injured workers benefits without proving negligence and which provides an exclusive remedy for work related claims. The arising out of component is meant to require a causal connection between the work and injury. That required causal connection has been liberally construed awarding benefits to more workers and for more medical conditions than appropriate while the maximum amount of compensation available for those who were truly injured by their work has remained the same since 1993.

To address these issues and to raise the threshold for entering the workers compensation system the compromise bill that is before you was negotiated between business and labor. Most importantly, the bill raises the standard for compensability. Under the compromise the work incident must now be the "prevailing factor" or the cause of both the accident and the injury. The prevailing factor test will require employers to only compensate employees and treat conditions for which the work injury was the prevailing cause.

As part of the compromise, the bill benefits injured employees by changing the method of compensation for bilateral upper or lower extremity injuries to the pre *Casco* method and raises the statutory maximum compensation that may be awarded to an injured worker, caps that have not been changed since 1993.

The proposed legislation addresses the *Bergstrom* decision and allows a judge to impute a post injury wage for those who have not returned to work. It addresses *Tyler* in that there must be a nexus between the workplace injury and the resulting wage loss. A connection which does not need to exist under the current law. It provides that employees will not be eligible for work disability if they do not have the capacity to enter into a valid contract of employment. It addresses the *McCready* case in that neutral falls or accidents will no longer be compensable. Again it requires that there must be a causal connection between the work and the accident. It conforms compensation for scheduled injuries to comply with the AMA Guides.

The bill retains employer choice of physician and closes future medical benefits unless the injured workers proves that future medical care will be required. It provides for dismissal of claims if there has not been a hearing or an award within three years, it clarifies the date of accident for repetitive trauma cases and it revises and clarifies the employee's obligation to timely report job related injuries to their employer.

The Act provides work disability benefits only for injured employees who have sustained at least a 10% wage loss and have a whole body disability. The wage loss required to qualify for work disability will not be considered if the worker has been terminated for cause, terminated for economic reasons or for other reasons not related to the injury or has voluntarily resigned. The bills adds a new requirement that an employee have a minimum percentage of permanent impairment before they are eligible for work disability. It also takes into consideration both preexisting functional impairment and preexisting work restrictions in computing benefits.

The overall goal was to provide fairness in the resolution of claims for both employers and employees, to raise the threshold to be entitled to benefits and to provide greater benefits to those who deserve them.

Attached is wording to conform HB 2134 as printed by the F  
wording agreed to by business and labor.

HOUSE COMMERCE & ECONOMIC  
DEVELOPMENT  
DATE: 2/7/11  
ATTACHMENT: 4-2

44-501(a)(2) - should read: "the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee"

44-508(f)(2)(B) - should read: "An injury by accident shall be deemed to arise out of employment only if:"

44-510k(a)(1) - should read: "At any time after the entry of an award for compensation wherein future medical benefits were awarded, the employee, employer, or insurance carrier may make application for a hearing, in such form as the director may require for the furnishing, termination or modification of medical treatment."

44-511 - The Revisor changed the order of the definitions of "money," "additional compensation" and "wage" from (1) wage, (2) money, (3) additional compensation to (1) money, (2) additional compensation, (3) wage. This doesn't change the substance of the agreement.

44-523(f)(1) - should read: "If the claimant cannot establish good cause, the claim shall be dismissed with prejudice by the administrative law judge for lack of prosecution. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund, pursuant to K.S.A. 44-534a(b)."

44-523(f)(2) - should read: "Unless the claimant can prove a good faith reason for delay, the claim shall be dismissed with prejudice by the administrative law judge. Such dismissal shall be considered a final disposition at a full hearing on the claim for purposes of employer reimbursement from the fund, pursuant to K.S.A. 44-534a(b)."

