

MINUTES OF THE SENATE COMMITTEE ON COMMERCE.

The meeting was called to order by Chairperson Senator Brownlee at 8:30 a.m. on January 16, 2002 in Room 123-S of the Capitol.

All members were present except:

Committee staff present: April Holman, Legislative Research Department
Sherman Parks, Revisor of Statues

Conferees appearing before the committee:

Roger Aeschliman, Deputy Secretary Kansas Dept. of Human Resources
William Sanders, Director Employment Security
Phil Harness, Director of Workman's Compensation
Martha Gabehart, Executive Director Kansas Commission on
Disability Concerns

Others attending: See attached list.

The joint meeting of the Senate Commerce Committee and the House Business, Commerce and Labor Committee was called to order by Senator Karin Brownlee. Representative Al Lane thanked everyone for being there and gave a few brief comments regarding the agenda for today's meeting.

Chairperson Brownlee recognized Roger Aeschliman, Deputy Secretary Kansas Department of Human Resources. The meeting was turned over to Mr. Aeschliman who briefed the committees on recent unemployment numbers and the impact it has had on the State of Kansas. Mr. Aeschliman then introduced the Human Resources staff and the meeting was turned over to William Sanders, Director Employment Security.

William Sanders provided a spreadsheet to the committee members showing a comparison for the last several years of claims taken (Attachment 1). Mr. Sanders explained that the following methods can be used by employees to file for unemployment benefits: Call Centers, Internet Access, Interactive Voice Response and Employer Filing. The new procedures have reduced their minutes per unit processing time to approximately 12 minutes opposed to the 47 minutes processing time two years ago.

Roger Aeschliman introduced Philip Harness, Director of Workers Compensation. Phil Harness briefed the Committee on Workers Compensation Fraud and Abuse, Information Technology and a Kansas State Plan. The State Plan would elect to develop and operate their own safety and health programs in contrast with Federal States which submit to the Occupational Safety & Health Administration (OSHA) under the United States Department of Labor (USDOL) (Attachment 2).

Roger Aeschliman introduced Martha Gabehart, Executive Director, Kansas Commission on Disability Concerns. Ms. Gabehart explained that the KCDC is an advocacy entity within the Kansas Department of Human Resources (KDHR) and that they recommend changes to states laws, programs and regulations to help Kansans with disabilities live in their communities (Attachment 3).

The Committee meeting was adjourned at 9:30 a.m.

The next meeting is scheduled for January 22, 2002 at 8:30 a.m.

SENATE COMMERCE COMMITTEE

GUEST LIST

DATE: January 16, 2002

NAME	REPRESENTING
Peg Spencer	SRS
Maitha Gabeaux	KDHR
Marc Lowe	KDHR
William Sanders	KDHR
Ken Bue	Hem/weir ChrtA
Phil Harners	KDHR-Workers Emp.
Roger Aeschliman	KDHR
Wayne Mauchup	K. AFL-CIO
John C. Gottenby	Wostar Energy
Barb Reavis	WorkForce Network of Kansas Board
George Barber	Ks Self Insured Assn.
Mike Huffles	Ks. Gov't. Consulting

Timeframe	Claims	Variance	Budget	Variance	FTE	Method	MPU
10/99 - 9/00	107,000	N/A	\$15.8 million	N/A	90	Paper	47
10/00 - 9/01	150,000	+40.2%	\$16.3 million	+3.2%	90	Call Centers	23
10/01 - 9/02	200,000+	+33.3%	N/A (\$17.2 million) (projected)	N/A (+5.5%) (projected)	90	Call Centers Internet IVR Employer Filing	12

Senate Commerce Committee
 1-16-02
 Attachment 1-1

January 6 - 12, 2002

<u>Day</u>	<u>Internet</u>	<u>Mass Layoff</u>	<u>Quick</u>	<u>CSR</u>	<u>Total</u>
Monday	362	0	0	845	1,207
Tuesday	272	0	0	877	1,149
Wednesday	225	0	0	737	962
Thursday	173	2,055	1	861	3,090
Friday	176	0	10	810	996
Weekly Totals	1,208 16.3%	2,055 27.8%	11 0.1%	4,130 55.8%	7,404
12/3 - Present	4,922 13.8%	10,538 29.4%	38 0.1%	20,291 56.7%	35,789

