

Approved: February 13, 1995
Date

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Alicia Salisbury at 8:00 a.m. on February 10, 1995 in Room 123-S of the Capitol.

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

Committee staff present: Lynne Holt, Legislative Research Department
Jerry Donaldson, Legislative Research Department
Bob Nugent, Revisor of Statutes
Betty Bomar, Committee Secretary

Conferees appearing before the committee:
Bill Henry, Executive Director, Kansas Association of Defense Counsel
Jeff Southard, Attorney, Western Resources
Ron Smith, Kansas Bar Association
George Gomez, Director, Division of Workers Compensation

Others attending: See attached list

SB 117-Release of employer from liability in cases separate from workers compensation actions during workers compensation settlement prohibited.

Bill Henry, Executive Director, Kansas Association of Defense Counsel, testified in opposition to the passage of the bill based on the following: (1) delay in settlement of claims; (2) concern could be solved through modification of script utilized by administrative law judge; and (3) ADA or retaliatory discharge matters are a separate issue outside the parameters of workers compensation. See attachment 1

Jeff Southard, General Attorney in charge of Litigation for Western Resources, Inc., stated it is a concern of Western Resources that the bill will discourage settlement and increase litigation. Mr. Southard advised a blanket approach, as contained in SB 117, could do more harm than good. It appears that those who are without representation are principally at risk, the Committee may wish to consider a ban on such releases should be limited to those persons who do not have an attorney, or the Administrative Law Judges could question claimants and make it clear that no other rights besides those involving workers' compensation matters are settled during hearing. See attachment 2.

Ron Smith, Kansas Bar Association, submitted copies of letters from two Administrative Law Judges, in response to Senator Harris's request of corroboration of statement of George Pearson. The judges point out they do have no jurisdiction on matters other than workers compensation claims. Claimants who are not represented by legal counsel should be informed of this. See attachment 3 and attachment 4.

George Gomez, Director, Division of Workers Compensation, testified the transcripts do not include those matters not directly affecting the workers compensation settlement. Any other comments are general made at the side bar and not recorded. There are incidents of pro se claimants being asked to sign waivers prior to a settlement hearing, but there are not often. The Director has the authority to change the script prepared for the Administrative Law Judges to advise claimants that other matters are outside of their jurisdiction. If Judges observe any untold papers or conversation between an employer and claimant who is without counsel, a time-out may be appropriate and communication made to claimant of his rights under ADA and EEO. The Director feels that the concern contained in SB 117 could be corrected administratively by the Division.

The Committee adjourned at 8:45 a.m.

The next meeting is scheduled for Monday, February 13, 1995.



**TESTIMONY
SENATE COMMERCE COMMITTEE
February 10, 1995**

Madam Chair and members of the committee I am Bill Henry, the Executive Secretary for the Kansas Association of Defense Counsel and I appear before you today in opposition to SB 117.

Under the provisions of SB 117 no one could obtain or attempt to obtain from an employee a release-general or partial-for the employer for any other claims, causes of actions, rights, benefits or insurance, except workers compensation benefits. Secondly, the bill would subject anyone obtaining or attempting to obtain such a release to a Class C non-person misdemeanor offense.

In representing the Kansas Bar Association yesterday Mr. Pearson said he thought SB 117 was probably a good idea but noted to you that his concern was the case where there was a pro se complainant who would not be on a level playing field at his workers compensation settlement conference where he might have to sign away other potential claims against an employer to receive the appropriate workers compensation settlement.

Mr. Pearson also said that often times in settlement of a small claim there is no opportunity to get this waiver issue to an appellate review.

The Kansas Association of Defense Counsel is made up of more than 300 licensed attorneys throughout our state who represent defendants in civil litigation. I apologize for not being able to bring any of our specialists in workers compensation before you today but in phone conferences the past week I would like to share some of my members' concerns with SB 117.

1. During any type of litigation in which individuals, partnerships or corporations are involved it is generally in the best interest of all parties to be able to close out litigation at an early stage. If SB 117 was passed any potential claimant or respondent would be unable to settle any other potential legal issues until the workers compensation matter was finished.