44-536(a) - should read: "With respect to any and all proceedings in connection with any initial or original claim for compensation, no claim of any attorney for services rendered in connection with the securing of compensation for an employee or the employee's dependents, whether secured by agreement, order, award or a judgment in any court shall exceed a reasonable amount for such services or 25% of the amount of compensation recovered and paid, whichever is less, in addition to actual expenses incurred, and subject to the other provisions of this section. Except as hereinafter provided in this section, in death cases, total disability and partial disability cases, the amount of attorney fees shall not exceed 25% of the sum which would be due under the workers compensation act beyond 415 weeks of permanent total disability based upon the employee's average weekly wage prior to the date of the accident or injury and subject to the maximum weekly benefits provided in K.S.A. 44-510c and amendments thereto.



KSA 44-510e(a)(2)(F)

(F) The amount of weekly compensation for permanent partial general disability shall be determined as follows:

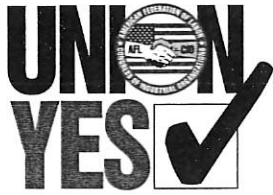
(i) Find the payment rate which shall be the lesser of (A) the amount determined by multiplying the average weekly wage of the worker prior to such injury by 66 2/3% or (B) the maximum provided in K.S.A. 44-510c and amendments thereto;

(ii) find the number of disability weeks payable by (A) subtracting from 415 weeks the total number of weeks of temporary ~~[total]~~ disability compensation ~~[was]~~ paid, excluding the first 15 such weeks. To calculate the total number of weeks of temporary disability compensation paid pursuant to this subsection (F)(ii), divide the sum of all temporary total and temporary partial disability compensation paid by the payment rate determined in this subsection (F)(i), and (B) multiply[ing] the remainder by the percentage of permanent partial general disability as determined under this subsection (a); and

(iii) multiply the number of disability weeks determined in paragraph (ii) of this subsection (F) by the payment rate determined in paragraph (i) of this subsection (F).

The resulting award shall be paid for the number of disability weeks at the full payment rate until fully paid or modified. ~~[If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury.]~~ In any case of permanent partial disability under this section, the employee shall be paid compensation for not to exceed 415 weeks following the date of such injury. ~~[subject to review and modification as provided in K.S.A. 44-528 and amendments thereto].~~ If there is an award of permanent disability as a result of the compensable injury, there shall be a presumption that disability existed immediately after such injury. Under no circumstances shall the period of permanent partial disability run concurrently with the period of temporary total or temporary partial disability.





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## COMMITTEE ON COMMERCE & ECONOMIC DEVELOPMENT TESTIMONY IN SUPPORT OF HB 2134

by

JOHN M. OSTROWSKI  
ON BEHALF OF  
KANSAS AFL-CIO

February 7, 2011

Mr. Chairman and Members of the Committee:

The Kansas AFL-CIO, in unity with the Kansas Coalition for Workplace Safety and the Kansas Association for Justice, *supports* HB 2134 in its present form, and without amendments.

As most everyone appreciates, workers compensation is historically a very contentious subject often leading to extremely heated debate. This is understandable. It is a complex law and difficult to fairly balance the competing interests of business with the needs of the injured workers and their families. All legislative districts in Kansas are possessed of businesses and working families. Both need legislative protection in this area of law.

From its inception, workers compensation laws set forth stated goals. These include protecting the employer from the burdens of civil liability. Protecting co-employees from suing each other over workplace events. Providing competent prompt medical care for workplace injuries. Allowing the injured worker some wage replacement while recovering from injury. Furthermore, all of this must be done through an efficient delivery system. Few argue with these stated goals. They are just as valid today as they were 100 years ago when Kansas passed its first workers compensation law.

The "devil is always in the details." If the system becomes unbalanced, unfairly favoring either side, then **none** of the identified objectives are ever achieved. Furthermore, there is no black and white or universal measure of "what is fair." What one side views as appropriate, the other side views as evil. What one side views as "reforming" the system, the other side views as "deforming" the system.