**TESTIMONY BEFORE JOINT MEETING OF
HOUSE BUSINESS, COMMERCE & LABOR COMMITTEE AND
SENATE COMMERCE COMMITTEE**

By Philip S. Harness, Director of Workers Compensation

Wednesday, January 16, 2002

1. Workers Compensation Fraud and Abuse Update

The Division has stepped up its fraud and abuse monitoring and prosecution activities during the past year. I have had the pleasure of working with a new Assistant Attorney General, Ezra Ginzburg, and, due to his work and the work of the investigative staff, fines, penalties, and restitution in the amount of \$202,465.09 have been ordered and assessed; to date, \$77,768.56 of that amount has actually been collected. We will once again be forwarding to you as soon as it is printed by the State Printer a special Workers Compensation Fraud and Abuse Annual Report covering the calendar year 2001. However, I have attached one page of that report to this testimony today which shows the array of victims of workers compensation fraud in a broken pie-chart fashion. Of the 199 referrals received for the year, claimants were indicated in 72, employers in 77, insurance entities in one, and the state of Kansas (whether the Workers Compensation Fund or the Division's Compliance Section) in 49. Compliance refers to an action brought against an employer who has failed to maintain workers compensation insurance coverage.

2. Information Technology

After some difficulty in getting the new database developed and built, November 5, 2001, was the "go live" date for most of the Division of Workers Compensation (some sections actually went "live" earlier). Since it is a web-based system, there is a greater need for maintenance than with the former mainframe system. The Division required this system to be built in order to facilitate the gathering of data. The Division desires to collect that data in an electronic format. In order to comply with the statute, during the time that the database was being developed, the Division created its own software which was shipped to a representative sample of insurance carriers, self-insured employers, and group pools requesting certain claim characteristics for a statistically significant sample of claims. We will be reporting our third year results in our Annual Statistical Report, which is presently at the State Printer and will be forwarded to you. Plans are to migrate from that specially designed software and to begin collecting claim information pursuant to standards drafted by a national consensus group. That group has presently drafted its third release of those standards, and I have offered Kansas as a beta test site. In addition, the Division is desirous of electronically collecting proof of coverage data, that is which employer is covered by which insurance carrier, any policy changes, renewals, cancellations, and the like. Proposed drafts of regulations on electronic data interchange (EDI) of both the first reports of injury (for claims data purposes) and proof of coverage have been presented to the Workers Compensation Advisory Council and reviewed, but there has not yet

been a recommendation thereon. As part of the database build, the Division took proposals on how to best map this information, once it is received, into our database. We are currently in contract negotiations for that purpose.

In this fashion, by automation, we should be able to determine by accident history per industry or perhaps even as fine as per employer, where our safety efforts should be targeted, as well as being watchful for any trends in workers compensation and reporting those to the Legislature. It may also allow the Legislature to make other important public policy decisions for other state regulators. Thus, it may allow the Legislature to focus important state resources in an appropriate manner, which leads to the next topic.

3. **State Plan**

I have attached to this testimony a one-page, very cursory discussion of where Secretary Richard Beyer and I believe our safety efforts should come into fruition. Presently in the area of safety, KDHR has jurisdiction over public sector employers, maintains an accident prevention program as specified by the Workers Compensation Act, and offers safety consultation services to private sector employers. Those consultation services are funded, in large part, by federal funds, are offered free to employers if the employer so requests, and no fines or penalties are rendered by the state; we only request abatement of the safety hazards. Currently all private sector employers are subject to compliance and enforcement action by the federal Occupational Safety and Health Administration (OSHA); however, about half of the states in the United States have departed from this scheme and adopted their own State Plan, which supplants OSHA and puts the state in its place. Statistics show that this action is more effective in that more inspections are completed, more hazards found and abated, the fines per violation are lessened, and Bureau of Labor Statistics studies indicate that those states with State Plans have an improved injury rate over those states which do not. In those states with an approved State Plan, OSHA will continue to fund the consultation program up to its current 90 percent level, will fund 50 percent of the enforcement program, and this pertains to both the private sector and public sector. Any fines collected from private sector employers would accrue to the State General Fund.

