ANALYSIS OF THE KANSAS WORKMEN'S COMPENSATION LAW

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CHAPTER I

INTRODUCTION

"The cost of occupational injuries must be borne by someone. Too often it has been borne mostly or entirely by the injured worker and his dependents. Generous employers and philanthropists have in the past done something to alleviate the suffering and distress of those injured, but generosity cannot be expected to do much, certainly not enough. There must be legal recourse for damages suffered."[1]

It is the purpose of this paper to trace in broad outline the pattern of legal recourse from the once accepted common law precepts to the present day workmen's compensation legislation. More specifically, the author will then look at certain facets of the Kansas Workmen's Compensation Act, including coverage, benefit structure and problem areas. The author will also examine various proposals of government, labor and management groups for improving, expanding and modernizing the act. It is not the purpose of this paper to critically analyze such proposals, only to present them to stimulate creative thinking.

The sources of information used were books and pamphlets, relative to workmen's compensation, written by private individuals, and by governmental, labor and management groups. The sources also included Kansas court cases, and the Kansas Workmen's Compensation booklet published by the Kansas Workmen's Compensation Department.

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[1]Domenico Gagliardo, American Social Insurance, Harper & Brothers, 1955, p 360.

Two basic questions that must be answered before commencing, however, are:

(1) Why do we have workmen's compensation?

(2) What are the objectives to be attained from workmen's compensation?

The answer to the first question is that industrial injuries are costly. They are costly to the employee in lost wages and in physical and mental well-being. They are costly to the employer in terms of wasted man power, increased costs of production and loss of profits. They are costly to society in both economic and humanitarian terms. Workmen's compensation by itself, cannot prevent injuries, but it may help reduce the number of injuries by encouraging employers to introduce safety programs. In a more direct fashion, workmen's compensation eases the lot of injured workers and their families, and outlines the legal liability of the employer.

The answer to the second question, as to the objectives of workmen's compensation, is to provide remuneration and economic rehabilitation of the occupationally injured. Marshall Dawson, an eminent workmen's compensation scholar, outlines the objective as follows:[2]

(1) to pay certain, prompt, and reasonable compensation to victims of work accidents;

(2) to eliminate delays, costs and wastes of personal injury litigation;

(3) to study and attempt to reduce the number of accident cases rather than to conceal them;

(4) to provide prompt and adequate medical treatment; and

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[2]Marshall Dawson, Problems of Workmen's Compensation Administration in the United States and Canada, Bulletin 672, U.S. Department of Labor, Bureau of Labor Statistics, Washington, D.C., 1940, pp 5-6.

(5) to provide rehabilitation for workers unable to return to their former jobs.

This question might also be answered in more formal economic terms by examining the objectives of any relief and social insurance program. The objectives advanced are:[3]

(1) to prevent any person in this country from having to exist in need or want;

(2) to guarantee to each person or family in this country an income sufficient to provide a living in accordance with a standard deemed suitable by the legislature;

(3) to keep the economic system functioning at something approaching a maximum level of production by redistributing part of the purchasing power through the "social security" system; and

(4) to use the "social security" system as a device to equalize the distribution of income.

How well workmen's compensation fills the need of the industrially injured, and attains the objectives attributed to it, will now be examined in more detail.

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[3]Lewis Meriam, Relief and Social Security, The Brookings Institute, 1946, p 558.

CHAPTER II

HISTORY OF WORKMEN'S COMPENSATION

Introduction

Workmen's compensation is a relatively new concept. Until the eighteenth century the craftsmen and his apprentices worked with hand tools. Accidents to workers were comparatively few and slight. Then came the advent of power-driven machinery and the beginning of the vast movement from the home to the factory. There was a tremendous increase in the frequency of industrial accidents.

Early statutes sought to require the employer to provide safe tools, enforce adequate safety rules and instruct workers properly regarding the dangers of their employment. But the injured workmen's only remedy was at common law. Under common law the workman fared poorly as the employer has three important defenses: contributory negligence--the employer had no responsibility if the neglect of the employee contributed to the cause of the accident; fellow servant rule--an employer could not be held liable for injury caused by the neglect or carelessness of fellow employees; assumption of risk--the employee was presumed to have accepted the risks of his occupation and his wages were presumed to have taken these risks into account.

Examination of Common Law Defenses

While upon first reading, these defenses appear reasonable and proper,

several cases will indicate the untenable position of the working person. In the Wager case[1] a girl worked for a candy company for some six months in the latter part of 1924, "in a damp, unsanitary, unventilated cellar," where she contracted tuberculosis. Suing for damages, she was awarded a verdict of $2,000 by a trial court, but this award was reversed by a higher court. The judge in his opinion said:[2]

> The plaintiff was fully aware of the conditions under which she worked, and continued in the employment from June to December in spite of such knowledge. It is from her testimony that we learn that the walls of the cellar were wet to the touch; that a cesspool backed up liquids which wet the floor; that the cellar was devoid of windows to light or air it; that dead rats were left about; that the odors were vile; that no fires were kept in the upstairs room; that the plaintiff worked in a drafty place; that the upstairs room was damp. It is common knowledge that such conditions are deleterious to health. The plaintiff was chargeable with such knowledge. We think that the plaintiff, as a matter of law, assumed the risk attendant upon her remaining in the employment, and that the recovery may not stand.

In Dow v. Kansas,[3] a railroad brakeman, Dow, was injured while coupling freight cars, allegedly because the conductor carelessly, negligently and unskillfully conducted the train, and he sued for $25,000 damages. He alleged everything necessary to recover except that he did not allege that the railroad was negligent in employing or retaining the conductor whose action caused the injury. Because negligence was not proved the district court held for the railroad. Dow appealed this ruling to the State Supreme Court. The attornies for the railroad in this appeal action prepared an elaborate and able brief, citing leading authorities on both sides of the question, apparently because they wanted to establish the fellow servant rule in Kansas. The court specifically

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[1] Wager v. White Star Candy Co., 217 N.Y. Supp., 173 (1924).

[2] Ibid.

[3] Dow v. Kansas Pacific Rly Co., 8 Kan. 642. (1870).

noted that more solicitude was entertained concerning the question involved, and in the precedent to be established, than concerning the case itself.

In an exceedingly brief opinion, considering the importance of the question involved, the court held for the company. "It is probable," said the court, "that both authority and reason are with the defendant." Why so? Because it is the "policy of the law to make it to the interest of every servant or agent of the railroad company to see that every other servant or agent of the company is competent and trustworthy." Workers are in the best position to know who is incompetent and careless, and either they should inform the company "of every act of any other employee showing a want of skill, care or competency," or they should quit. If an employee is willing to work with an incompetent or untrustworthy fellow worker without informing the company, "let him bear the consequences." And if he is willing thus to endanger the lives of other human beings, "he deserves punishment."[4] This reasoning showed but little understanding on the court's part of modern industry and of the position occupied in it by the worker.

Thus the employees, in order to recover damages, had to establish negligence on the part of their employers, a negligence which the courts, for the most part, refused to recognize. The injured worker, therefore, either failed to recover any remuneration for his injury, or the judgments against the employers were so large as to bankrupt them. In addition, many of the cases that did reach the courts were subjected to long, costly legal action which the worker could ill afford.[5]

By the end of the nineteenth century it finally became apparent that

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[4] Ibid.

[5] Arnold Weber, Workmen's Compensation In Illinois, ILIR Bulletin 25, University of Illinois, 1955, p 5.

industrial accidents were due largely to the inherent danger of the employment and that personal blame could not be fixed for every industrial accident. With the acceptance of this philosophy many people concluded that the problem of compensation for injured workers was a responsibility which must be borne by industry. Thus the idea of workmen's compensation developed. It is, in essence, that those injured in industrial accidents shall be compensated without regard as to fault, and that the cost of compensation shall be borne by industry. This cost shall be borne not because the employer is responsible for the injury, not because he caused it, not because he was negligent, but simply because of social policy.

Development of Workmen's Compensation Legislation

Workmen's compensation, as we know it, was founded in Europe. Germany enacted a general compensation law in 1885 under the support of Bismarck. England followed suit in 1897, but with several important differences; in Germany employers were required to insure their risks and employees were required to pay part of the cost, whereas in England employers were merely made liable, the entire cost was placed upon the employer, and administration was left up to the courts. Americans were influenced more by the English than by the German act, largely because the German act was designed to fit into a highly centralized totalitarian type of government differing greatly from British-American democracy.[6]

Maryland is generally credited with the first workmen's compensation act in the United States. In 1902 it provided that in mining, quarrying, steam and street railways, and in the excavation and construction of sewers

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[6]Domenico Gagliardo, op. cit., pp 384-385.

and other physical structures for municipalities, dependents of those killed in accidents would be paid $1,000 without proof of negligence. The insurance commissioner was authorized to extend the act to any industry he deemed it prudent to include, and to exempt any company making better payments than those provided by law. After slightly less than two years, the act was declared unconstitutional by a Baltimore court, on the grounds that it gave the insurance commissioner judicial powers and also deprived individuals of the right to trial by jury. The decision was not appealed.[7]

In 1908, President Theodore Roosevelt succeeded in bringing about the enactment of a compensation law for certain categories of Federal employees. Samuel Gompers, president of the American Federation of Labor, claimed that the bill was passed "wholly and solely through the activities and at the expense" of his organization.[8] The Federal act covered civilian employment in government manufacturing establishments, arsenals, navy yards, river and harbor fortification construction, hazardous construction work for the Isthmian Canal Commission, and in the reclamation or management of arid lands. Injured workers, after a fifteen-day waiting period, or their dependents in case of death, were allowed one year's wages. Compensation was payable when the injury arose out of or in the course of employment, unless the injury was due to the worker's negligence or misconduct. Although limited in scope and benefits, it was nevertheless the first real American workmen's compensation law. In 1910, New York passed a compulsory act applicable to eight enumerated especially hazardous occupations. This act was declared unconstitutional in 1911, but in 1913, New York amended its constitution to authorize the enactment

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[7] Ibid., pp 386-387.

[8] Proceedings of The American Federation of Labor Convention, 1909, p 27.

of a compensation law which was held constitutional by the U.S. Supreme Court in a 1917 decision.[9] After the Federal act of 1908 and New York act of 1910, the movement gained momentum. State commissions, The National Civil Federation, The National Association of Manufacturers, The American Bar Association, and the American Federation of Labor all threw support behind the movement. In 1911, five laws became effective, the following year nine more became effective, 1913, eight more, and four more in 1914. Thereafter the movement spread until it has now covered all states,[10] Mississippi being the last to enact workmen's compensation legislation in 1948.

In most states employers automatically covered under workmen's compensation are not allowed to use common law defenses. Employers are generally held responsible for workmen's compensation damages for injuries incurred on the job, unless they can prove that the worker deliberately injured himself. The objective of the act is to partly compensate the workman for wages lost as the result of his disability, but they in no way attempt to pay him any civil damages for his injury.

The Kansas Workmen's Compensation Act, as adopted in 1911 and subsequently amended in 1927 and 1939, follows the basic principle of workmen's compensation that those injured in industrial accidents shall be compensated without regard as to fault. The general policy in Kansas is to interpret the law liberally, and this has resulted in awards in the majority of cases involving heart attacks. For the fiscal year 1961, total benefits paid by 172 self-insurers and 202 insurance companies, authorized to write workmen's

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[9] N.Y. Central R.R. Co. v. White, 243 U.S. 188 (1917).

[10] Domenico Gagliardo, op. cit., p 387-389.

compensation business in Kansas, was approximately $11,470,000, as compared to a total of $117,395 reported paid for the fiscal year 1928.[11]

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[11] History of Workmen's Compensation - Kansas, Office of The Kansas Workmen's Compensation Director, 1962, p 1.

