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WORKERS' COMPENSATION SENATE BILL 167 **DELIVERED FEB. 18, 2015 SENATE COMMERCE COMMITTEE**

My name is Keith Mark, and I have practiced in the area of workers' compensation for my entire law career – the first seven years, exclusively on the defense side and the last 22 years, on the claimant's side.

I have seen many changes in the Kansas workers' compensation laws, but none more drastic than those enacted in 2011. When the 2011 changes were effectuated, there was a significant problem that needed to be addressed to prevent an injured worker from collecting enhanced benefits in cases where they voluntarily and purposefully removed themselves from the workforce. That problem was solved.

However, in addition to fixing that problem, additional changes were made creating a "prevailing factor standard" that greatly restricts many on-the-job injured workers from accessing the Kansas workers' compensation system. Kansas is only one of two States that uses a prevailing factor standard and is the only State in the Union that uses a prevailing factor standard and any *AMA Guides* whatsoever. Additional changes included specifically eliminating aggravations of pre-existing injuries no matter how old the prior injury was. For example, if a man had injured his back serving this Country in the military and then 30 years later, re-injured that same condition at work, after 2011, he was not allowed Kansas workers' compensation benefits. Another change was to exclude injuries that were considered activities of daily living. For example, a man climbs up 15 stairs at work to check on the pressure gages of a machine and injures his knee while climbing up those stairs. This event is no longer covered under the Kansas Workers' Compensation Act since 2011 because the new law says the injured worker could have just as easily injured his knee climbing stairs in his own home. There were many other changes, but I have listed these to make a point. After 2011, the Kansas Workers' Compensation Act became one of, if not the most, restrictive in the entire Country.

On top of those changes, Kansas has one of the lowest rates used to calculate disability benefits and is in the overwhelmingly minority of States that actually cap permanent total and death benefits. What those caps mean is that if an injured worker is so severely injured that he is permanently and totally disabled from engaging in any future employment for the rest of his life, his workers' compensation benefits are capped at \$155,000.00. If a worker is killed on the job, his workers' compensation benefits are capped at \$300,000.00.

One of the most important facts to point out is that the 2011 changes were negotiated and agreed upon in a complete bipartisan manner. Problems were identified, both sides came to the table to discuss and negotiate, and the end result was a comprehensive major overhaul of the Kansas Workers' Compensation Act that was done entirely by agreement.

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So, what are the results of the 2011 changes? Well, exactly what you would expect. There has been a huge decrease in the number of Applications for Hearing filed in Kansas, and the dollar value of the claims that actually make their way into the system have gone down significantly. According to the Secretary of Labor in a meeting I had with her last week, the 2011 changes were wildly more successful than anyone had predicted. Workers' compensation claims filed since 2011 have gone down by 20%. The total claims costs in Kansas since the 2011 changes have decreased by 40%. I have attached to my material, data obtained from the Kansas Department of Labor to support these percentages.

What has this meant for employers in Kansas since 2011? According to Ray Mesa of the Chamber of Commerce, there has been a State-wide reduction in employer workers' compensation premiums of \$50 million. Let me repeat myself. Since the 2011 workers' compensation law changes, the number of workers' compensation claims in Kansas has significantly decreased, the dollar value of compensable claims since 2011 has decreased by 40% AND employers have enjoyed a State-wide reduction in workers' compensation premiums of \$50 million dollars!

Yet, for some folks, that just was not enough. They proposed and passed in 2013 yet another change to the Kansas Workers' Compensation Act. Unlike the 2011 changes that were done with complete bipartisan support, over strong objection from the labor community, they completely changed the playing field of Kansas workers' compensation. A change of how injured workers' benefits would be calculated by moving from the *American Medical Association Guides to the Evaluation of Permanent Impairment 4th Ed. (AMA Guides 4th Ed.)* to the *American Medical Association Guides to the Evaluation of Permanent Impairment 6th Ed. (AMA Guides 6th Ed.)* starting in January of this year.