HB 2134 is unique legislation. It represents the culmination of competing interests spending countless hours to reach agreement on significant legislation. Industry representatives included the Kansas Chamber, the Society of Human Resource Managers (SHRM) and the Kansas Self-Insurers Association (KSIA). Labor representatives included the Kansas AFL-CIO, the Kansas Coalition for Workplace Safety and the Kansas Association for Justice. All major issues identified from both parties were put on the table and ultimately included in some form in the "package."

HB 2134 is a delicate compromise and represents the give and take from both sides. The individual components are interlocking and collectively hold the entire proposal together. Therefore, both the industry representatives and the labor representatives have agreed to oppose any new changes or amendments to the bill. Both industry and labor representatives have agreed to respectfully request that the Committee make no amendments. Again, it is an honest effort to reach the balance of which I have previously spoken.

The bill's proposed changes advocated by business interests include the accident being the "prevailing factor," thresholds for claiming a work disability; higher standards for the allowance of future medical coverage; a new definition of work disability, and others. The bill's proposed changes that should benefit injured workers and their families include a modest increase in caps, and returning to previous law regarding bilateral extremity injuries. Neither side would have individually crafted HB 2134 in its present form, but in the true spirit of compromise, it is a bill that we will support, with no additional amendments.

Labor would be remiss if we did not remind this Committee that there is no present workers compensation "crisis" in Kansas. According to the National Council on Compensation Insurance (NCCI), the rate filing authority for Kansas, Kansas enjoys a very healthy workers compensation insurance environment, both nationally and regionally. Our businesses pay low premiums. The NCCI filed for a rate reduction again last year (over 2%), and cumulative rates are down over 30% since 1994. Medical costs remain the "cost driver", consuming 63% of every benefit dollar.

In conclusion, and again, labor supports the bill in its present form, without amendments.



National  
Council on  
Compensation  
Insurance, Inc.

# Kansas state advisory forums 2010

November 2, 2010

Terri\_Robinson@ncci.com  
Jim\_Davis@ncci.com  
Frank\_Schmid@ncci.com

501-753-5180  
561-893-3097  
561-893-3316

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HOUSE COMMERCE & ECONOMIC  
DEVELOPMENT