I would ask for your consideration of a committee hearing on this important subject, along with proposed legislation which has been recommended favorably to the Legislature by the Advisory Council. Those proposals include:

1. An amendment to K.S.A. 44-550b which would exclude social security numbers on records research requests;
2. An amendment to K.S.A. 44-508 (b) and 44-542a, which would designate members of limited liability companies the same as partners, and not covered by the Workers compensation Act;
3. An amendment to K.S.A. 44-510b (i) which would strike the necessity of filing an annual surviving spouse report with the Division, but retaining the requirement that the

statement would be required to be filed with the employer/insurance carrier, and clarifying the definition of "wholly dependent child";

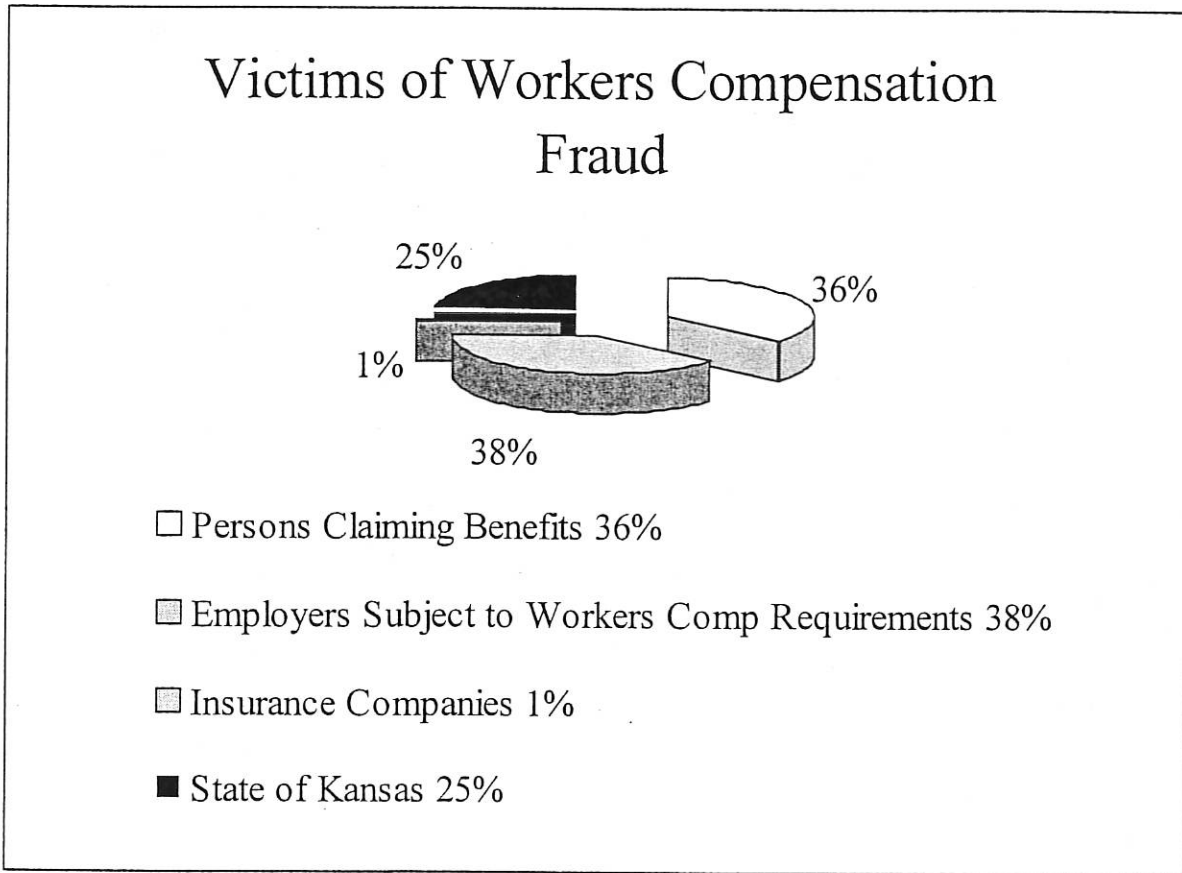
4. An amendment to K.S.A. 44-557a allowing the Secretary of Revenue and the Director of Workers Compensation to exchange certain information to be used solely for the verification of workers compensation data files.

The Workers Compensation Advisory Council has another meeting set for February 1, 2002, and other recommendations may be forwarded to the Legislature for your review following that meeting.

Fraud Victims

Figure 4-5 below indicates who is the potential victim of the fraud being perpetrated. Of the 199 referrals for the year, claimants were indicated in 72, employers 77, insurance entities 1, renderers of medical care 0 and the State of Kansas (Workers Compensation Fund or compliance) 49. The chart indicates the percentages for each.