I was not involved in any of the 2011 or 2013 discussions or negotiations, but I have heard members on both sides of the negotiations state that the 2011 changes that were negotiated were predicated on Kansas never going to the *AMA Guides 6th Ed.* Let me repeat, those individuals who negotiated the 2011 changes, which included individuals representing the labor community, individuals representing employers and the insurance industry, including the current Director of Workers' Compensation, Larry Karns, agreed as part of the 2011 changes that Kansas would never move to the *AMA Guides 6th Ed.* Additionally, I have personally heard one of the strongest proponents in enacting and staying with the *AMA Guides 6th Ed.*, Eric Stafford, admit that they never even had the *AMA Guides 6th Ed.* prior to pressing this Committee to enact it. That actually makes sense because even though it was passed in 2013, it did not come in to effect until January of 2015, apparently, so the *AMA Guides 6th Ed.* could be reviewed, studied and vetted. Well, it has been reviewed, and it has been sharply criticized by those that have reviewed it.

The man who is generally recognized as the architect of the 2011 changes from the employer/insurance company side, Fred Greenbaum, has publicly stated that it is bad for Kansas. He has publicly stated that he recalls that the 2011 negotiations and ultimate bipartisan agreement was predicated on the promise that Kansas would never go to the *AMA Guides 6th Ed.* I have heard with my own ears director Larry Karns say, "In theory, the *AMA Guides 6th Ed.*

sounded good but in practice, it did not fit the Kansas workers' compensation system as amended in 2011." You have heard Dr. Koprivica, one of the leading experts in Kansas regarding the *American Medical Association Guides* testify that the *AMA Guides 6th Ed.* arbitrarily reduces the impairment ratings of injured workers on an average of 72% across the board.

When this issue was presented to the leading constitutional expert in the State and one of the most respected conservatives in Kansas, Secretary of State Kris Kobach, it was his learned opinion that the changes from the *AMA Guides 4th Ed.* to the *AMA Guides 6th Ed.*, on top of the already-restrictive Kansas workers' compensation laws, would likely make the entire Kansas Workers' Compensation Act unconstitutional. This issue was also presented to Washburn Law School's nationally-acclaimed constitutional law professor Bill Rich, and he has also concluded that adding the *AMA Guides 6th Ed.* to the already-restrictive Kansas Workers' Compensation Act would leave injured workers without an adequate remedy, which our Kansas constitution guarantees all of our citizens, which would render the entire Kansas Workers' Compensation Act unconstitutional.

What does that mean from a practical standpoint? Prior to a workers' compensation act being established in Kansas, the only recourse at law an injured worker had was against their employer in civil court if the work injury was due to employer or co-worker fault. That occurs in approximately 10% to 20% of work accidents, but when it did, the injured worker would receive enormous awards because there is no limit to economic damages in civil cases. The result was that very few injured workers received compensation, but the amounts paid in those limited cases were astronomical and placed a huge burden on employers. So, in what is termed as the "Grand Bargain," the Kansas Workers' Compensation Act was created. What the bargain consisted of was all workers injured on the job were given a remedy at law through the new Workers' Compensation Act, but agreed-upon limits were placed on those benefits. In return, employers received the "Exclusive Remedy Rule" which prevents an employee from filing suit against the employer directly in civil court even in cases of employer or co-employer fault. Each side received a quid pro quo, "something for something." This allowed all injured workers to collect a little and employers to be insulated from the catastrophic lawsuits that were once filed in civil court. This also allowed employers to budget their workers' compensation claims quite predictably, which in the business world of establishing budgets, is very important.