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Attachment 1, sheet 2

2. In settling a workers compensation claim any settlement has to be approved by an administrative law judge. At the settlement conference the administrative law judge inquires of the claimant if he understands what the settlement gives the claimant. Secondly the administrative law judge also states in the hearing what the claimant is giving up in terms of his opportunities under the workers compensation act. The workers compensation administrative law judge will also discuss opportunities to appeal or disagree with the settlement offer. Mr. Pearson is correct, in some small claim situations the complainant may not be represented by counsel. However my members have expressed to me the fact the administrative law judge is most careful to advise the complainant at the settlement hearing of any and all opportunities he may be foreclosed from engaging in accepting the settlement offer.
3. Finally, for a complainant to give up any other legal rights there must be some measure of consideration presented for that release given to be upheld. In some situations an opportunity to seek other recourse under the ADA or for retaliatory discharge may be waived. That waiver or release however usually is accompanied by perhaps an added benefit, monetary or otherwise, that might not be due to the claimant under the parameters of our workers compensation act.

For the above reasons the Kansas Association of Defense Counsel believes SB 117 will create a barrier for settling different legal issues and delay settlements in general. We believe settlements are to be encouraged and that the enactment of SB 117 will discourage quick settlements of all issues between an employer and employee.

Respectfully Submitted,

William M. Henry, Executive Secretary
Kansas Association of Defense Counsel



Western
Resources

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TESTIMONY

TO

SENATE COMMERCE COMMITTEE

SENATE BILL 117

FEBRUARY 10, 1995

BY JEFF SOUTHARD, WESTERN RESOURCES

Madame Chairperson, Members of the Committee:

I am General Attorney in charge of Litigation for Western Resources, Inc., a combined electric-natural gas utility serving most of the eastern two-thirds of Kansas. I appear today to express my client's concerns about Senate Bill No. 117, which is now before this committee. My client is concerned that the language of the bill will not prevent the evils which other conferees discussed before the committee yesterday, and will have the additional effects of discouraging settlements and increasing litigation.

Western Resources is a self-insured company under Kansas workers' compensation law, and settles a number of claims every year. Some of our employees retain attorneys to represent them, while others do not. Some of the claims are officially docketed into the system, while others are handled in a more informal manner. Regardless of these factors, however, when a claim is ready to be settled, it is necessary that a hearing be held in which an administrative law judge (ALJ) receives the testimony

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of the claimant. The ALJ inquires of the claimant to determine whether the settlement is being entered into freely and willingly by the claimant, and to assure that the claimant is aware that he or she is surrendering certain rights in return for the settlement at that time. If the system works right, and in my experience it usually does, no claimant can settle their workers' compensation claim in such a way as to be the victim of fraud or undue influence. If such things do occur, procedures exist for them to be detected and remedied.

Therefore, this bill must be about rights other than those given by the workers' compensation laws, such those granted by the Americans with Disabilities Act (ADA), or Equal Employment Opportunity (EEO) laws. It is not infrequently the case that a claimant's injury and subsequent recovery may give rise to such rights and protections, just as it is not infrequent that an employer may, in return for a lump-sum settlement, wish to resolve all outstanding and potential claims a claimant may have. This bill would appear to preclude such universal releases by its terms. If so, it would be a marked departure from civil procedure as it is otherwise established in Kansas.

To the extent that abuses do occur, it is questionable if this bill will remedy them. At the outset, it appears obvious that the class of people who are most affected are those who do not have legal representation. Without such counsel, they are prey to an improper waiver of any claims that they might have, regardless of

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how their workers' compensation hearing is conducted. If an employee is told that she will lose her job unless she settles an injury claim before she is completely healed or unless she waives vocational rehabilitation, this bill will not prevent that.

On the other hand, if an employee, even one represented by counsel (either privately retained or provided by a union), wants to enter into a global settlement of a number of potential claims, under this bill, he would be prevented from doing so. This bill may in fact discourage settlement and increase litigation, effects which the committee should carefully consider in its deliberations.

In summary, the intent of this bill -- to prevent the uninformed or coerced waiver of rights -- is a laudable one. The method chosen, however, is a blanket approach that could do more harm than good. Since it appears that those who are without representation are principally at risk, the committee may wish to consider whether a ban on such releases should be limited to those persons who do not have an attorney. Alternatively, ALJ's could, through their questioning of claimants, make it clear that no other rights besides those involving workers' compensation matters need to be settled at that time, and that a claimant's employment could not be made conditional on any such waivers or releases. These approaches would do more than the present language of the bill to address whatever problem may exist in this area, with a minimum of impact on the freedom of employees and employers to resolve their legal disputes as they see fit.