CHAPTER III

PROVISIONS OF THE KANSAS ACT

The major provisions of the Kansas Workmen's Compensation Act, as of May 1, 1963, will now be examined. These provisions were obtained from the Kansas statutes, and from the Kansas Workmen's Compensation booklet prepared by the office of the workmen's compensation director.[1]

Coverage

The Kansas Workmen's Compensation Law has both "automatic" and "elective" coverage provisions. Employers in certain hazardous industries, who have 5 or more employees at the time of an injury are automatically covered, i.e., they are presumed to be covered unless they have otherwise elected not to be. These employments include railway and motor transportation lines, factories, mines or quarries, laundries, etc. In addition, mine and building work employers are "automatically" covered without regard as to the number of workers employed.

Any employer in any trade or business, not "automatically" covered, may "elect" to come under the act. This would include public and quasi-public employers, farmers, taxicab operators and any other trade or business not specifically described and covered under the act.

The Kansas act covers legally employed minors under 21 years of age. The

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[1]The sources used were Chapter forty-four, Article five, General Statutes of Kansas, 1949, and amendments thereto, and Workmen's Compensation Law, State of Kansas, Office of the Workmen's Compensation Director.

act also covers the employment of minors under 14 years of age in violation of the child labor laws. The benefit structure in both cases is the same as for "adult" workers. For those workers covered under the act, benefits are paid only if the injury arose out of and in the course of employment.

Certain occupational diseases are covered under the Kansas act. The diseases so covered are specifically listed in the act,[2] and benefit scales are the same as for accidental deaths and injuries.

Benefits

There are three distinct types of benefits payable under the Kansas act. The first type of benefit pertains to medical expenses, the second type to cash benefits payable for fatal injuries and the third type to cash benefits payable for non-fatal injuries. These will be discussed in the order listed. The author will then discuss benefits applicable to injuries to minors and females. the second injury fund in relation to benefit payments and finally the general question of civil damages.

Medical Benefits

It is the duty of the employer to provide the services of a physician or surgeon and such medical, surgical and hospital treatment as may be reasonably necessary to cure and relieve the workman from the effects of an

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[2]There are twelve disease classifications listed in the Kansas act. They are poisoning, anthrax, blisters, Brucellosis, compressed air illness, Conjunctivitis, Dermatites, x-ray or radio-active exposure, Erysipeloid, Nystagmus, Synovitis and Silicosis. It should be noted, however, that many of the disease classifications are specifically limited in coverage. For example, Brucellosis covers employment in milk plants, packing plants or butcher shops only. Another example is the poisoning coverage which is limited to poisoning from specific compounds as listed in the act.

injury. This service and treatment includes nursing, medicines, medical and surgical supplies, ambulance, crutches and apparatus, and transportation to and from the home of the injured workman to a place outside the community in which he resides as may be reasonably necessary to cure and relieve the workman from the effects of the injury. The total cost of such treatment and services cannot exceed $6,000, or 120 days, except in exceptional cases as determined by the director.

Death Benefits

The employer liability for the accidental death of a worker, leaving a dependent wholly dependent upon his earnings, is three times his average yearly earnings. There is a limitation on this liability however, the upper limit being $13,500, and the lower limit being $2,500. These amounts are further reduced for any previous payments made under the act on account of any injury from which death eventually occurred.

If the worker leaves no dependents who are citizens of, or are residing in, the United States at the time of the accident, the amount of the compensation is limited to $750. If the deceased worker leaves a dependent who was only partially dependent upon him, the amount of compensation is limited to the percentage of support given, times the average annual earnings of the deceased for the two year period prior to death.

Death benefits, as determined by the director of the Workmen's Compensation Commission, may be paid on a weekly basis, or in a lump sum settlement at the rate of 95 percent of the amount of the liability redeemed. In the latter case, however, weekly payments under the award must have been made for at least six months prior to the date of settlement. Computation of the lump-sum settlement would be as follows: total death benefit, reduced by the weekly

payments already made, times 95 percent. If the lump-sum settlement is not made, the award can be paid in installments at a "maximum" rate of $42.00 per week, and a "minimum" rate of $7.00 per week.

In addition to the above benefits, the employer is liable for reasonable expense of burial, up to a maximum of $600.

If a workman has received an injury for which compensation is being paid to him, and his death is caused by other and independent causes, any payment of compensation already due him at the time of his death shall be paid directly to his dependents, or to his legal representatives if he left no dependents. The liability of the employer for the payments of compensation not yet due at the time of the death, i.e., compensation that would have been paid to the worker during the duration of the injury had death not occurred, shall cease and be abrogated by his death.

After recovery of death benefits under workmen's compensation, the family of the deceased worker cannot bring legal action against the employer. They may, however, sue a third party. For instance, if a worker in driving an automobile in the course of his employment is hit by another automobile and killed, the family of the deceased may sue the other driver for damages. However, upon recovery of damages, the employer is entitled to recover the compensation he has paid to the family, provided the civil damages equal or exceed that amount. For a further discussion of this point see the civil damages section on page 17.

Injury Benefits

For accidental injury not resulting in death, cash benefits are payable under four sets of circumstances; total permanent disability, partial permanent disability, temporary total disability and temporary partial disability.

Where total permanent disability results from the injury, no compensation is paid during the first week, except that necessary for medical expenses. After the expiration of the first week, the worker receives a payment equal to sixty percent of his average weekly earnings, but in no case less than $7.00 per week, nor more than $42.00 per week. The payments of the compensation for total permanent disability is limited to a period not to exceed 415 weeks from the date of injury.

The loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, will, in the absence of proof to the contrary, constitute total permanent disability. In addition, substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, constitutes total permanent disability. In all other cases total permanent disability is determined on a case by case basis.

The benefit structure for total temporary, partial temporary and partial permanent disability is the same. The injured workman is entitled to the compensation necessary for medical expenses, but is not entitled to any other compensation during the first week following the injury. Thereafter, compensation is paid as provided in the act, based on average weekly wages, the sum being equal to 60 percent of the average weekly earnings of the injured workman. In no case, however, can less than $7.00 per week, nor more than $42.00 per week, be paid. The period of time for which benefits are paid varies according to the type of injury.

If a workman has suffered a previous disability and later suffers an additional injury, the effects of which together with the previous disability result in total permanent disability, then the compensation due the workman will be the difference between the amount provided in the act for his prior injury, and the sum total which would be due the workman for such total

disability computed as provided in the act; but in no case less than $7.00 per week nor more than $42.00 per week. In any case the total amount of compensation that will be allowed or awarded an injured workman for all injuries received in any one accident, will is no event exceed the compensation provided for in the act for total permanent disability.

Benefits to Minors and Females

Where a minor or his dependents are entitled to compensation under the provisions of this act, such compensation is exclusive of all other remedies or causes of action for such injury or death. No further claim or causes of action against the employer can be sustained by the parent or parents of such minor employee on account of the loss of earnings, or loss of services, of the minor employee. The foregoing rule is also applicable in the case of an injury to, or death of, a female employee. The surviving husband, or any other relative, can make no claim on the employer other than a claim for normal workmen's compensation benefits.

Second Injury Benefits

The second injury fund law is designed to encourage employers to hire workmen who have already sustained a previous loss, or loss of use, of an eye, arm, hand, leg or foot. The law applies to these members of the body only, and where the injury, by reason of an additional loss, or loss of use, of any of these members of the body, results in total permanent disability. Where such additional loss occurrs, the employer is liable to the workman only for the amount provided in the act for the member of the body lost. The second injury fund is liable for the remaining amount due for total permanent disability, less the amount provided in the schedule set forth in the act for

his prior disability.

The second injury fund was originally financed by a transfer of $25,000 from the State of Kansas general fund. The fund has been subsequently financed by a $500 assessment placed on every employer covered under the act, where death has resulted from an injury incurred in their particular employment, provided there are no dependents who are entitled to compensation under the act. These assessments are effective until the fund is declared "ample" by the director, which according to the act is the point where the fund totals $50,000.

Civil Damages

The fact that civil damages have been paid by a third party to an injured workman does not relieve the employer of his liability to pay workmen's compensation. However, the employer is entitled to recover the compensation he had paid to the workman provided the civil damages equal or exceed that amount, and provided he protects his lien in the civil action. The fact that workmen's compensation has been paid by an employer is no defense to the third party in any civil suit against him. Moreover, the interest of the employer or his insurance carrier usually may not be shown in any such third party action.[3]

Financing

In Kansas the payroll tax method of financing is not used. Instead,

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[3]This allowing of an employer to recover payments made under workmen's compensation has been attacked by the Kansas AFL-CIO. Their argument is that the civil damages includes an allowance for pain and suffering which is not allowed under workmen's compensation. The employer is, therefore, placed in a more advantageous position for potential future recovery. See page 66 of the Appendix.

the full financial liability for meeting workmen's compensation benefits is assessed against the employer by requiring him to insure this risk. In Kansas this risk may be insured with a private insurance carrier, or the employer may follow a program of self-insurance if he can satisfy the director of his ability to do so.

Administration

Office of Workmen's Compensation

The office of workmen's compensation is supervised by a director who is appointed by the governor for a period of four years. The office has the following powers, duties and functions:

1. Determining if an injury is covered by the Kansas law.
2. Determining the nature and extent of the injury.
3. Determining the amount of compensation and medical care to which the injured worker or his dependents are entitled, in many cases using the formulas established by the Kansas State Supreme Court.
4. Seeing that payments are made regularly and in accordance with the law.

The director is assisted in his duties by five part time examiners and one full time examiner. These examiners are presently limited to hearing cases in specific geographical areas. The examiners findings are final unless appealed to the director for rehearing, or unless appealed to the applicable district court within 20 days after the decision.[4]

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[4]Parties interested in the Kansas Workmen's Compensation Act have made several recommendations relative to these examiners. These recommendations include the hiring of more full time examiners with increased or full time pay (see pages 59 and 63 of Appendix), and the allowing of examiners to hear cases in any area of the State dependent upon workload, rather than specific geographical areas (see page 60 of Appendix).

Employer's and Employee's Election

Every employer and employee, entitled to come within the provisions of the act, is presumed to have done so, unless either of the two parties elect in writing to the contrary. Thereafter any such employee or employer desiring to change his election may do so by filing a written declaration with the director. The employee in such a case must give a duplicate copy of the declaration to his employer, and for the recovery of a claim, the notice must have been filed thirty days prior to an accident.

Defenses

Common law defenses are not available to an employer when the injured employee is properly covered under the act. However, common law defenses are available to the employer when the employee has elected not to be covered by the act. None of these defenses are available when the injury was caused by the willful negligence of the employer.[5]

Claim Proceedings

The first step in "claim" proceedings is for the injured worker, or his representative, to give written notice to his employer within ten days after the accident demanding workmen's compensation. The want of such notice, or any defect therein, however, will not bar recovery unless the employer can prove that he has been prejudiced thereby. Actual knowledge of the accident by the employer renders the giving of notice unnecessary. To sustain the

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[5]It is possible for a worker in Kansas to elect to be covered under the act, but to waive the benefits applicable thereunder. This waiver has been attacked as inequitable by the Kansas State Federation of Labor, AFL-CIO. See page 69 of Appendix.

action a written claim must then be given to the employer within one hundred eighty days after the accident, or within one year after the death of the injured employee if death results from the injury within five years after the date of the accident.

In occupational disease cases, written notice should be given the employer within ninety days after the date of disablement or death, and claim filed with the director or served on the employer within one year after such disablement or death.

Report of Accident

The employer must report to the director every incapacitating injury known to him within seven days after such injury. If death results subsequent notice must be given the director within forty-eight hours after receipt of knowledge of the death. Failure to make such reports will result in a fine of not more than five hundred dollars on each offense.