DATE: 2/7/11  
ATTACHMENT: 5-3

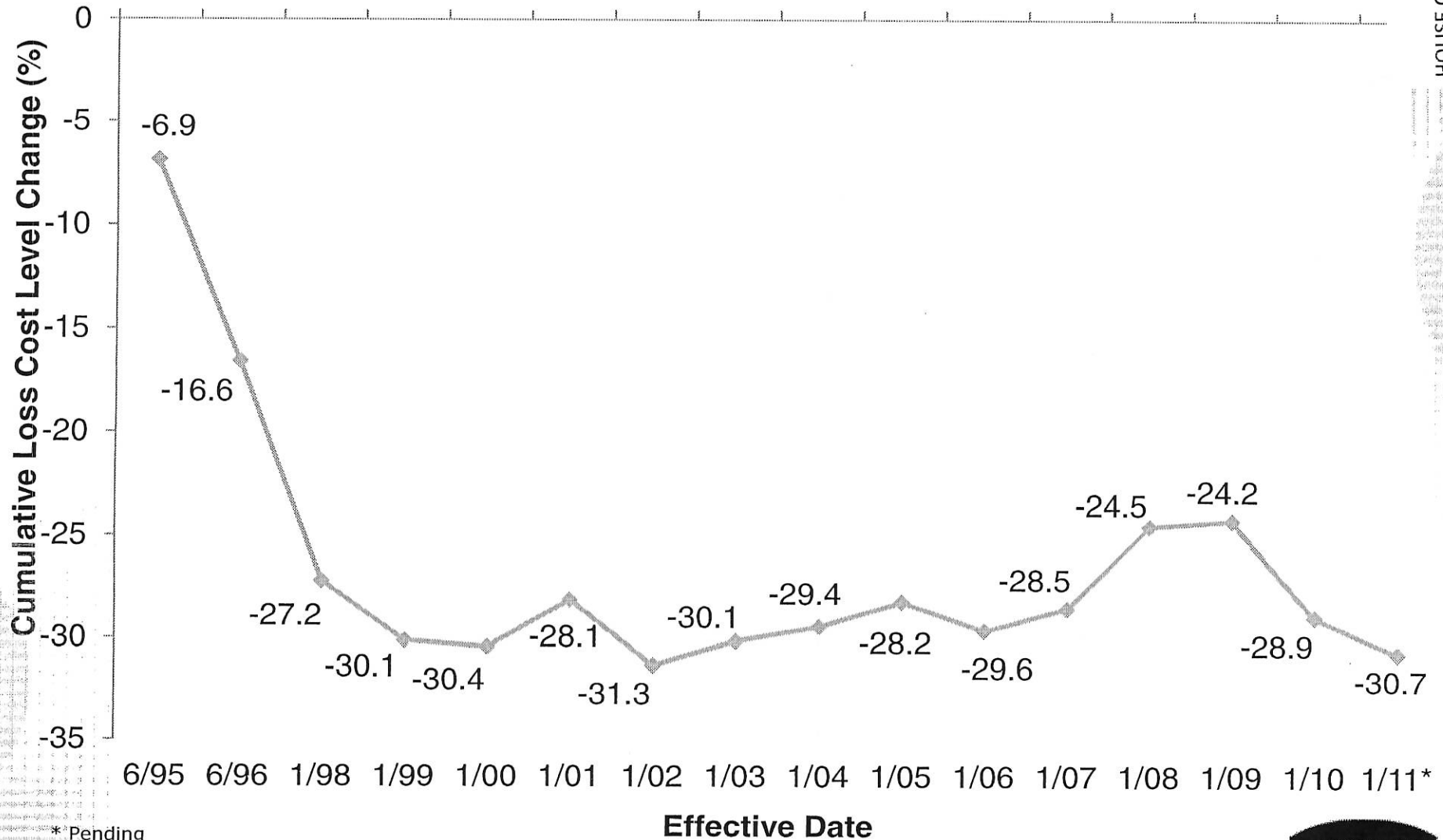


# Kansas Workers Compensation System— An Overview

- Written premium declines in Calendar Year 2009 after several years of modest growth
- Combined ratios are very stable over the latest five years
- Claim frequency continues to decline
- Medical costs continue to outpace wage growth
- Assigned risk market continues to depopulate through Calendar Year 2009