If the Secretary of State, the esteemed law professor and the vast majority of attorneys who have weighed-in on this issue are correct, the current Kansas Workers' Compensation Act, because of the inclusion of the *AMA Guides 6th Ed.*, has denied injured workers an adequate remedy, hence the quid pro quo has been destroyed, then there is no Kansas Workers' Compensation Act. That means there is no Exclusive Remedy Rule, so in every case since January 1, 2015, where a worker has been injured on the job in Kansas due to employer or co-worker fault, employers will be liable in civil court, and they will not be insulated and protected by the current workers' compensation caps and limitations. The causes of action will range from direct employer or co-worker fault (like the boss driving an employee to a job site or a conference who is at fault in a car accident, or a highway department worker injured as a passenger when his co-worker is at fault in a vehicle accident), failure to train, failure to supervise, failure to maintain equipment, failure to provide equipment, failure to maintain a safe work environment, failure to provide an ergonomically safe work environment, etc.

I also want to add that municipalities in the State of Kansas will not be immune to those lawsuits. I have attached a summary of the City of Kansas City, Kansas, law firm's research supporting the proposition that liability will be the general rule, not the exception. This means that the State of Kansas and municipalities large and small across the State will be forced to defend, and ultimately pay, significant civil judgments in cases resulting from employer or co-worker fault. When this occurs, budgets of employers, the State and municipalities will be destroyed. Some employers and mid-tier to small municipalities will be bankrupt.

Here are some examples: I have a Union transport driver that was significantly injured due to direct employer negligence. He makes \$100,000.00 per year, and he has had a significant neck surgery and, likely, will never get released to return to his previous heavy job duties. Prior to January of 2015, that man's claim would have been capped at \$130,000.00 and that includes his lost time and permanent disability compensation. With the Exclusive Remedy Rule no longer applying, this will become a civil lawsuit in Wyandotte County District Court and worth potentially \$3.5 million. That figure is arrived at with \$3 million in actual income loss, \$130,000.00 in medical expenses plus the \$300,000.00 that Kansas allows for non-economic damages. The net result is that this case will be worth a potential \$3.3 million more in district court and the employer will be on-the-hook for the entire amount of that difference.

Yet another example: I have a case where my client was in a roll-over accident due to employer fault. My client is paralyzed from the neck down and is only 35 years-old. He will never work again. In workers' compensation, this man's claim would be capped at the \$155,000.00 permanent total cap. In district court, this will be a \$15 to \$16 million case. That figure includes \$3 million in wage loss, \$12.5 million for the life-care plan and the \$300,000.00 non-economic loss allowed by Kansas law. That is potentially \$15 million more than this case would have been worth if handled in the previous Kansas workers' compensation system.

Lastly, I recently read about a 30-year-old Manhattan city employee killed on the job on February 6, 2015 due to what appears to be co-worker fault in a trench cave-in accident. If there is co-worker fault in that tragedy, and the Exclusive Remedy Rule is abolished, a \$300,000.00 maximum Kansas workers' compensation case turns in to a \$3 to \$5 million civil case.

Is any of this worth the risk? It does not take much imagination at all to see the catastrophic train wreck that is coming to Kansas if the respective constitutional law experts are correct. Oklahoma is currently dealing with a legal Armageddon since their Workers' Compensation Act was found to be unconstitutional. Employers will be ruined and bankrupt. State and municipality budgets will be devastated and, in some instances, destroyed. An uncertain and unconstitutional workers' compensation system will thwart the influx of prospective out-of-State employers from moving in to Kansas and will force some existing employers to relocate out of the State. With a State budget that is already under attack, what will happen when State employees start filing civil cases in work accidents that involve employer or co-worker fault? The State will have to find never-before-budgeted dollars to defend and, potentially, pay for these lawsuits as opposed to how they have always been able to predictably budget their workers' compensation losses in the past.

Let's not forget the tens of thousands of Kansas workers whose lives will be ruined because they were unfortunate enough to suffer an on-the-job work injury. Keep in mind, these are not fellow Kansans who have removed themselves from the work force and are habitually seeking a handout. These are the hardworking folks you work with, hunt and fish with, and go to church with, who are on the rope pulling and being productive Kansans every day.