Settlement Agreements

The Kansas act provides for two methods of closing claims for compensation due on agreements between the injured workman and his employer's representative. These methods are "final receipt and release of liability" and "joint petition and stipulation." The "final receipt and release of liability" is a settlement agreement covering all compensation paid, and should not be taken until the disability has terminated. The form itself is made up in such a manner that the director can determine if proper compensation has been paid. If compensation paid is not proper the director will disapprove settlement. The "final receipt and release of liability" settlement agreement can be set aside, under the law, within a year on grounds of

mutual mistake or inadequacy of compensation. To preclude the setting aside of a settlement the parties may wish to appear before the director to obtain his approval for the compensation due. The award of the director, being final and conclusive would preclude any subsequent litigation by the parties. The procedures to be followed in such a case would be for the parties to prepare a "joint petition and stipulation" in advance of the hearing and present it to the director for approval, or the director, by his form of interrogation of the parties at the hearing, will cause the record to show such a "joint petition and stipulation."

Contested Cases

In instances where the parties cannot reach a settlement as regards workmen's compensation, the case may be submitted to a committee, representative of both parties, specifically organized for the purpose of settling disputes under the act. The committee may be ad hoc, or permanent, and its membership is determined by agreement between labor and management. Either party may refuse such a committee hearing by giving written notice to the other party. In such cases appeal would be made directly to the workmen's compensation director.

If a case is submitted to a committee, and if the committee cannot reach an agreement within 30 days of the submission of the claim, the matter may be referred to an arbitrator agreed upon by both parties. If the parties cannot agree on the specific person to arbitrate the dispute, the matter is referred to the workmen's compensation director.

All matters submitted to a committee, an arbitrator, or the director, must be heard and the findings or award made within 30 days after submission

of the matter to such committee, arbitrator or director. The parties, however, may agree in writing to extend the time of filing findings or awards. There is no limitation in the act on the duration of such an extension.

Conduct of Hearing

The hearings conducted by the director are called "proceedings" and not "trials." All such "proceedings" are informal for the benefit of the workmen. Technical rules of procedure are not invoked. However, since the award may be appealed to the district court and thence to the supreme court, sufficient formality is maintained to insure that the record, which goes up on appeal, shall be in a form comparable to that obtained by a regular legal trial. This is necessary so as to afford those who must review the record a fair opportunity for a judicial review.

Pretrial Stipulations

Before any evidence is submitted in any hearing, whether it be a hearing on a settlement agreement or a disputed case, a "pretrial" hearing takes place. The purpose of such a hearing is to define the specific issues involved by taking certain stipulations necessary to establish jurisdiction on the part of the director, the identity of the parties, the venue, and certain other facts required by law. Weekly wages, compensation paid and medical and hospital expenses incurred are normally established at this time. If the parties cannot agree to a settlement at the pretrial hearing, the stipulations and issues are formally placed in the record.

Burden of Proof

Following the stipulations and the determination of the issues in the hearing, the claimant must then put into the record his evidence to support his claim. If the issues are in dispute the claimant has the burden of proving the following:

1. that his injury resulted from an accident, or his disability from an occupational disease;
2. that the accident or disability arose out of and in the course of his employment;
3. that he gave notice and served a claim as required by law;
4. his average weekly wage;
5. the medical and hospital expense which he has incurred, if he is claiming reimbursement for same; and
6. the nature and extent of his disability.

If there is any alleged defect in the notice the respondent has the burden of proving what prejudice he sustained as a result of the defect in the notice.

The placing of the burden of proof upon the claimant is a serious shortcoming of the Kansas act, and will be discussed fully in the next chapter.

Hearing of all Questions

On an appeal the reviewing court is limited to the record, and no additional evidence can be taken during such review. Very often a respondent contending that the director does not have jurisdiction, or that the parties are not governed by the law, will rest his case. If the claimant then proceeds to make a prima-facie case as to his accident, and the extent of his disability, this will be the only evidence concerning these matters which the

reviewing court will have before it in the record. Consequently, if the respondent loses his main contention he will then be bound by all of the evidence presented in the prima-facie case. This is equally true of the other party. Therefore, in a hearing on a disputed case, the parties should be prepared to submit whatever evidence they have on all of the questions in issue.

Evidence

Pertinent medical and hospital records may be introduced in evidence. Medical reports, however, cannot be received into evidence unless all parties agree. When the claimant is requested to submit to examination by the respondent's medical examiner, the claimant has the right to have his own doctor present at such examination and can have him testify with respect thereto. The claimant also has the right to receive a copy of the medical report by the respondent's doctor, upon his request to the doctor for a copy within fifteen days after the examination. This request may be enforced through application to the director.

If the claimant refuses a medical examination his right to compensation is suspended until he submits to the examination. If the refusal is made while proceedings are pending for determining the amount of compensation due, the proceedings are dismissed.

Appeals

Any party to the proceedings may appeal from any and all decisions, findings, awards, or rulings of the director to the district court of the county where the cause of action arose. The notice of appeal must be given to the director within twenty days after the decision being appealed was

made and filed by the director. The director will immediately transmit a certified copy of this notice to the clerk of the district court who will place the action on the docket. The appeal action has precedence over all other hearings except those of like character, and will be heard no later than the first term of the court after the appeal has been submitted.

Appeals as to questions of law may thence be made to the supreme court. Notice of such appeals must be given the clerk of the district court within twenty days after the final order of the court. The clerk of the district court will then immediately transmit a certified copy of the notice to the clerk of the supreme court. This appeal, just as a district court appeal, has precedence over all other hearings except those of like character, and will be heard no later than the first term of the court after the appeal has been submitted.

It should be noted that the injured worker must hire the attorney for such appeals, and bear all costs attached thereto. This appears to be another serious shortcoming of the Kansas act, and will be discussed more fully in the next chapter.

CHAPTER IV

PROBLEM AREAS AND RECOMMENDATIONS APPLICABLE THERETO

The Kansas Workmen's Compensation Act has several problem areas and many shortcomings in application. The problem areas are primarily centered in the definition of the term accident and in the definition of the phrase "out of and in the course of". The shortcomings in application concern the "coverage" of casual workers, the exclusion of certain employers through a numerical exemption, the deficiencies in second injury fund coverage and in occupational disease coverage, and the deficiencies in the benefit structure. These problem areas and shortcomings will be examined in detail along with recommendations applicable to these areas. The Kansas act will also be compared to standards of coverage and application as envisioned by the U.S. Department of Labor.

PROBLEM AREAS

What are Accidental Injuries

The workmen's compensation act specifies that employers are obligated to compensate workmen for "personal injury by accident arising out of and in the course of employment". Six elements are necessary to prove "personal injury by accident". The injury must have been undesigned, sudden, unexpected and unforeseen, afflictive or unfortunate in nature, often accompaned by force, or traumatic in origin, and the time, place and circumstances must be such

that the injury could have occurred in the manner claimed.

In practice, it is exceedingly difficult to draw a fine line between accidental and nonaccidental injuries. A look at four court cases will indicate the court's approach to this problem. In a 1950 case[1] a man suffered a hernia while bending over to tie his shoe lace while changing clothes after "checking-in" for work. The court held that the worker had suffered a compensable accident because the act was undesigned and had an unexpected result. In this particular case, the court looked at the result as accidental and not the means.

In another case[2] a carpenter suffered a coronary occlusion, i.e., the heart failed to get sufficient nourishment. He went to work the next day with this condition and died of a heart attack caused by physicial exertion. The court ruled that the heart attack was an "accident" as it was not an expected result of what the carpenter had been doing, i.e., a heart attack would not have been expected from the performance of his normal work-load. The court, therefore allowed the widow to recover death benefits under workmen's compensation.

In a third case[3] a roofer remained in one position all day and then could not stand up. There was no fall or strain involved. The court once again ruled that the worker had suffered a compensable accident.

In the fourth case[4] a man lost his hearing because of repeated trauma, i.e., shock. This man had to practice continually on a pistol range, and the

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[1] Kauffman v. Co-operative Refinery Assn., 170 Kansas 325 (1950).

[2] Workman v. Johnson Bros. Construction Co., 164 Kansas 478 (1948).

[3] Bender v. Salina Roofing Co., 179 Kansas 415 (1956).

[4] Winkelman v. Boeing Airplane Co., 166 Kansas 503 (1949).

repeated noise allegedly caused the loss of hearing. Once again the ruling was a compensable accident.

It appears from the above cases that the court interprets the act rather liberally in determining accidental injury. In fact, injury which results from the aggravation of a pre-existing condition may be classified as an accidental injury[5]. If the legislature agrees with the court interpretation of injury as indicated above, the definition, per the law, should be amended to include injuries being the result of preceding unusual acts, since the courts in most cases look to the results, and not the causes, of a particular happening. The agreement of definitions and consistent application thereof is, of course, highly desirable from the standpoint of both the employer and employee. Much of the confusion and delay in attempting to determine whether an injury is covered under the act could be eliminated[6].

Arising "Out of and in the Course of" Employment

The words "arising out of and in the course of employment" are defined as follows: "out of" relates to the causal connection between the employment and the accident; "in the course of" relates to the time, place and circumstances of the injury, as during working hours and upon the employer's premises. The "arising" provision attempts to establish a connection between the accident, the work the employee was hired to do, and the conditions surrounding his job. The "arising" provision, however, has been the source of much dispute in the administration of workmen's compensation, in that if

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[5] Hall v. Kornfeld - Harper Well Servicing Co., 159 Kansas 70 (1944).

[6] A detailed explanation of the problem and consequences of the court interpretation of the term "accident" can be found on pp 70-72 of the Appendix.

the claim is disputed, the burden of proof is on the employee[7]. The main areas of controversy are in the interpretation of the meaning of the phrases "in the course of" and "out of" employment.

In the course of. There are five problem areas in defining the phrase "in the course of". They are the "going and coming" rule, the zone of employer's responsibility, the continuity of employment, the bunkhouse rule and temporary detachment and deviation. These will now be examined in detail.

Going and coming rule. The court has interpreted this rule to mean that injuries arising out of travel to and from work are not compensable. There are, however, four exceptions to this rule: (1) where the employment requires the employee to travel on the highways, such as the performance of sales work, repair work, etc., (2) where the employer contracts to furnish transportation, (3) where the employee is subject to emergency calls, and (4) where the employee uses the highway to do something incidental to his employment, with the knowledge and approval of his employer. Two cases will illustrate the courts approach in this area. In the first case[8] an employer paid an employee for travel time and the employee had an accident going to work. The court held that the employment started at the time the employee left home, and that the employment required the use of the highway. In the second case[9] an employee in a grain elevator, with no regular hours of employment, went home one evening and a storm came up. He was called and told to return to the elevator to

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[7] The Kansas AFL-CIO have made a very detailed study of this "arising" problem. For a discussion of the problem, court cases and recommendations, see pp 63-75 of the Appendix.

[8] Crawford v. Atchison, Topeka and S.F. Rly Co., 166 Kansas 163 (1948).

[9] Abbott v. Southwestern Grain Co., 162 Kansas 315 (1947).

close some doors. He was returning to the elevator when an accident occurred. The court ruled that the injury was not compensable, in that the employee was on his way to perform work. To be compensable, an injury must occur in the course of employment. It would appear that a broader interpretation of the "in the course of" phrase would be called for in the second case. The employee would certainly not have suffered the accident had it not been for his employment, and apparently he was subjected to emergency calls.

Zone of employer's responsibility. Any injury must occur on the employer's premises to be compensable. Two cases will illustrate the courts interpretation of this concept. In the first case[10] a claimant was working at an ordnance plant doing construction work for his employer. He parked his car in the ordnance plant parking lot and starting walking across the lot when he was struck by a bus. The court ruled that the accident was not compensable because the claimant was on his way to work, and was not on his employer's premises.