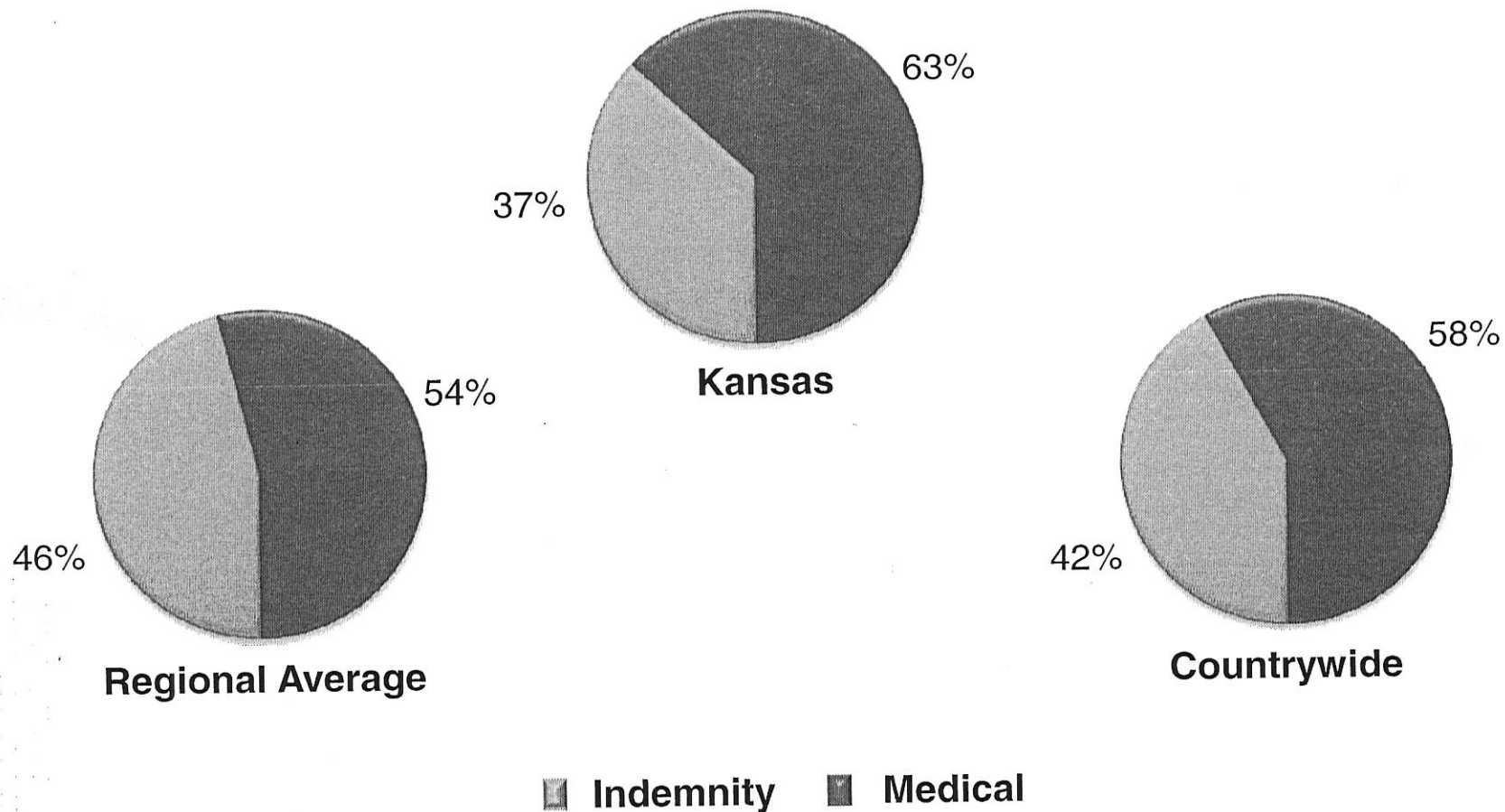
# Kansas Cumulative Loss Cost Level Change



\*Pending



# Kansas—Medical Costs Constitute the Majority of Total Benefit Costs



Regional states are Colorado, Missouri, Nebraska, and Oklahoma





**Legislative Testimony before the House Committee on Commerce and Economic Development**  
**By: Eric Stafford, Senior Director of Government Affairs, Kansas Chamber of Commerce**

Mister Chairman and members of the committee, my name is Eric Stafford and I am the Senior Director of Government Affairs for the Kansas Chamber.

On behalf of the 26 business organizations included at the bottom of my testimony, I would like to express our support for HB 2134 which brings substantial positive reform to Kansas' workers compensation system, for both the employee and the employer.

In the fall of 2010, the Kansas Chamber, Kansas Society of Human Resource Management and Kansas Self-Insurers Association began discussions with representatives from labor and the plaintiff's bar in an attempt to find a compromise on work comp that could be presented to the legislature in 2011.

Thanks to the hard work of attorneys on both sides, we are proud to present you with our compromise today. As mentioned above, this bill brings fairness to the system for both the employer and injured worker. Workers compensation is a unique system of protection offered by employers to employees through statutory guidelines established by the state.

Significant workers compensation reform hasn't taken place since 1993 and is long overdue after a series of court decisions have eroded the intent of work comp. HB 2134 makes several significant steps to return the Kansas work comp system back to a system that truly protects the injured worker and employers by ensuring that legitimate claims are compensated and injuries never intended to be served by the system are not.