How many lawsuits are going to be filed in Kansas? I have no way of giving you an exact number, but I can tell you there will be a lot of them. In my practice, in 2013, my firm handled 73 workers' compensation cases where there was employer or co-worker negligence. In 2014, we are currently handling 52 cases where there was employer or co-worker negligence. In 2015 already, we have 11 cases of work accidents that were caused by employer or co-worker fault. I can assure you that if this unconstitutional act is not fixed, I will file every one of these cases since January 1, 2015, in district court against each employer, municipality or State agency where fault lies, and I will make sure that every other workers' compensation lawyer in the State of Kansas has the blueprint of how to do it, too!

The proponents of using the *AMA Guides 6th Ed.* are short-sighted. Unlike in 2011 when changes were made by agreement to solve identified problems, the *AMA Guides 6th Ed.* was not implemented to solve a problem, unless employers enjoying \$50 million in premium reductions State-wide is a problem! The argument that the *AMA Guides 6th Ed.* simply modernizes how percentages are calculated is incorrect. No one should be able to convince intelligent people, especially the members of this committee, the practice of medicine has so advanced in the last 20 years to account for a 72% across-the-board reduction in impairment ratings and to account for completely eliminating impairments for some injuries altogether. The result is to, likely, render the Kansas Workers' Compensation Act unconstitutional.

Is this risk worth it? No one with any skin in the game can tell you that it is. Since the 2011 changes, employers have enjoyed a very predictable and employer-favored Workers' Compensation Act. Employers have enjoyed a huge reduction in State-wide premiums and, according to the Department of Labor, there have been 20% fewer cases filed with a 40% overall reduction in the total values of those cases, and there is no reason to expect that trend to change any time soon. If Secretary Kobach and Professor Rich are correct, the same employers that are enjoying predictable and limited workers' compensation liability will be thrust into district court with the cost of defense and uncertain judgments. I have heard from many small businesses that even one claim will jeopardize their ability to stay in business. How can any one vote to allow that risk to occur? If workers' compensation costs were skyrocketing and premiums were rising at unprecedented rates and there was a problem that needed to be addressed, then I can see both sides sitting down to try and solve the problem like was done in 2011 in a bipartisan effort. However, no one opposing Senate Bill 167 can point to a significant current problem in the Kansas Workers' Compensation Act subsequent to the 2011 changes. I will be surprised if there is any lawyer or constitutional law expert who would be willing to stake their reputation that the current state of the Kansas Workers' Compensation Act remains constitutional. This Committee, and the legislature in total, has a chance to prevent a legal Armageddon that assuredly will come if the *AMA Guides 6th Ed.* remains in force in Kansas.

Thank God that there are some smart, forward-thinking conservative Kansans like Secretary of State Kris Kobach. This Senate Bill 167 can prevent this legal Armageddon and, with the compromises contained in the Bill, can keep the Kansas Workers' Compensation Act one that is built upon compromise. Compromise is always the best approach, especially if it is unanimous, and I can guarantee you unanimous support from Democrats and the labor community on this Bill. I would like you to remember the words of our Governor Sam Brownback. He spoke these words after the historic 2011 workers' compensation compromise legislation:

“This is what I love about Kansas. Unlike what I got in to on the Federal level where people would just fight, here it's, ‘Look, we’ve got a problem, how are we going to fix it?’ Labor said, ‘We want higher caps.’ Okay, done. Business said, ‘We want more predictability on the cases that are questionable.’ Okay, done.”

No one identified a problem that needed to be fixed prior to implementing the *AMA Guides 6th Ed.* If the *AMA Guides 6th Ed.* remains, it will be without a compromise and will lead to many costly lawsuits to determine the constitutionality of the Kansas Workers' Compensation Act. If the Act is found to be unconstitutional, then employers, municipalities and the State of Kansas itself will face unimaginable liability! Therefore, on behalf of Kansas employers and workers alike, I urge you to vote yes on Senate Bill 167.