It would appear that this interpretation by the court might invite some criticism, in that the worker, in this particular case, would not have been exposed to the danger, and subsequent injury, had he not been involved in his employer's business. The employment specifically placed the worker within a zone of danger and he was injured.[11]

In the second case[12] the claimant clocked in early to work; started to change clothes and fell. The court ruled that the injury was a compensable

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[10] Harrison v. Lozier-Broderick & Gordon, 158 Kansas 129 (1944).

[11] The Kansas AFL-CIO has attacked this interpretation by the courts as being unsound. See p 67 of Appendix.

[12] Taylor v. Hogan Milling Co., 129 Kansas 690 (1930).

accident as it occurred on the employer's premises.

Continuity of employment. It has been interpreted by the court that the course of employment is not broken because of "acts of ministration", such as rest periods and coffee breaks, by a servant to himself accomplished on the premises and consistent with his employment. A case[13] that will illustrate the broad interpretation of this concept involves a claimant who was injured while going to another part of the building to pay a personal debt. The court held that the accident was compensable for two reasons: (1) in this case it was customary for the employer to allow employees to be called from work to pay debts, and (2) the trip was incident to the worker's employment.

Bunkhouse rule. The court has held that injuries to employees are compensable when they are required to live on the premises and are continually on call, or "risk" is distinctly associated with the premises. When compensation is denied, it is generally on the theory that the activity was too personal. An illustration of a denial of a claim because of "personal" activity involved a claimant who lived on respondent's land, in a seven room house, as part of his compensation for feeding and otherwise caring for respondent's cattle. The claimant was hurt while chopping wood for fuel for his own use. The court ruled that no recovery would be allowed because the accident was not "in the course of" employment[14]. Once again it would appear that this interpretation might be criticized in that the worker would not have sustained the injury except for the fact that he was employed at this

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[13] Corpora v. Kansas City Public Service Co., 129 Kansas 370 (1929).

[14] Schooley v. Swanson, 147 Kansas 758 (1938).

particular job, and was in a sense "required" to "live in" since lodging made up part of his compensation. It would appear to be doubtful, in any case, that a worker could afford to live somewhere else when the level of compensation has been reduced to give consideration for furnished lodging.

Temporary detachment and deviation. Recovery for injuries suffered while deviating from "work" is dependent upon the facts of the particular case, i.e., custom, relation to work, etc. An illustration of one case[15] where the court allowed recovery involved an oil field worker, who, during a work lull, started working on his personal auto. In the course of this repair work his clothing ignited due to an inflammable substance on his clothing. The court allowed recovery for three reasons: (1) it was the custom for employees to work on personal autos when not busy, (2) it was also the custom for personal autos to be used in furtherance of the employer's business, and (3) the work was incident to his employment.

Out of. To have a compensable injury it is not enough that the injury occurrs when one is engaged in a particular employment, there must also be some causal relationship, i.e., something happened because of something I was doing in the course of my employment, because I was exposed by the nature of my employment to some peculiar danger. Three cases will illustrate the courts approach, and apparent contradiction in application, in this area. In the first case[16] a railway ticket agent was slugged and killed. No other facts were known. The court held that this was a compensable accident since the employment of the agent invited the assault. In the second

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[15] Hilyard v. Lohmann-Johnson Drilling Co., 168 Kansas 177 (1949).

[16] Phillips v. Kansas City, L. & W. Rly. Co., 126 Kansas 133 (1929).

case[17] a traveling salesman was driving to another county and ran into an electrical wire which killed him. The salesman was out of his territory at the time, but the court felt that the "going and coming" rule was not applicable in that the salesman was not going to a "factory". The court also felt that the salesman was in the course of employment. They therefore held that the death was compensable. The court said that the salesman was killed by human means (wire), and that his employment exposed him to the risk. The third case reflects the apparent discrepancy in court interpretation of the "out of" phrase. In this case[18] a salesman, in the course of his employment, was driving along a highway when someone threw a rock from an overpass, which struck his windshield, and put out an eye. The court disallowed the claim for compensation because the employment in no way provoked the attack. This ruling appears to be a direct contradiction of the "law" recognized in the second case.

In addition to the problem of interpretation of the "out of" phrase itself, there are also three "proof and knowledge" problem areas that the court must resolve in determining if a case arose "out of" employment. The first of these problems involves altercations and assualts. The Kansas law looks to the knowledge of the employer relative to the behavior of the employee as to whether that employee is likely to have altercations, i.e., habitually bad conduct. It would appear that proof of such knowledge would be extremely difficult to come by. The second of these problems has to do with proscribed conduct. Under this concept certain types of conduct on the job will preclude recovery of compensation due to an injury. Such

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[17] Kennedy v. Hull & Dillon Packing Co., 130 Kansas 191 (1930).

[18] Covert v. John Morrell & Co., 138 Kansas 592 (1933).

conduct would include intentional self-infliction of injury, willful failure, or refusal to wear safety devices and injury caused by intoxication. Once again there would appear to be a problem of proving such conduct, especially intoxication. The third problem area involves "horseplay". There are four general situations of "horseplay" which are covered and specified in the act. In the first of these, the employer knows, or ought to know of the existence of a "custom" of horseplay, and an innocent party is injured. A court case will illustrate the court's interpretation of this section. In this case[19] a claimant was injured by a prank in which fellow workers hooked an electrically charged wire to an iron door on the employer's property and the employer's foreman was a participant in the prank. The claimant was severly shocked when he came in contact with the door. The court held this to be a compensable accident due to evidence submitted which proved that such pranks had become a "custom", and thus an incident of employment. The court held that knowledge by the foreman of the pranks was notice to the employer. The second of the "horseplay" problems is where the employer knows, or ought to know, of the existence of a "custom" of horseplay, and the participant is injured. An illustrative case[20] in this area involves a seventeen year old girl who, after eating her lunch, participated with other employees in accordance with a "custom" of riding on a truck; a custom which the employer knew of and approved. The girl was injured. The injury was held to be compensable. The court cited the following reasons: (1) the foreman had given permission, (2) eating of lunch on the premises was an advantage to the employer, and injury had therefore occurred in the course of the employment,

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[19] White v. Kansas City Stock Yards Co., 104 Kansas 90 (1919).

[20] Thomas v. The Proctor & Gamble Mfg. Co., 104 Kansas 432 (1919).

and (3) the play engaged in had become a "custom", and therefore the injury arose out of the employment. The third "horseplay" problem is where there is no knowledge of such "custom" by the employer and an innocent party is injured. A court case[21] illustrating this concept involved a claimant who was engaged in mixing mortar to repair boilers. After attaching a bucket to a rope to be hoisted, he looked up and was struck in the eye by some mortar. The claimant supposed, but did not know, that a fellow workman, who had a reputation of playing pranks and jokes, threw the mortar. The court held this to be a recoverable accident since the workman was injured by an accident arising out of and in the course of employment, even though he could not explain how it happened. The last "horseplay" problem is where there is no knowledge of such "custom" and an active participant is injured. An illustrative case[22] involving this concept is where a claimant, during a lull in work, was engaged in horseplay with fellow employees in trying to lift a heavy roll of paper over his head. He was injured. The foreman had previously told them to leave the paper alone. The court disallowed any recovery in that the injury was not sustained out of and in the course of employment. The court held that the accident occurred because of horseplay in which the employee was voluntarily engaged and unrelated to his work, and that the action was not "custom" and disapproval of the practice had been voiced by the foreman.

While all of the areas of horseplay, and applicable illustrating court cases, appear to be quite clear and specific in application, there also appears to be a real basic underlying problem. This problem has to do, once

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[21] Stuart v. The City of Kansas City, 102 Kansas 307 (1918).

[22] Neal v. Boeing Airplane Co., 161 Kansas 322 (1946).

again, with subjective "proof" and "knowledge". In many cases it would appear that these two elements would be extremely difficult to prove.

Casual Employment Covered

Kansas usually accepts casual employees as being covered under the act. An employee is excluded, however, if the work was not, in itself, hazardous; and if the work performed was not in the regular trade or business of the employer. These elements of exclusion are pointed out in a case[23] where a woman owned a building which she rented to two tenants. She hired two workers to perform certain repair work to this rental property. One of the workers, while doing this repair work, was killed. The owner was sued for workmen's compensation benefits by the worker's dependents. The court, however, would not allow recovery. The court held that the workers did indeed fall within the realm of the act, that although five employees are normally required for an employer to be "covered", "building" was involved, i.e., rapair work, and therefore the minimum requirement for workmen's compensation coverage, as regards the number of employees, was not applicable. The court also held that the workers fell into the realm of the act even though casual employment was involved. However, the court ruled that to recover under the act the work must be in the employer's trade or business, and the employer's trade in this case was renting of property, not building. Therefore recovery was not allowed.

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[23] Setter v. Wilson, 140 Kansas 447 (1934).

Number of Employees Problem

The Kansas act applies only to employers employing five or more workmen, within the state of Kansas, at the time of the accident. These five workers must be "exposed" to the hazard to be covered. The only exceptions apply to mining and building. In these areas the act applies without regard to the number of workmen employed, or the period of time employed. Three court cases will illustrate the court's approach in this area. The first case[24] involves a company which had four men in their repair and maintenance shop, and ten clerks in the office. One of the workers in the repair shop was injured and sued for workmen's compensation benefits. The court held that the company was not covered since the act requires five or more individuals participating in the "hazardous" part of the business. In the second case, however, the court made a contradictory ruling. In this case[25] a rock quarry had four people working in the quarry, and one woman clerk in the office. A truck driver was killed in the performance of his work and his widow sued for workmen's compensation benefits. The court held that the company was covered under the act as the woman in the office would be considered part of the hazardous employment, and the widow was allowed to recover. The act, according to the courts interpretation, does not require the person to be engaged in the hazardous employment, only five in the hazardous line. In the third case[26] a man owned and operated a grain elevator. He decided to build an addition, at the time employing less than

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[24] Thorp v. Victory Cab Co., 172 Kansas 384 (1952).

[25] Mitchener v. Daniels Stone Co., 187 Kansas 767 (1961).

[26] Johnson v. Voss & Verhage Grain & Implement Co., 152 Kansas 586 (1940).

five employees, and one of the workmen on the addition was killed. The court would not allow the widow to recover because the "building" was outside the course of the employer's trade or business.

Occupational Diseases

Death or incapacitation due to an occupational disease is covered under the Kansas act, subject to the following qualifications: (1) the disease must be specifically listed in the act, (2) the disease must have resulted from the nature of the employment in which the employee was engaged, (3) the disease has to be actually contracted while so engaged, (4) there is attached to the job a particular hazard of such disease that distinguishes it from the usual run of occupations, and is in excess of the hazard of such disease attending employment in general, and (5) disablement occurrs within one year after the last injurious exposure or three years for silicosis; or seven years from last exposure for death if there has been continuous disability.

The question arises as to what happens when a worker works for several different employers in the same line of work and becomes disabled. In Kansas the award is made on the basis of the last employment where exposed, rather than on a proportionate basis. It is not known how the recovery would be made if the "last" employer was not covered by the act.

The problems that arise by excluding certain diseases, and the reasons for their exclusion, will be discussed in the "recommendations" section.

Second Injury Fund

A second injury fund is a special fund set up within the administrative framework of the workmen's compensation system to insure that an employer who

hired a handicapped worker will not, in the event such a worker suffers a subsequent injury on the job, be responsible for a greater disability than actually occurred while the worker was in his employment. Under such a system the employer pays only the benefits that are due for the second injury. However, the employee is fully protected because the fund pays the difference between what he actually receives from the employer and what he would have received for his resulting condition if there had been no prior disability. By removing an employer's fear of increased workmen's compensation costs, the second injury fund enhances the employment opportunities of disabled workers. By paying the worker full benefits for his resulting disability they free him from the need and humiliation of seeking charity for himself or his family. The coverage of a second injury fund may be broad enough to protect workers with many types of prior disabilities --, as, for example, polio, epilepsy, arthritis, heart disease, or diabetes; or it may be so narrow that it applies only to such handicaps as the loss, or loss of use, of a hand, arm, foot, leg, or eye. The Kansas act provides for the latter type of coverage.