First, this bill strengthens the threshold of entry into the work comp system through what is known as the "prevailing factor test." Under today's "one iota" method of entry, if the employee can show "one iota" of difference in their body caused by the workplace injury, that worker will be compensated. HB 2134 establishes provisions which state that the workplace incident must be THE prevailing factor behind the injury.

Second, this bill reverses several court cases which significantly altered the intent of the work comp system. We start by fixing the *Bergstrom* case. Employees again have a good faith obligation to find work. If they do not find work, a judge can impute a wage for them. Next, we address the *Tyler vs. Goodyear* case. There must be a nexus between the workplace injury and the wage loss. The *Fernandez* case is also corrected. You must be eligible for a valid contract of employment to be eligible for work disability.

While these are a few of the highlights of positive changes for employers, we also should focus on the changes taking place in this legislation which benefit the injured worker. The business community was

willing to increase caps to benefit legitimately injured workers. This legislation raises the Permanent Partial and Permanent Total caps by \$30,000 each. The death benefit also increases from \$250,000 to \$300,000.

Additionally, not only do we address unfair court decisions for the employer, but also the *Casco* decision for the injured worker, which took a bilateral injury from a "body of the whole" injury to a "scheduled injury" resulting in significantly less benefits for the worker. This legislation will essentially reverse that case.

In conclusion, many long hours of negotiations took place to craft what the business community feels is a fair compromise for both sides, and we would ask for your support in passing HB 2134.

Thank you,

**Associated Builders and Contractors, Heart of America Chapter**  
**Associated General Contractors of Kansas**  
**Builders' Association of Kansas City**  
**Greater Topeka Chamber of Commerce**  
**Kansas Agri-business Retailers Association**  
**Kansas Association of Ethanol Processors**  
**Kansas Association of Insurance Agents**  
**Kansas Building Industry Association**  
**Kansas City Chapter, Associated General Contractors**  
**Kansas Contractors Association**  
**Kansas Chamber of Commerce**  
**Kansas Cooperative Council**  
**Kansas Grain and Feed Association**  
**Kansas Hospital Association**

**Kansas Livestock Association**  
**Kansas Restaurant & Hospitality Association**  
**Kansas Roofing Association**  
**Kansas Self-Insurers Association**  
**Kansas Society of Human Resource Management**  
**Lenexa Chamber of Commerce**  
**National Federation of Independent Business/Kansas**  
**Northeast Johnson County Chamber of Commerce**  
**Overland Park Chamber of Commerce**  
**Topeka Independent Business Association**  
**Wichita Independent Business Association**  
**Wichita Metro Chamber of Commerce**



To: Representative Anthony Brown, Chair, and Members  
House Committee on Commerce and Economic Development  
From: Kevin McFarland, President  
Date: February 7, 2011

## Testimony in Support of House Bill 2134

The Kansas Association of Homes and Services for the Aging (KAHSA) represents 160 not-for-profit nursing homes, retirement communities, hospital long-term care units, assisted living facilities, senior housing and community service providers serving over 20,000 older Kansas every day.

The KAHSA Insurance Group (KING) is a group-funded workers' compensation pool that provides workers compensation insurance coverage and loss prevention services for 60 KAHSA members. KING has been in operation for over 20 years.

We ask for your support of House Bill 2134. Primarily because of recent poor court decisions (Bergstrom) the cost of work disability claims have skyrocketed and have increased the workers compensation premiums to Kansas nursing homes because of rising experience modification factors. The bill protects and reinforces fairness in the workers' compensation system. An important provision of the bill is that it clarifies that it is the employer's responsibility for medical expenses and lost wages that result from a job related injury and not pre-existing conditions the employee brings to work.

As large employers in many Kansas communities the cost of workers' compensation is a significant expense for nursing homes and retirement communities. Approximately 50% of reimbursement to Kansas nursing homes for the care of elders comes from the state Medicaid program. Without changes offered in the bill the state's cost for Medicaid reimbursement may also increase. House Bill 2134 provides reforms that will protect workers who are legitimately injured through the course of their employment and make the Kansas workers' compensation system less likely to be abused.