Figure 4-4



Investigations

The Fraud Unit has three full time investigators. These investigators are not law enforcement officers, however, they perform almost identical investigative duties as sworn law enforcement. The investigation process includes activities such as interviewing witnesses, collecting evidence, forming liaisons with law enforcement groups as well as special fraud investigation units within the insurance industry and testifying in administrative and criminal actions.

- Of the 199 referrals received by the Unit, 188 were fully investigated.

Kansas State Plan: The Time Has Come

What is a State Plan?

The Occupational Safety & Health Act of 1970 encourages states to develop and operate their own occupational safety and health programs including enforcement. States and territories which elect to develop and operate their own safety and health programs are known as State Plans in contrast with Federal States which submit to the Occupational Safety & Health Administration (OSHA) under the United States Department of Labor (USDOL).

What are the advantages of being a State Plan?

1. Kansas can better focus resources in areas which will improve the safety and health of Kansans.
2. Fines and penalties will remain in the state.
3. More inspections will result in more hazards being identified and abated but less assessed in penalties for businesses in Kansas.
4. Kansas can assume a leadership role in safety and health nationally.

What are the disadvantages of a State Plan?

1. Adoption of regulations to govern compliance activities and associated problems.
2. Fines and penalty assessment.

How is a State Plan to be funded?

The Department of Human Resources is proposing that an assessment not to exceed 1% be paid by insurance carriers, group funded pools, and self-insureds on annual paid losses to fund the Kansas occupational safety and health program. This program will include an enforcement program, a consultation program, the accident prevention program, and the annual safety and health conference. OSHA will fund 50% of the enforcement program and up to 90% of the consultation program. Fines collected (about \$1 million per year) would accrue to the State General fund.

What is required to become a State Plan?

Once enabling legislation is approved, the state must

1. adopt standards "at least as effective as" comparable federal standards (common practice is to adopt OSHA standards),
2. conduct enforcement inspections,
3. include public sector employees, and
4. implement an occupational safety and health training and education program.

Currently, KDHR does 3 of these 4 tasks.

A 3-year "developmental plan" allows the structural element to be put in place and culminates in "certification" by OSHA. An operational status agreement is then formed where OSHA suspends discretionary enforcement activity. Final approval is gained one year later when the program is demonstrated to be "at least as effective as" OSHA.

Presentation by
Martha K. Gabehart
Executive Director
Kansas Commission on Disability Concerns
to Senate Commerce Committee and
House Business, Commerce and Labor Committee
January 16, 2002
Statehouse Room 123-S

Thank you for asking me to speak with you today about the Kansas Commission on Disability Concerns (KCDC) and disability related issues that may come before you this session. KCDC is an advocacy entity within the Kansas Department of Human Resources (KDHR). We advocate for changes to state laws, programs and regulations to help Kansans with disabilities live in their communities. The commission is made up of 15 people appointed by Secretary Beyer and 15 ex officio members representing state agencies and programs. At least half of our appointed members must be people with disabilities. The commissioners decide policy and initiatives with regard to Kansans with disabilities. The staff implements these initiatives and communicates with the governor, legislature and agency heads about changes needed to help Kansans with disabilities live more active lives in their own communities.

At this time we do not know of any initiatives coming before your committees that have to do with the Americans with Disabilities Act (ADA) or any other disability civil rights laws. Ms. Donaldson asked that I give you some information about two recent Supreme Court cases that have had some impact on the ADA. I have not found a synopsis that truly gives basic information about the effects of the two decisions, but I will forward those to you when I do.

Thank you again for this opportunity.

Senate Commerce Committee
JANUARY 16, 2002
Attachment 03-1

Martha Gabehart

From: [REDACTED]
Sent: Tuesday, January 15, 2002 10:31 AM
To: ADA@KCDCINFO.ORG
Subject: FW: Article: EEOC Can Ignore Arbitration Deals

Tuesday January 15 10:32 AM ET
EEOC Can Ignore Arbitration Deals
By ANNE GEARAN, Associated Press Writer

EEOC v Waffle House, Inc

WASHINGTON (AP) - A federal anti-discrimination agency may step in to win back pay or other help for workers who have signed away the right to sue their employers, a divided Supreme Court ruled Tuesday.

The 6-3 ruling clarifies the reach of the federal Equal Employment Opportunity Commission, and curbs the ability of employers to keep workplace disputes out of the courts.