Benefits

The Kansas act was originally designed to pay the injured worker sixty percent of his weekly wage as benefits. However, the act also sets a maximum weekly benefit rate of $42.00, a rate just passed in the 1963 legislature. This action on the part of the legislature, however, did not go far enough. In many cases the worker is still precluded from receiving a sixty percent recovery. In fact, the average weekly wage in Kansas in 1960 was $85.41.[24]

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[24] State Workmen's Compensation Laws: A Comparison of Major Provisions With Recommended Standards, Bul. 212, U.S. Department of Labor, Dec. 1961, p35.

This would indicate that the ratio of maximum weekly benefits to average weekly wages is 49.1 percent based on the 1960 average weekly wage. The same type of problem exists as to death benefits. Under the Kansas act death benefits paid to dependents should be equal to three times the employee's average yearly earnings. However, again there is a maximum of $13,500, which in certain cases will negate a "three times" recovery. If the goal of the act is to provide a sixty percent recovery for injuries suffered, and a "three times" recovery in the case of death, the act should be amended and the maximum " dollar amounts" eliminated. It is recognized that the elimination of such dollar amounts might create a problem as regards "high-salaried" professional workers, i.e., the level of benefit payments would be higher with a resultant increase, to some extent, in insurance premiums. However, if one considers that the purpose of workmen's compensation is to allow the injured worker and/or his dependents to maintain a certain basic standard of living to which they had become accustomed, then the increases should be allowed. This would then become an additional social cost which, in this writer's opinion, should be borne by industry, just as are present workmen's compensation benefits.

Another problem in the area of benefits concerns payments made for total permanent disability. Under the present act such payments are made for a period of only 415 weeks. There can be no justification for such a time limitation as a total permanent disability will continue forever; it will not cease to exist at the end of 415 weeks. Justice would dictate the elimination of this "time" limitation. Another area of concern in the total permanent disability realm has been indicated by the AFL-CIO.[25] This area of

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[25] See p 67 of Appendix.

concern involves scheduled injuries and compensation therefor. The AFL-CIO cites the example of a right-handed carpenter, who knows no other trade, and loses his hight hand. They contend that this person is as totally disabled as if he had lost both hands, and should receive compensation on such a basis. It might be added that the AFL-CIO argument is certainly strengthened when one considers that Kansas has no provisions for rehabilitation of an injured worker.

RECOMMENDATIONS APPLICABLE TO THE KANSAS ACT

Some recommendations relative to the Kansas act have already been made in the process of listing and analyzing the preceding problem areas. A recap of these recommendations, and others not previously analyzed, will now be made.

The first recommendation is for a more descriptive and positive definition of the term "accident". As indicated in the problem area section, there is now apparently a discrepancy between the written law, and the court interpretation thereof. An "agreement" as to the definition of an accident between court and written law is desirable in that much of the confusion and delay in attempting to determine if an injury is covered under the act could be eliminated. An example of the court's problem in determining workmen's compensation coverage involves a worker in a cement plant who was found bleeding from his mouth and nostrils[26]. He died soon after. The employer defended against the claim for compensation by arguing that there was no evidence that the workman had suffered an accident. The court ruled that "the word accident does not have a settled legal signification ..... an

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[26] Gilliland v. Cement Co., 104 Kansas 771 (1919).

accident is simply an undesigned, sudden and unexpected event, usually of an afflictive or unfortunate character, and often accompanied by a manifestation of force ..... In this instance all the characteristics of an accident were present ..... the fact remains, however, that an unforeseen thing suddenly and unpremeditately occurred." The court then ruled in favor of the widow's claim. In this particular case if the term "accident" had been "properly" defined, there would have been no need for a long and costly court action.

The second recommendation applies to the phrase "arising 'out of and in the course of' employment". The application of this phrase in workmen's compensation cases, as presently written, is extremely difficult and highly subjective. As indicated in the discussion of this problem herein, there are extremely difficult judgments that must be made as regards "knowledge" and "proof". In addition, it appears that the strict interpretation of this phrase results in "too narrow" an application of the law in certain cases. These cases would involve injuries which, while strictly speaking, did not arise "out of" employment, but certainly did arise "in the course of" employment. Two cases, Abbott v. Southwestern Grain Co., page 29, and Covert v. John Morrell Co., page 33, were cited in the problems section, to illustrate this delimma. The recommendation in this area involves the substitution of the word "or" for the word "and" in the phrase "out of and in the course of" employment[27]. This would expand application of the act; and make the courts job easier in applying the act in that it would eliminate the necessity for that body to conjure up an interrelationship which in many cases should not be applicable. The recommendation relative to the "knowledge" and "proof" problem areas

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[27]This recommendation agrees with that advocated by the Kansas AFL-CIO. See p 63 of Appendix.

would be along the lines of more specific wording in the act to let both parties know exactly where they stand. For instance in the White v. Kansas City Stock Yards Co. case cited on page 34, in which the court held that notice to the foreman was notice to the employer, it appears that an undue burden was placed on the shoulders of the employer. In this day of big business and separation of owners and managers, the court's interpretation seems ill-conceived. "Wording" in the act could preclude such an interpretation. Another example is the problem of intoxication. It is extremely difficult to prove, or disprove, such a state. Possibly the act could be amended to call for some sort of drunkenness test to prove or disprove intoxication. This test would be required whenever an accident takes place where the employer believes this to be the causing factor, i.e., the employer would have the right to call for such a test, which would be given while the worker is being treated for the injury.

The third recommendation pertains to "casual" employees. The Kansas act appears to be too narrow in its interpretation of this section. The problem arises because the work must be performed in the "regular" trade or business of the employer. It would appear that most casual employment is outside the realm of "regular" business, i.e., repair and construction work, etc. I would recommend that the act be amended to include all casual workers, whether engaged in the employer's regular trade or business or not, i.e., if the injury was caused in the course of work being performed for an employer, and if all the other requirements of the act are met, then the worker should be allowed recovery.

The fourth recommendation applies to the number of employees needed for coverage. As was noted earlier, the Kansas act applies only to employers

employing five or more workers, within the state of Kansas, at the time of the accident. It is difficult to see why the number of employees should affect coverage. For instance, the danger inherent in a manufacturing operation would be the same whether a concern has one, five or fifty employees. This requirement, it would seem, has no basis for justification and should be eliminated from the act.

The fifth recommendation concerns occupational diseases. The Kansas act covers only those diseases specifically listed in the regulation. The law should be expanded to cover all diseases incurred in the performance of one's work. It would appear to be extremely difficult to justify the exclusion of any job inflicted diseases from workmen's compensation coverage. The main reason for such exclusion, in the writers opinion, is political in nature. Business pressure groups have apparently succeeded in narrowing this coverage, and in so doing have escaped the social costs which society has attempted to place on them. These groups have then shifted this burden to society as a whole, in that someone, or some group, must take care of the sick individual and his dependents. For the fact remains that this individual is indeed a "cost" to society.

Another problem area concerning occupational diseases is that it is not known how recovery for an occupational disease would be made if the "last" employer was not covered under the act. The act should call for some proportionate recovery from prior employers when this happens.

The sixth recommendation is for the expansion of coverage in the second injury fund. At the present time the act is limited in coverage to the loss, or the loss of use, of a member of the body. It does not protect other disabilities such as heart disease, arthiritis, etc., even though these

ailments may constitute just as complete and permanent a disability as the loss of a member of the body.

Seventh, I would recommend that benefits be expanded, at least to the sixty percent level envisioned in the act. As noted previously, the maximum weekly payment of $42.00 results in a present percentage recovery of 49.1 percent, based on the 1960 average weekly wage paid in Kansas. Needless to say, $42.00 per week cannot possibly sustain a family at even a minimum of subsistence. As Paul Samuelson has noted,[28] approximately $2,500 is needed in annual income to sustain a "bare subsistence" level of living. "Bare subsistence" is defined as a level of living with no movies, no meat, no dental care, no newspapers, little clothing, and so forth. Kansas, in paying $42.00 per week in benefits, pays $2,184 on a per annum basis, approximately $300 less than what is needed for "bare subsistence". It would seem reasonable to conclude, therefore, that Kansas has not eliminated the economic and mental burden placed on an injured worker. It would also seem reasonable to conclude that these workers must rely on charity from neighbors, relatives and philanthropic groups in order to "exist". Of course it must be recognized that a "bare subsistence" level of living will vary from state to state.

Eighth, I would recommend that the cost of appeals of workmen's compensation decisions and rulings be borne by the State. It goes without saying that in many cases the worker can ill-afford the expense involved in appealing a finding or award.

The ninth recommendation concerns "burden of proof". On page 21 the author listed the six elements that the injured worker must prove when an

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[28] Paul Samuelson, Economics: An Introductory Analysis, McGraw-Hill, 1961, pp 113-114.

issue is in dispute. These included the proving that his injury resulted from an accident, that the accident or disability arose out of and in the course of employment, etc. Needless to say this placing of the burden of proof upon the injured worker violates the entire principle of workmen's compensation laws. This principle is that any worker injured on the job, regardless of fault, is entitled to a certain level of benefits so that he and his dependents can maintain a certain basic minimum standard of living. These benefits are to be paid as quickly as possible so that the hardships caused by the accident will be blunted. The principle of the Kansas act apparently is that the worker is entitled to "timely" benefits only if he can prove certain things, bringing in elements that were not envisioned by a theoretically sound and just workmen's compensation act. I would recommend that these "burden of proof" areas be eliminated, or placed on the shoulders of the employer, who in most instances would be in a better position to prove or disprove certain issues than the employee.

In addition to the above recommendations, certain "standards" as reflected in a bulletin[29] prepared by the U.S. Department of Labor should be adopted. These "standards" have been recommended by the U.S. Department of Labor, International Association of Industrial Accident Boards and Commissions, American College of Surgeons or the Council of State Governments. The standards so recommended are: (1) compulsory coverage, (2) provisions for rehabilitation, (3) revamping of medical procedures and benefits, (4) revamping of filing and waiting periods, (5) expansion of certain benefit payments, and (6) judicial review.

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[29]State Workmen's Compensation Laws: A Comparison of Major Provisions With Recommended Standards, Bul. 212, U.S. Department of Labor, Dec., 1961, p 35.

The first standard recommends compulsory coverage as opposed to the elective coverage provision which Kansas presently has. This standard precludes the necessity of the employee instigating a costly damage suit if the employer elected not to be covered. In addition, coverage should be expanded to cover all agricultural workers. There can be little justification for their exclusion. Agricultural workers are indeed engaged in hazardous occupations.

The second recommendation calls for the payment of maintenance benefits during rehabilitation, and the establishment of a rehabilitation division within the workmen's compensation division. The purpose of this new division is to provide the facilities, the procedures and the building force necessary to once again make the injured worker a productive segment of the economy. To allow the worker the opportunity to undergo such rehabilitation training, maintenance benefits should be paid so that the worker could sustain himself and his family. This recommendation is extremely important when one considers the dollar and time limitations, as regards benefits, imposed by the Kansas act.

The recommendation relative to medical procedures and benefits first of all calls for the initial medical treatment and care to be at the hands of a physician selected by the worker. At the present time, the initial selection is made either by the employer or the insurance carrier. This recommendation would grant to the worker a certain peace of mind, and probably would generate more cooperation on the part of the worker with regard to the relationship with the physician. Secondly the recommendation calls for supervision of the medical care so proffered by the workmen's compensation agency. This is to insure and achieve maximum restoration of

the injured worker with a minimum of delay. Thirdly the recommendation would allow full medical benefits for accidents and occupational diseases. As set forth previously, Kansas benefits are limited to $6,000 and/or 120 days, whichever occurrs first. Medical benefits should, of course, be paid to the worker in such amounts, and over such a period of time, as is necessary to restore the worker physically and mentally. The question that arises, of course, is what happens to the worker when these limits are reached. Certainly treatment must be continued. Therefore, once again, the worker is forced to rely on charity, help from neighbors, relatives, friends and philanthropic groups, to become well and a productive segment of the economy. The social cost that business should bear is again shifted to society as a whole.