Thank you for your favorable consideration of House Bill 2134.

785.233.7443  
kahsainfo@kahsa.org

fax 785.233.9471  
217 SE 8th Avenue  
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Kansas Economic Progress Council  
Suite 200  
212 West 8<sup>th</sup>  
Topeka, Kansas 66603

**Testimony on HB 2134  
House Commerce & Economic Development Committee  
February 7, 2011**

Good afternoon, Mr. Chairman and members of the committee. Thank you for the opportunity to submit testimony today in support of House Bill 2134, a bill which would enact comprehensive workers' compensation reform

I'm Bernie Koch with the Kansas Economic Progress Council, a statewide not for profit organization of businesses, trade associations, and chambers of commerce. We support pro-growth policies for communities and the state.

Our organization believes that reliable legal systems are a significant basis for economic growth. These systems provide dependable enforcement of private contracts, protection of private property rights, effective law enforcement and an absence of corruption. Part of our legal system which the government wisely chose to implement has been the workers' compensation system, a method of fairly compensating workers who are injured on the job. The system is really an agreement between business and labor to avoid constant legal actions when a worker is injured.

We also support public policy which encourages economic freedom, the freedom of business to operate as reasonably as possible, unfettered by unnecessary bureaucracy.

We believe House bill 2134 deals with both of these important basics of a free enterprise system: a reliable legal system and economic freedom. Our policies for 2011 support "stability and certainty in the state's workers' compensation system. KEPC supports changes to clarify court decisions which have eroded previous reforms."

Both business and labor/trial lawyers have been holding private negotiations to update this sometimes complicated, but important system. We urge your serious consideration of House Bill 2134 and its ultimate passage.

*The Kansas Economic Progress Council is a not for profit designed to draw together organizations and businesses interested in advancing sound public policy in Kansas to enhance our state's quality of life.*

**Kansas Economic Progress Council**  
**www.ksepc.org**  
212 SW 8th Avenue, Suite 200  
Topeka KS 66612

**Written Testimony before the Committee on  
Commerce and Economic Development**

**February 7, 2011**

**House Bill No. 2134**

**Presented by Roy T. Artman  
Kansas Building Industry Workers Compensation Fund**

The Honorable Chairman Brown and Distinguished Committee Members:

I would like to thank you for the opportunity to address the committee on House Bill No. 2134. My name is Roy T. Artman and I'm here today as a representative of the Kansas Building Industry Workers Compensation Fund (Fund). I serve as general legal counsel to the Fund and work directly with it's claims department. In this capacity, I represent the Fund in all litigated claims before the Division of Workers Compensation. As to my background, I graduated from Washburn University School of Law and have been practicing since 1991. During this time, I have represented employers , group funded entities, injured workers, as well as the Kansas Workers Compensation Fund.

Although House Bill No. 2134 contains a plethora of changes in the workers compensation arena, I would like to confine my comments to the proposed revision of K.S.A. 44-501(b)(1) C) as it pertains to the use or consumption of alcohol or drugs by an employee. The proposed amendment states that "it shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed. The confirmatory test cutoff levels are then listed for each drug with their respective nanograms per milliliter. (ng/ml).

The Fund's concern with the proposed amendment is that it does not account for or reflect the scientific and technological advances in the area of chemical screening. The standards listed in the proposed legislation are for that of urine screening only and do not account for Hair Follicle or Saliva swab testing. The confirmatory cutoff levels for these alternative methods of testing are much different than what is listed in the proposed legislation. I have attached a copy of the Drug Test Cutoff Levels for urine, hair follicle and saliva swab testing for your consideration.

On behalf of the Fund, I would ask that the Committee consider amending the proposed legislation to include the appropriate confirmatory test cutoff levels for hair follicle and saliva swab testing.

Again, thank you for your consideration and the opportunity to address you today. I would be happy to answers any questions by the committee.