The high court held that the EEOC may sue for money in federal court on behalf of a short-order cook who was fired after he had a seizure at work. The cook had agreed when he was hired that any on-the-job dispute would be resolved by arbitration, but the EEOC can ignore that agreement, Justice John Paul Stevens wrote in the majority opinion.

The court's decision means that in some cases the EEOC can circumvent an arbitration agreement to do for an individual wronged worker what the worker is unable or perhaps unwilling to do for himself.

The EEOC is "the master of its own case," and free to decide for itself whether it is in the public's interest to pursue a given lawsuit, Stevens wrote on behalf of himself and Justices Sandra Day O'Connor, Anthony M. Kennedy, David H. Souter, Ruth Bader Ginsburg and Stephen Breyer.

"It is the public agency's province, not that of the court, to determine whether public resources should be committed to the recovery of victim-specific relief," Stevens wrote.

Justice Clarence Thomas, who once headed the EEOC, dissented. The EEOC must "take a victim of discrimination as it finds him," Thomas wrote on behalf of himself, Chief Justice William H. Rehnquist and Justice Antonin Scalia.

"I cannot agree that the EEOC may do on behalf of an employee that which an employee has agreed not to do for himself," Thomas wrote.

Randy Fisher

From: [REDACTED]
Sent: Tuesday, January 08, 2002 12:33 PM
To: GREATLAKES@LISTSERV.UIC.EDU
Subject: Supreme Court rules in Toyota v Williams case....Associated Press article

Follow Up Flag: Follow up
Flag Status: Flagged

The following article is forwarded to you by the Great Lakes ADA Center for your information:

High court limits disability law in carpal tunnel case

By Anne Gearan

Associated Press Writer

January 8, 2002

WASHINGTON -- The Supreme Court narrowed the reach of a landmark disability rights law today, ruling that an assembly line worker with carpal tunnel syndrome was not entitled to special treatment on the job.

A unanimous court ruled that Ella Williams' partial disability did not obligate her employer, car manufacturer Toyota, to tailor a job to suit her wrist, arm and shoulder problems.

The 1990 Americans With Disabilities Act guarantees equal treatment on the job and elsewhere for people whose disabilities "substantially limit" their ability to perform what the law calls "major life activities," such as caring for oneself.

Williams' disability did not prevent her from doing many tasks at home and at work. But a federal appeals court found that she was disabled under the ADA because her physical problems substantially limited her ability to perform manual tasks at work.

"This was error," the Supreme Court noted in an opinion written by Justice Sandra Day O'Connor.

In cases like Williams', "the central inquiry must be whether the claimant is unable to perform the variety of tasks central to most people's daily lives, not whether the claimant is unable to perform the tasks associated with her specific job," the court wrote.

Disability cannot be assessed by looking only at someone's fitness to work, the court said.

The court reversed the opinion of the Cincinnati-based 6th U.S. Circuit Court of Appeals and sent the Williams case back with instructions to reconsider it.

The ruling does not mean that anyone with carpal tunnel syndrome or similar partial disabilities is automatically excluded from protection by the ADA. But it probably will make such claims harder to prove, since the court makes clear that disability must affect a range of manual tasks or duties.

Williams and advocates for the disabled had argued that her case was emblematic of just the kind of discrimination the ADA was supposed to prevent.

A partially disabled person who wants to work should be able to do so, with modest accommodation by an employer,

rather than being forced to sit home, her lawyers have a

Williams claimed that her work on a Toyota engine assembly line so damaged her hands and arms that she has trouble brushing her hair and buckling her shoes. Her doctor said she cannot lift more than 20 pounds, repeatedly flex her wrists and elbows or keep her arms extended at shoulder height for long periods.

Williams' problems began within months of taking a job at the Georgetown, Ky., manufacturing plant in 1990, she claimed.

At oral argument in November, the justices focused on how employers and courts should classify people who may be unable to do some tasks, but are perfectly capable of doing others.

"Don't you have to look at both what they can do and what they can't do?" O'Connor asked Williams' lawyer then.

Toyota did try to accommodate Williams for a time, with a job inspecting paint, but that truce broke down when the company required her to swab cars with an oil that highlighted paint flaws. The task, which involved keeping her arms extended, aggravated her symptoms, Williams said.

The U.S. Chamber of Commerce and other business groups backed Toyota. Several civil rights, legal and labor interests supported Williams.

The case is *Toyota v. Williams*, 00-1089.
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