The fourth recommendation relative to the revamping of filing and waiting periods concerns the adoption of a flexible period for filing an occupational disease claim, and a reduction in the waiting period for benefit payments. As to the first point, it is recommended that the time limitation for the filing of occupational disease claims should be at least one year after the date when the employee has knowledge of the nature of his disability, and its relation to his job. The purpose of this provision is that a substantial period of time may have passed after the date of exposure, or a substantial period of time may pass before the condition is diagnosed as a disease that occurred as a result of employment. As previously noted, Kansas requires that notice be given the employer within ninety days after disablement or death, and a claim filed with the director or served on the employer within one year after such disablement or death. The second point calls for reduction in the waiting period for not more

than three days with retroactive benefits after two weeks or less. This recommendation is made to keep the waiting period to a minimum, thereby lessening the financial burden of the injured worker. The retroactive provision reflects the fact that the injury commences with infliction and compensation should commence at the same time. Under the present act, Kansas has a waiting period of one week, with no retroactive provisions.

The fifth standard relative to the expansion of benefit payments applies to four different areas. In the first place benefits would be paid to a widow during her widowhood. This would provide indemnity benefits to the children until they reach eighteen years of age, and after eighteen years of age if they are disabled. The desirability of this recommendation is obvious. The dependent widow and childred are provided for as long as their "need" exists. Also the widow is not forced to leave the home in order to work to provide for her children. In the second area benefits for total permanent disability would be paid for life, or for the period of disability. This recognized the quite obvious fact that the worker will probable have this type of disability for the rest of his life. Kansas presently limits payments for this type disability to 415 weeks, as if after this time the injury is miraculously cured. The third point calls for additional benefits to be paid to illegally employed minors. The recommended standard is for double benefits to be paid such employees. The main argument for this provision is that it is an impetus to the maintenance of standards set by child-labor laws to protect young workers from unsafe or hazardous employment. It would therefore protect the young worker from this type of employment, and in case of injury because of disregard of these standards, compensate him to some degree through payment of additional

benefits. At the present time, Kansas only pays "regular" workmen's compensation benefits for such employment. The fourth recommendation states that maximum weekly benefits should be equal at least to 66 2/3 percent of the States average weekly wage. This recommendation is made to provide a maximum weekly benefit rate which would allow an injured worker, and his dependents, to maintain a standard of living above the subsistence level. As previously noted, Kansas, with its weekly maximum of $42.00, pays about 49.1 percent of the 1960 average weekly wage in benefits. This recommendation could be instituted by adopting a percentage maximum, rather than a dollar maximum. The adoption of such a percentage maximum would of course, have the effect of increasing, to some extent, insurance rates. However, once again, it must be remembered that workmen's compensation is a social cost of doing business, and must be paid just as any other expense of doing business must be paid. It is also doubtful that the increase in insurance rates would be an intolerable burden to business, when one considers that in 1960 the estimated cost of workmen's compensation to employers was only .94 percent of the total payroll in covered employment[30].

The last standard states that judicial review should be limited to questions of law. The purpose of workmen's compensation legislation is to take the settlement of claims, in so far as possible, out of the courts. This recommendation gives the administrative agency exclusive jurisdiction over questions of fact, with appeals to the courts then being limited to questions of law only. In Kansas, appeals are not so limited.

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[30]Alfred M. Skolnik, New Benchmarks In Workmen's Compensation, U.S. Department of Health, Education and Welfare, 1962, p 15.

As has been indicated and implied above, the economic consequences of these shortcomings are great. No society can hope to continue to progress and survive if its productive capacity is impaired. When we exclude workers from workmen's compensation because a numerical requirement has not been met, or because of political pressures, when we exclude, for the most part, casual employment, when we limit occupational disease coverage and second injury fund coverage, when we limit injury and medical benefits, when we refuse to rehabilitate an injured worker, society and the economy must suffer. First, there is the damage to a worker's pride and peace of mind, and eventually damage to the moral fibre of society, which will be reflected in the level of productivity attained. Second, the dollar limitation on injury benefits reduces the purchasing power of society, assuming that the average injured worker has a very high propensity to consume. Third, the "time" limitation placed on injury benefits, especially as regards a total permanent disability, places a cost and burden on society since it is quite obvious that someone, or some group, must take care of the injured worker if he is not able to fend for himself. This third point is also applicable to medical benefits, which have a dollar and time limitation. Fourth, by refusing to rehabilitate an injured worker, we are eliminating a factor of production, and what is more, we are allowing a drain on our economic resources, since someone must take care of this individual, which could be eliminated.

In concluding this section, some general mention of the Kansas State Chamber of Commerce recommendations should be made. Their recommendations cover such points as a new simplified formula for determining benefits to be paid, a statute of limitations as regards timely filing for a hearing, autopsies, exchange of medical information, fraudulent representation, etc. A

detailed explanation of these and other points can be found on pages 70 through 76 of the Appendix.

CHAPTER V

CONCLUSION

Workmen's compensation is an accepted element of our society today. The need for such legislation arose because of the increasing complexities of industry, with resultant increases in severity and quantity of accidents, and the inadequacy of the common law concepts. The employer's claiming of contributory negligence, or assumption of risk, or the fellow servant doctrine, too often allowed the employer to escape completely from the payment of injury claims. The employee was forced to fend for himself, and in many cases he had to rely on charity to sustain himself and his family. Workmen's compensation today is designed to prevent such as the above from happening. It calls for the protection of the worker from the hazards of industrial employment, without consideration as to blame.

Workmen's compensation acts, however, are written and interpreted by human beings. They become quickly outdated in the fast pace of the business world. In addition to the problem of antiquation, there also exists the problem of employer pressure groups. These pressure groups exist for the purposes of keeping their particular business enterprise from being covered under the act, or obtaining the most favorable "conditions" possible if covered. In Kansas we find that the legislature in writing, and amending, the act has succumbed in certain cases to these pressure groups. Agriculture is not covered, even though it is certainly a dangerous occupation; employers with less than five employees are for the most part excluded from the act, as

if by some necromancy this smaller number of employees has eliminated or reduced the hazards involved in a particular occupation; the second injury fund has been limited in its application so that it applies only to particular types of subsequent accidents; filing periods are inflexible and do not recognize the complexities involved in determining the nature of a disease or injury; and widows are not provided for during widowhood.

In addition to these shortcomings caused by pressure groups, we find that the Kansas act does not, in certain cases, attain or reach the objectives normally attributed to a good workmen's compensation act. In chapter one the author enumerated five such objectives. The first of these states that a good workmen's compensation act should pay certain, prompt, and reasonable compensation to victims of work accidents. It is difficult to say whether the Kansas act pays certain and prompt benefits. Kansas statistics are not inclusive enough to accurately determine the lapse of time between the filing of the claim and actual payment. However, it has been noted in one publication[1] that the national average lag is about one month. Assuming that Kansas approaches this national average, it must be concluded that the lag is too long. The economic impact upon an injured worker, for such a period of time, would be quite unbearable. It is also interesting to note that the Kansas act has a waiting period of 7 days, i.e., one week must elapse before the payment of compensation indemnity benefits is required. The Kansas act also does not contain a "retroactive" provision if the disability lasts beyond a certain number of days. So the worker, in most cases automatically loses one week's compensation. Also the continued use of the

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[1] Turnbull, Williams and Cheit, Economic and Social Security, Second Edition, The Ronald Press Co., 1962, p 280.

"agreement" method of settling claims leaves open the possibility of defeating intended statutory benefits, and makes it difficult to determine whether or not benefits are paid promptly and with certainty.

As to the reasonableness of benefits it must be concluded that the Kansas act has not accomplished its purpose. As has been noted previously, the Kansas act was originally designed to pay the injured worker 60 percent of his weekly wage as benefits, against a recommended standard of 66 2/3 percent. However, with the dollar limitation imposed by the act the injured worker is precluded from recovering such a percentage. In fact, the present maximum benefit of $42.00 approximates 49 percent of the 1960 average weekly wage. And, as was noted, this $42.00 payment, when compared to recommended budget levels, will not allow an injured worker to maintain a subsistence level of living. In addition to the percentage recovery being below the recommended standard, benefits for permanent disability are limited to 415 weeks. This time limitation is completely beyond reason. If a worker is permanently disabled then benefits should be paid on a permanent basis. The injured worker should not be forced to look to relatives, friends or charitable institutions in order to subsist.

The second objective attributed to a good workmen's compensation act is the elimination of delays, costs and wastes of personal injury litigation. The Kansas act, by introducing the concept of liability without fault, has eliminated many of the delays and costs made necessary by the common law. However, as was previously noted, the Kansas act places the burden of proof on the worker in all issues that are in dispute. In these instances it is doubtful whether the act meets the second objective.

The third objective of any workmen's compensation act is its impetus

in helping to reduce the number of accidents. In Kansas, as in other states, the long-run general trend in accident frequency and severity rates has been downward[2]. There is some disagreement, however, about whether or not workmen's compensation laws have contributed substantially to this trend. There are several reasons, however, why we might assume that it has. First, it is obviously to an employer's self-interest to install safety measures for the prevention of accidents when he is liable for the payment of compensation benefits, or the insurance premiums applicable thereto. Secondly, it is to the self-interest of the insurance carrier to see to the prevention of accidents in companies that they are insuring. Consequently, many compensation carriers allocate a portion of their premium dollar to safety services for their assureds. Finally workmen's compensation systems in themselves make accident control more possible, since the assembly of accident data is a part of their operation.

The fourth objective concerns prompt and adequate medical treatment. The Kansas act meets this objective to some extent. The primary shortcoming of the act is the day and/or dollar limitation relating to medical benefits. At the present time these limitations are $6,000 or 120 days, whichever occurrs first. Medical benefits should, of course, be paid to the worker in such amounts, and over such a period of time, as is necessary to restore the worker physically and mentally. This task should not be placed in the hands of charities or friends.

The fifth objective relates to the problem of rehabilitation. Kansas, at the present time, has no rehabilitation activities whatsoever. Such activities are justified not only on humanitarian grounds, but also on economic

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[2]Turnbull, Williams and Cheit, op. cit., pp 249-253 and p 284.

grounds. In addition to the savings in workmen's compensation benefits which would not now have to be paid to a productive worker, there would also be savings to society as a whole in that another productive element would be in operation. The rehabilitation aspects of workmen's compensation are especially important in Kansas with its 415 week limitation on permanent disability benefits. By limiting benefits, and failing to rehabilitate the injured worker, a burden is being shifted to the workers' friends, neighbors or to philanthropic groups.

There are additional shortcomings in the Kansas act, other than those mentioned above. For instance, there is much confusion surrounding the definition of the term "accident", and in the interpretation of the phrase "out of and in the course of". In both instances the act should be reworded to facilitate the understanding and application of the act. The Kansas act also reflects shortcomings in the coverage of "casual" employees, and in the coverage of workers suffering from occupational diseases. The act, in many cases, really fails to cover casual employees. This is because of the requirement that such workers must be engaged in the employer's regular trade or business in order to recover benefits. Quite obviously most "casual" work would be performed outside of the employer's regular trade or business, being in the nature primarily of repair and maintenance work. As to occupational disease the act specifically enumerates those diseases to be covered. There can be no justifiable reason for such an enumeration and limitation. If a worker is stricken with a disease arising from the performance of his job, he should be allowed to recover workmen's compensation benefits.