The tables below are compiled from public-domain information in the Mandatory Guidelines for Federal Workplace Drug Testing Programs. They are for urine analysis of the commonly-abused types of drugs known as the "SAMHSA Five."

### Drug Test Cutoff Levels for the (EMIT) Test

Drug	Nanograms per Milliliter (ng/ml)
Marijuana metabolites	50
Cocaine metabolites	150
Opiate metabolites <sup>1</sup>	2000
Phencyclidine (PCP)	25
Amphetamines <sup>2</sup>	500

<sup>1</sup> Labs are permitted to initial test all specimens for 6-acetylmorphine at a 10 ng/ml cutoff

<sup>2</sup> Target analyte must be d-methamphetamine and the test must significantly cross-react with MDMA, MDA, and MDEA

### Drug Test Cutoff Levels for the (GC/MS) Test

Drug	Nanograms per Milliliter (ng/ml)
Marijuana metabolite <sup>1</sup>	15
Cocaine metabolite <sup>2</sup>	100
<i>Opiates</i>	
Morphine	2000
Codeine	2000
6-acetylmorphine <sup>4</sup>	10
Phencyclidine (PCP)	25
<i>Amphetamines</i>	
Amphetamine	250
Methamphetamine <sup>3</sup>	250
MDMA	250
MDA	250
MDEA	250

<sup>1</sup> Delta-9-tetrahydrocannabinol-9-carboxylic acid

<sup>2</sup> Benzoyllecgonine

<sup>3</sup> Specimen must also contain d-amphetamine at a concentration  $\geq 100$  ng/ml

<sup>4</sup> Labs test for 6-acetylmorphine when the morphine concentration exceeds 2,000 ng/ml

**Drug Test Cutoff Levels for the (GC/MS)  
Hair Follicle Test**

<b>Drug</b>	<b>picoograms per Milliliter (pg/ml)</b>
Marijuana metabolite <sup>1</sup>	1
Cocaine metabolite <sup>2</sup>	300
Opiates	500
Phencyclidine (PCP)	300
Amphetamines	300
/ Methamphetamine <sup>3</sup>	300
MDMA (Ecstasy)	

<sup>1</sup> Delta-9-tetrahydrocannabinol-9-carboxylic acid

<sup>2</sup> Benzoylecgonine

<sup>3</sup> Specimen must also contain d-amphetamine at a concentration  $\geq 100$  ng/ml

**Drug Test Cutoff Levels for Saliva Swab  
Testing**

<b>Drug</b>	<b>nanoograms per Milliliter (ng/ml)</b>
Marijuana (THC)	2
Cocaine metabolite <sup>2</sup> /	30
Benzoylecgonine	
Opiates / Morphine	30
Phencyclidine (PCP)	50
Amphetamines	50
/ Methamphetamine <sup>3</sup>	50
MDMA (Ecstasy)	

<sup>1</sup> Delta-9-tetrahydrocannabinol-9-carboxylic acid

<sup>2</sup> Benzoylecgonine

<sup>3</sup> Specimen must also contain d-amphetamine at a concentration  $\geq 100$  ng/ml

**Notes**

6-acetylmorphine (6-AM) is a heroin metabolite and also called 6-monoacetylmorphine (6-MAM). 6-AM is rapidly metabolized to morphine, so will not likely be detected in most urine specimens. But of course, morphine will likely be detected after recent heroin use. Because codeine is a naturally-occurring alkaloid in the opium poppy juice that is the source of morphine and heroin, it too might be in the urine of heroin users.

Codeine is rapidly metabolized and excreted in urine as codeine, morphine, or both. Morphine is a metabolite of codeine, but not the other way around, so ingestion of morphine will not account for the presence of codeine.

The chemical names for the most-common forms of amphetamines are d-amphetamine and d-methamphetamine.

MDMA, MDA and MDEA are methylene-dioxy derivatives of amphetamine and methamphetamine. They are the so-called "designer drugs" commonly known as Ecstasy, X, XTC, etc.

An analyte is the substance for which the lab is testing (analyzing).