David J. Wood
Special Administrative Law Judge
Division of Workers Compensation
P. O. Box 3416, Wichita, KS 67201
Ph. 316-267- 0200 FAX 316-267-0242

Mr. Ron Smith, KBA
via fax 913-234-5544
and 913-234-3813

February 9, 1995

Re: S.B 117, amendment of KSA 44-520(d)21 on Release of Non-Workers Compensation claims

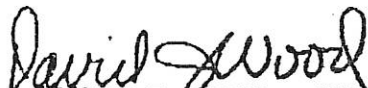
Dear Mr. Smith:

Responding to your February 9, 1995 fax on potential overreaching or adhesion at Workers Compensation friendly settlement hearings, I would guess I see about 8 to 10 cases a month involving what appear to be efforts by the Employer to settle any colorable claim for wrongful termination, ADA (most frequent) or Civil Rights violations, or similar non-Comp. issues. These are very rarely unrepresented claimants, so I assume the issue is first raised by claimant's counsel, or the Employer sensitive to ADA claims, at least.

I would not approve the settlement unless I'm satisfied the PRO SE claimant FULLY UNDERSTANDS, upon an adequate record made, that he/she is giving up any identified non-Comp issue. Where claimant has counsel, I generally assume the trade off is fully bargained-for, but still inquire. The "no jurisdiction" risk is on the Employer: it's their settlement offer. I know some counsel feel I lack that jurisdiction, but no claimant's counsel that I recall has raised that on a settlement record.

I haven't had a chance to fully think this through, but my impulse reaction is to support S.B 117, including the amendment 44-520(d)21, to discourage Employer overreaching or adhesion in those cases where the pro se claimant has a nominal Comp case and a good ADA (etc.) case, and the Employer has greater exposure on the latter than the former. Remember: the Carrier usually handles the comp claim, and has no money at risk on the Employer's other workplace "problems". I've seen Carrier's counsel squirm at the late added non-Comp baggage on the offer, and there is room for legitimate concern over a claimant being shortchanged.

Very truly yours,


DAVID J. WOOD, SALJ

DJW/hs RonSmith.Ltr

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Attachment 3

ERNEST L. JOHNSON

ATTORNEY AT LAW
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KANSAS CITY, KANSAS 66101

PHONE (913) 342-7070

FAX (913) 342-7073

February 9, 1995

Ron Smith, General Counsel
Kansas Bar Association

Transmitted Via Fax Only To
913-234-5544 and 913-234-3813

Re: Senate Bill 117

Dear Mr. Smith:

Thank you for providing me a copy of the above proposed amendment to the Workers Compensation Act. As we discussed today, I am now and have been for several years a Special Administrative Law Judge in Workers Compensation. My major function in that capacity is hearing cases where agreements have been reached between parties to a claim, and determining whether or not the agreement should be approved and made the order of the Division.

Over the years, on rare occasions (perhaps once every three or four months) issues separate and apart from the workers compensation claim under consideration are raised at a settlement hearing. Those usually have involved a collateral dispute between the employer and employee regarding wrongful termination/retaliatory discharge, or some grievance related matter concerning the voluntariness of termination, sick leave, vacation, or similar contract matter. Most recently the issue of an ADA claim was raised.

I believe that in each such case the employee was represented by counsel. I also believe that in each case the settlement of the workers compensation claim was separately described for the acknowledgment of claimant and for my approval. After that but while on the record the parties merely have also indicated that they have resolved a collateral issue. Generally the terms are not described and any such releases are not incorporated in the record.

When the ADA claim matter was raised at the recent hearing, claimant's attorney took great pains to advise his client that he represented claimant in the workers compensation claim only, that claimant had the right to retain separate counsel for his ADA claim, that the attorney had no expertise in such matters, that he did not negotiate the separate settlement of the ADA claim, and that his workers compensation settlement was not contingent on his acceptance of the ADA offer. All of that was confirmed by

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Attachment 4-4

Ron Smith, General Counsel
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respondent's counsel.

At any hearing where such a collateral issue is raised, I confirm for all parties that I do not have jurisdiction of any matter other than the workers compensation claim. I rule on the appropriateness of a settlement only under the terms of the workers compensation act.

As I have been writing this I have recalled some occasions where unrepresented claimants have raised questions about the extent of the release involved in a settlement. I have been asked if the release means that the employee can not collect unemployment. I simply assure the employee that the only claim settled is the one under workers compensation.

I can not recall that I have ever been told by any claimant, represented or not, that the employer attempted to obtain the employee's release for collateral claims as a requirement for receiving the workers compensation settlement. With the advent of the ADA, though, I can understand the concern.

If you need any more information from me on this, please just give me a call.

Very truly yours,

Ernest L. Johnson

ELJ:gmi

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