An additional shortcoming of the Kansas act relates to its "elective" coverage provisions, i.e., an employer is automatically covered unless he

elects not to be. This means that an injured worker, of an employer who has elected not to be covered, must instigate a costly legal action in order to recover damages or benefits. In other words, we are returning to a pre-workmen's compensation era, i.e., suits for recovery must be brought under common law. Happily there is one main difference, an employer who has elected not to be covered cannot use any of the common law defenses previously analyzed. However, this estoppel gives little consolation to a worker who cannot afford to undertake the lawsuit.

The shortcomings of the Kansas workmen's compensation act analyzed in this paper should be rectified, not only for the sake of humanity and justice, but also for the sake of our economy. In overcoming these deficiencies the Kansas act will then be able to meet the real objectives of any workmen's compensation legislation, which is to provide remuneration for the injured worker or to his family in case of death, so that he will be able to sustain himself and his family at something more than a subsistence level, and to rehabilitate the worker so that he can once again become a productive useful person in our society. It is hoped that the needed changes in the Kansas act will be made in the near future, to the benefit of labor, management and society.

APPENDIX

RECOMMENDATIONS OF INTERESTED PARTIES
IN REGARDS TO THE KANSAS WORKMEN'S COMPENSATION ACT

INTRODUCTION

Many recommendations relative to the Kansas Workmen's Compensation act are made every year. This section includes those proposed by the Bureau of the Budget, The Kansas State Federation of Labor, AFL-CIO, and The Kansas State Chamber of Commerce. These recommendations are copied verbatim from the source documents, or reports submitted, except for The Bureau of the Budget recommendations. The Bureau's recommendations have been summarized, and presented with commentary relative thereto, or action taken, that arose from a personal interview that this writer had with Mr. Fred Rausch, the director of Kansas Workmen's Compensation. All of these recommendations are presented so that a better appraisal and understanding of the act can be had.

Recommendations of
The Bureau of the Budget Dated June, 1960

1. The present examiners are now considered to work part-time. Their rate of pay is $324 to $458 per month (although this is a "full time" rate in the particular classification in which they are presently covered). It was recommended that the salary scales be adjusted and included in a salary range of up to $9,000 per year. With this salary increase the workmen's compensation director's

salary was to increase to $10,000 per year. It was also recommended that the examiners be placed under "Classified" service. Action Taken - In 1962 the director's pay was increased to $10,000; the examiners pay was increased to a maximum of $8,500 (for full-time examiners). The examiners, however, still serve at the pleasure of the director, they are not under "classified" service.

2. It was also recommended that the Office discontinue utilizing the services of Official Court Shorthand Reporters (OCSR) as court reporters, and hire three (or more) qualified stenographers. The OCSR charge $.90 per page for lay testimony and $1.25 per page for medical testimony with certain minimums such as $20 for an informal or friendly hearing (a case in which settlement is sought and finalized). Presently reporters also are charging an appearance fee of $15 in contested cases. Reporter fees ran over $72,000 in fiscal year 1959, and one reporter grossed $38,500. The hiring of stenographers at an anticipated scale of $358-$505 (based on Missouri pay schedules) would result in some savings in this area. Action Taken - None taken. Mr. Fred Bausch, the director, believes that while the idea is good, it would be extremely difficult to hire and retain good reporters on state salaries.

3. A recommendation was also made that the Office exercise more freedom in assignment of examiners, i.e., an examiner should not be limited to hearing cases in set geographical areas as is presently done, but should be assigned as workload requires. Action Taken - None taken. Mr. Rausch said that the problem here is one of travel limitations. He said that it would be foolish to

send an examiner from Kansas City to Goodland, Kansas, to hear a case. He believes that it is best to have the examiner in a specific area, because they know the lawyers etc., and in many cases can get the parties together and arrange a settlement where a stranger could not. Mr. Rausch thinks it is best to handle examiners in a manner similar to judges in a judicial system, i.e., the judge presides in one court only.

4. It was recommended that the Workmen's Compensation Office establish penalties which are more realistic for the late filing of accident reports, and unnecessary continuances of cases. The only present fine is an "up to" $500 fine, for each offense, for not reporting the accident. The reviewing body felt that a $10 per day penalty should be assessed for late filing of accident reports, in that the late filing caused unnecessary work in the office by delays in scheduling, docketing, etc. The $500 fine for not filing would be retained.

   Action Taken - None taken. Mr. Rausch favors this proposal however.

5. It was recommended that the director devote his time primarily to administration rather than in hearing cases.

   Action Taken - Some procedural change has already taken place. In the past the examiners sent in all of their findings to the director who supposedly read all of the cases and then made the award. In 1961, the legislature changed the law - the findings of the examiners are now final, unless appealed to the director for rehearing or unless appealed to the district court within 20 days.

6. It was also recommended that a "cut-down" on excess continuances, sometimes more than a dozen, be made by charging a $10 fee of the party requesting each continuance, unless it was at the pleasure of the examiner. The reviewing body felt that this would reduce the workload of the examiners, and "cut-down" administration costs (especially reporter fees).

   Action Taken - None taken. Mr. Rausch said that his office, at present, has no authority to do this. The legislature would have to act. The problem in this proposal, however, is that many of the claimants are poor and this would be a hardship for them, unless a provision is made to take the charge out of the settlement.

Recommendations of Kansas State Federation of Labor, AFL-CIO, Dated June 12, 1959

1. Delay in the payment of compensation - workmen's compensation cases held before the workmen's compensation director have resulted in much delay in the payment of compensation to an injured employee. Hearings are generally tried piecemeal; that is, a witness testifies, then the hearing is continued to another day for another witness until eventually it is finished and the case is submitted for decision. In some cases many weeks elapse during the progress of the trial. Due to the workload of the director and his staff, some cases are not decided for several months after the case is submitted for decision. During this period of time, many injured workmen have no income whatever, and this creates hardships during this period of time. Many injured workmen actually do accept a

token settlement in order to exist during this period of disability.

Recommendation: Areas of study.

A. The study of the possibility of a penalty in cases that are tried where compensation is not paid during the time the employee is off work prior to an award of compensation.

B. The study of the advisability of requiring a formal hearing to be held and completed within a certain given time and requiring the necessary deposition to be transcribed and submitted to the director and his examiners prior to the day of the formal hearing and further to study the advisability of requiring the director or examiner to dictate his award immediately at the close of said hearing.

C. To study the advisability of full time workmen's compensation examiners, who would be compensated on a full-time basis.

D. To study the advisability of ex parte orders for the payment of compensation pending a hearing and an award similar to the procedure for child support and temporary alimony in divorce cases.

2. The arising problem - there are cases where a claimant receives an injury in the course of his employment, but the injury did not arise "out-of" it, and compensation was denied. There are cases where the claimant suffered injury that arose "out-of" his employment but was not in the "course-of" employment and compensation was denied. In either case the claimant would not have received the injury if not for his employment and in these cases the injured should be compensated.

Example I

Colbert v. John Morrell and Co., 138 Kansas 592 (1933). The claimant was denied compensation although he was injured in the course of his employment. He was driving an automobile and a clod of dirt was thrown into the windshield causing the removal of his eye. He was denied compensation because the clod of dirt did not necessarily arise "out-of" the hazards of the employment.

Example II

Jones v. Lozier, Brodrick and Gordon, 160 Kansas 91 (1945). The claimant's injury arose "out-of" the employment but did not happen "in the course of" it and the claimant was denied compensation. In this case the claimant worked the night shift and was changed to the day shift and was required to go to the personnel office to get a time slip. In reporting to the personnel office, he was struck by an automobile. The court holds that it was sufficiently incidental to the employment to arise "out-of" the employment but did not happen "in the course of" employment. The Supreme Court of Kansas in the recent case of Pinkston v. Rice Motor Co., 180 Kansas 295 (1956), held that it is essential under our present workmen's compensation act that the injured workman prove his personal injury arose "out-of" and "in the course of" employment. The court holds these phrases mean separate things with respect to our statute, and both conditions must exist.

Recommendation: To study the advisability of eliminating in G.S. 1949, 44-501, the "and" between "out-of" and "in the course of employment" and inserting therein the word, "or".

To study the advisability of eliminating the term, "by accident", from the workmen's compensation act and repealing the occupational disease section of said workmen's compensation act and whether the definition of personal injury would, by eliminating the words, "by accident", cover all occupational diseases arising out of the employment.

The Supreme Court of Kansas in Pinkston v. Rice Motor Co., 180 Kansas 295 (1956), at Syllabus 1, defined personal injury as follows: "The term 'personal injury' as used in our workmen's compensation act, G.S., 1949, 44-501 is construed as meaning any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the workmen's usual labor, and it is not essential that the disorder be of such a character as to prevent external or visable signs of its existance."

3. Safety - (G.S., 1949, sections 44-502, 44-564, 44-101 through 108, 44-109, 110 and 44-636) - many injuries arising out of employment are caused by unsafe working conditions. Of the statutes cited, only two are in the workmen's compensation act. They are 44-502 and 564. The other sections are under general labor and industry sections of General Statutes of Kansas. If an employee is injured due to a defect which is in violation of one of these statutes, the employer is liable only for workmen's compensation and not actual damage suffered to the employee.

Example

Bell v. Hall Lithographing Co., 154 Kansas 660 (1942). One issue

in the case was whether the "factory act" applies when an employer was under workmen's compensation. The court held the workmen's compensation act was exclusive and did not permit common law action under the "factory act" above cited, and that he was limited to limited benefits under workmen's compensation.

Recommendation: To study the workmen's compensation act in conjunction with the "factory act" to determine what changes in both might foster the reduction of industrial accidents.

4. Third-party actions - under the present act, if an injured employee is injured by a negligent third party and recovers a judgment against the negligent third party, the law provides that his employer and insurance carrier are subrogated to the amount of compensation paid both previous to and after the date of judgment. The act in question could permit an employer or insurance carrier to recover damages paid to an injured worker by the negligent third party, in which the jury allowed pain and suffering and other elements of damage at common law, which are not authorized in a workmen's compensation award.

Recommendation: To study the possibility of jury verdicts in third-party actions being itemized and the subrogation of the employer and insurance carrier limited to the portion of the judgment that pertains to what is allowed in the award of compensation.

Example

If the jury allowed damages only for pain and suffering there would be no subrogation as compensation is not awarded for pain and suffering.

5. Off the premises accidents - injuries are occasioned by dangerous conditions near the employer's premises, which but for the employment, the worker would not be exposed to the hazard of going to or from work. If the employment brings the employee within this zone of danger and he is injured, he should be compensated therefore.
Recommendation: The advisability of eliminating Subsection (k) from G.S., 1949, 44-508.

6. Scheduled injuries - scheduled injuries and compensation therefor create hardships on many workers who suffer the misfortune of injuries to a member of their body. A right-handed carpenter, who knows no other trade and loses his right hand is as totally disabled as another person who receives an injury to his body and who is unable to perform his trade. A workman who suffers a scheduled injury with the very limited number of weeks allowed in the schedule is compensated not upon his earning capacity, but upon the weeks allowed in the schedule.
Recommendation: To study the advisability of eliminating the schedule of specific injuries or permitting additional compensation to compensate for the actual disability sustained.
To study advisability of changing the method of calculation for compensation under the schedule of specific injuries if not eliminated so that a workman's average weekly wage; that is, earning capacity prior to his accident would be a factor in determining compensation due.

7. Claim for compensation - compensation has been denied in cases to injured workmen who do not file a claim for compensation within the

statutory claim period because they do not know that they suffered personal injury. Compensation is denied when a claim was not filed until the injury is discovered.

Rutledge v. Sandlin, 181 Kansas 369 (1957). The workman was struck in the ribs and the breath was knocked out of him and he was knocked to his knees. He felt no pain and was aware of no injury at this time, which was August of 1954. In May 1955, he did feel a pain and discomfort in that area and was seen by a doctor. An x-ray revealed two fractures of the eighth rib on the right side. It was later discovered there was a malignant tumor, which was caused by the accident. This was removed from the eighth rib. The claimant did not file claim for compensation within the 120 days allowed at that time. He filed it after he discovered his injury. The director disallowed compensation but the trial court allowed compensation holding the fact that the employee was furnished medical treatment after the 120 day period revived the time to file the claim and that the legislature intended the 120 day period to commence to run from the time the injury was discovered. The court held that the statute as it now stands requires the claim to be filed within 120 days from the date of the accident irrespective of when the injury is discovered and compensation was denied.

8. Lump sum awards - reduction of lump sum awards under our present workmen's compensation statute has been held to apply only to permanent awards when as a matter of fact, there is no difference in temporary awards and permanent awards as both are limited to

eight years or 415 weeks. A permanent total award and a temporary total award can be vacated or reduced at a later time under the review and modification statute. G.S., 1949, 1957 Supp. 44-528. This statute provides that any award, except one for a scheduled injury is subject to review and modification. The only apparent difference between temporary total award and a permanent total award is the name. The Supreme Court of Kansas held that the lump sum statute does not apply to awards of temporary disability. See Ross v. Lyttle, 183 Kansas 825 (1958) in the Supreme Court of Kansas. The lump sum statute should be clarified to state that the six months period begins to run from the original award and a new six months period is unnecessary after an award is modified. The statute is not clear and could be interpreted to prevent a lump sum award by a series of applications to review and modify under 44-528, which necessitates another award.

Recommendation: To study the statute pertaining to lump sum awards for the purpose of determining which awards are subject to being reduced to a lump sum and further to study 44-510 for the purpose of determining a difference between permanent and temporary awards of compensation.

9. Waivers - waivers provided in the act can permit unscrupulous employers and company doctors to eliminate workmen's compensation covering their business by withholding an offer of employment unless and until a waiver is signed. This section does not protect the physical handicapped or enhance their chance of employment. A waiver under workmen's compensation is inequitable as it leaves the

men under workmen's compensation without a remedy for negligence at common law as he is still under workmen's compensation with only the benefits waived.

Recommendation: To study the advisability of repealing the waiver provision of section 44-543 and study the advisability of amending G.S., 1949, Chapter 72-4301-12 to provide that the vocational rehabilitation department furnish the employers free of charge, workmen's compensation insurance coverage for any employee with a physical defect. Further, to study the advisability of financing this free workmen's compensation insurance coverage from death cases where there are no dependents and from injury cases where the award is terminated by the death of the employee by requiring the respondent or insurance carrier to pay a percentage of the award which would be due had the deceased employee left dependents or injured workman lived.

Recommendations of The Kansas
State Chamber of Commerce, Dated June 11, 1959

1. Personal injury caused by accident 44-501

Problem: The term "accident" applied to a personal injury covered by the Kansas Workmen's Compensation Law has been interpreted more liberally with the passing of time, until today the manifestitation of a disability while the employee is on the premises of his employer is sufficient evidence in many cases for the employee to claim a compensable accidental injury. The result of this liberalized interpretation has been payment by employers of many claims for heart disease and back disabilities, the origins of which are

not conclusively indicated to have resulted from an accident which occurred in the performance of his work. Many states require an overt act, but in Kansas it can be contended that a man's day to day work results in a gradual accumulation of disability. While this principle is certainly acceptable in areas of radiation injury, it is not fair to burden industry with the cost of disability arising out of certain illnesses such as heart disease and alleged back disabilities which had not resulted from any particular accident arising out of and in the course of the employment.

Recommendation: The term "accident" should be defined by statute possibly under Section 44-508. The definition should be explicit and provide protection for the employee who sustains a personal injury arising out of a specific occurrence due to some external force or violence, the results of which are such that the physical structure of the body is injured. Also, the employee should be able to establish that the accident occurred at a specific time and place in the course of his employment.

2. General Disability 44-510 (3) (24)

Problem: The law is not clear as to what constitutes a general disability. Neither the employee nor the employer has a clear understanding of their rights or obligations under the law.

Recommendation: Consideration should be given to revising this section of the law to include a specific definition of general disability.

3. Method for determining amount of compensation due 44-510 (3) (24)

Problem: The method for determining the amount of compensation due

an employee who sustains an injury involving general disability is presently tied to a formula arrived at by the Kansas Supreme Court in its interpretation of Section 44-510. The formula for computing the amount of compensation due is complicated and uncertain in its meaning and given rise to an increasing trend of litigated cases. There are inequities created which result in overpayment in some cases and underpayment in others. Two workers with the same type of injury with the same resultant disability do not receive the same amount of compensation under the present formula.

Recommendation: This section of the law should be revised to include a simplified specific formula for computing compensation due as a result of general disability. Perhaps the new formula should apply the percentage of disability to the 415 weeks maximum compensation payable under the law rather than the percentage of disability being applied to the employee's average weekly wage.

4. Method of determining wages 44-511

Problem: The law provides that where the rate of wages is fixed by the hour the daily wage shall be found by multiplying the hourly rate by the customary number of working hours constituting an ordinary day in the character of work involved. This results in many cases in the establishment of an average weekly wage of an employee at a higher level than that which would actually have been attained had his work not been interrupted by the injury.

Recommendation: This section of the law possibly should be revised to provide a simple and more explicit formula which would be based on the total wages an injured employee received during a specific

period just prior to the date of accident, with this figure divided by the number of weeks during the period. If the employee had not been employed at this job during the specified period, it may be recommended that his wage be determined by obtaining the average weekly wage of a certain number of other employees so employed in the same type of work in the same type of industry.

5. Credit for previous disability 44-511 (4)

Problem: Since there is no provision in the law for the employer to obtain credits for previous disability payments in determining the amount of compensation due an employee following an injury sustained while in the employment, it is possible for an employee to recover several times for the same disability.

Recommendation: The law should be revised to provide that if a workman has suffered a previous disability and receives a later injury, the amount of compensation payable for such later injury should be only for the increase in disability created by such later injury. This is in keeping with the original intent of the cited statute and is in conformity with the parallel provision of the Industrial Disease Law, 44-5a 01 (b).

6. Statute of Limitations

Problem: Although the law presently provides the time limit within which written claim for compensation must be made, it contains no provisions or time limit within which application for hearing must be filed. As a result, an employee who has filed a timely notice of injury may wait an unlimited period of time before suit.

Recommendation: A statute of limitation should be written in the

law providing a period of time within which application for hearing must be made.

7. Dependents

Problem: The term "dependents" is defined in Section 44-508 (j), and is again referred to in Section 44-510 (2) (b). Supreme Court decision regarding partial dependents have produced situations where a partial dependent recovers as much as a total dependent.

Recommendation: It is suggested that the term be redefined so that partial dependents do not recover as much as total dependents.

Reference: Peterson v. Fairmont Food Co., 179 Kansas 799 (1956); 180 Kansas 271 (1956).

8. Third Party Cases

Problem: Presently the compensation act in Section 44-504 provides for repayment by the employee to the employer of all compensation paid up to the date the employee recovers damages from a negligent third party. The act provides further that after this "date of recovery" the employer shall be reimbursed by the employee for further compensation payments if the employee recovers a judgment. This should be extended to include "judgment, settlement, or otherwise". However, the law does not provide for reimbursement of the employer by the employee in the event recovery is by settlement or otherwise.

Recommendation: The phrase "judgment, settlement or otherwise" should be uniform throughout this section of the law.

9. Autopsy

Problem: The present law does not give the employer the right to

demand an autopsy and thus protect his interest by determining the cause of death.

Recommendation: Consideration should be given to include provisions for autopsy in connection with workmen's compensation accidental death cases similar to the existing provision in the Occupational Disease Law in Section 44-5a 18.

10. Exchange of Medical Information

Problem: The present law provides that the employer must furnish to the employee or his representatives copies of medical reports, but there is no provision that the employee is required to furnish copies of his medical reports to the employer.

Recommendation: Provision should be made in Section 44-515 requiring claimants to furnish upon demand to the insurance carrier or the employer all written medical reports in their possession thus making the right a reciprocal one.

11. Fraudulent Representation

Problem: The employee can make any representation to a prospective employer about his physical condition without any recourse for the employer.

Recommendation: A provision should be added to the workmen's compensation law regarding the fraudulent representation by an employee at the time of employment similar to the parallel provision in the Occupational Disease Law 44-a 03.

12. Right of Appeal

Problem: It is uncertain whether Section 44-512 (a), which states that if any workmen's compensation installment payment is missed,

the total amount becomes due and payable, nullifies the employers right to appeal an award of the workmen's compensation director to the Appellate Court as provided in Section 44-556.

Recommendation: Section 44-512 (a) and Section 44-556 should be brought into harmony.

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ANALYSIS OF THE KANSAS WORKMEN'S COMPENSATION LAW

by

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Social insurance in America was pioneered by a workmen's compensation law enacted over fifty years ago. The first law back in 1908 protected a small number of federal workers from the effects of on-the-job injuries. This breakthrough inspired most states to enact similar legislation within several years. The impetus for the passage of workmen's compensation laws came from the dissatisfaction with the then existing common law "protection" afforded the employer. Prior to the passage of workmen's compensation laws, the injured worker had the common law right to sue his employer for damages. The employer, however, could plead three defenses: assumption of risk; fellow servant rule and contributory negligence. In most cases the pleading of these defenses enabled the employer to escape liability for job-incurred injuries.

Workmen's compensation attempted to negate the social and physical suffering of the injured worker by estopping the employer from pleading these common law defenses, and by assuring that benefits would be paid the injured worker promptly, regardless of fault and with a minimum of litigation. In return for these gains the injured worker relinquished his right to sue. But the law, which held out so much hope for meeting human problems in an industrial age, has been left obsolete by rapidly changing conditions and the playing of politics by business pressure groups.

The purpose of my thesis is to examine the Kansas Workmen's Compensation Law in order to uncover problem areas and shortcomings in coverage, benefits, etc., as compared to "standards" established by the U.S. Government and other interested parties and to determine in an over-all manner if the Kansas act met the generally accepted objectives of any social insurance program.

The procedures used to accomplish the purposes of my thesis ~~was~~ WERE first a review of the workmen's compensation statutes of the State of Kansas to

determine coverage, benefits, financing, administration, etc. Next a review of certain problem areas and shortcomings of the act was made, and in many instances selected court cases were examined to better understand the problem involved. Thirdly, recommendations of the author were presented. Fourthly, facets of the Kansas act were compared to "standards" of a "good" workmen's compensation act as reflected in a pamphlet prepared by the U.S. Department of Labor.

After the above procedures were completed a conclusion as to the relative inadequacy of the act, based on the following shortcomings, was made. First, the act fails in many cases to meet four of the five objectives normally attributed a "good" social insurance act. These included the failure to pay certain, prompt and reasonable benefits, the failure of eliminating delays, costs and wastes of personal injury litigation, the failure to provide adequate medical treatment and the failure to provide rehabilitation of the injured worker. Second, the act has many other shortcomings and problem areas. Agriculture is not covered, even though it is a dangerous occupation; employers with less than five employees are for the most part excluded from the act; the second injury fund has been limited in its application so that it applies only to particular types of subsequent accidents, filing periods are inflexible and do not recognize the complexities involved in determining the nature of a disease or injury; widows are not provided for during widowhood; occupational disease coverage is limited; casual employees are not really covered; etc. Third, there is much confusion surrounding the definition of the term "accident" and in the interpretation of the phrase "out of and in the course of". Fourth, the "elective" coverage provisions allows an employer to elect not to be covered, and forces the injured worker, if he wishes to recover damages, to instigate a costly legal suit, which he probably can ill-afford.