



Wallace Saunders

ATTORNEYS AT LAW

February 16, 2015

Douglas C. Hobbs
316.219.8311
dhobbs@wallacesaunders.com

To: Chairwoman Julia Lynn and The Honorable Members of the
Senate Standing Committee on Commerce

Re: Testimony in Opposition to SB 167

My name is Douglas Hobbs and I am an attorney practicing with the Wallace Saunders law firm in Wichita, Kansas. I have been representing employers and insurance carriers in workers compensation matters for over twenty-eight years. I have been asked on behalf of Kansas Society for Human Resource Management (KS SHRM) to provide testimony in opposition to SB 167.

For those unfamiliar with KS SHRM, it is an organization comprised of over 2,300 human resource (HR) professionals in Kansas. Our members serve public and private sectors as well as large and small businesses. The focus of the HR professional is to facilitate between the employer and employee so that a safe and productive work environment is reached. On a daily basis our members are on the front line working to administer and control workers compensation for their employers and employees.

In 2013, the Kansas legislature amended Workers Compensation Statutes K.S.A. 44-510d and K.S.A. 44-510e to mandate that the 4th Edition of the *American Medical Association Guides to the Evaluation of Permanent Impairment* be replaced with the 6th Edition of the same *Guides*, effective January 1, 2015, to be used by the medical profession in assessing functional impairment. The stated purpose of the *Guides* is "to bring greater objectivity to estimating the degree of long-standing or 'permanent' impairments". *AMA Guides*, 4th Ed. The rationale for each new edition is that the "pace of progress and advance in medicine continues to be rapid, and that a new look at the impairment criteria for all organ systems is advisable" *Id.*

The 4th Edition of the *Guides*, which was initially printed in June 1993, and is no longer available for purchase except in used bookstores, relies on initial diagnoses to assign impairment with no consideration given to the final outcome. Under the 4th Edition, for example, "a patient may decline treatment of any impairment with a surgical procedure...or other therapeutic approach". *Id.* at 2.2. The view of the *Guides* contributors is that if a patient declines therapy for a permanent impairment that decision should neither decrease or increase the estimated percentage of the patient's impairment. *Id.* The 6th Edition, by contrast, rates the final outcome following the conclusion of medical treatment, surgeries and therapies. An outcome-based compensation methodology is much more realistic and fair than one predicated on an initial diagnosis regardless of treatment and recovery.

Many of the conferees in support of SB 167 have argued that continuation of the *AMA Guides*, 6th Edition, will somehow result in the Kansas Supreme Court overruling or dismantling the “exclusive remedy rule”, resulting in a wave of civil lawsuits arising from individuals injured in the course of their employment. The fact of the matter, however, is that the exclusive remedy provision in the Kansas Workers Compensation Act has no relevance or bearing to which edition of the *Guides* is used by the workers compensation system.

The exclusive remedy provision stems from the original “grand bargain” forged at the beginning of the twentieth century when workers compensation statutory schemes were being implemented across the country. Prior to the implementation of workers compensation, injured workers had to sue their employers in district court to obtain benefits. Employers had all of the usual defenses available in a personal injury case, including contributory negligence which, at that time, was a complete bar to recovery. In what was seen as a reform movement, workers were provided guaranteed medical and wage benefits in exchange for giving up the right to bring a common law suit for damages. Under this no-fault system, the claimant’s exclusive remedy was to proceed against the employer within the statutory framework of the workers compensation system, which was subject to various benefit caps. Injured workers received the benefit of immediate medical treatment and lost wage reimbursement while employers received financial certainty of anticipated losses within statutorily mandated financial parameters.

Many of the conferees in support of SB 167 have discussed recent court cases in other states where the respective exclusive remedy provisions have been eroded or vacated. The fear is that the Kansas Supreme Court will likewise abolish or eliminate the exclusive remedy provision in Kansas causing a wave of civil lawsuits. In reviewing the cases, however, in which exclusive remedy was initially overturned or eliminated by the courts, the problem was either corrected by an appellate court or the court was relying on different statutory language than found in Kansas. In any event, none of the decisions by the lower courts in the other states turned on what methodology of compensation was used or even whether a certain version of the *AMA Guides* was used.

In a highly publicized case in Florida, a district court judge found that the widow of a worker killed in the line of duty could bring a separate civil suit against the employer and their insurance company under the employer liability portion of an insurance plan which paid benefits for the employer’s negligence. *Morales v. Zenith Ins. Co.*, SC 13-696. The claimant’s widow obtained a \$9.25 million judgment against the employer which the insurance company refused to pay. An action was brought directly against the insurance company for payment of the award, which was removed to federal court. The 11th Circuit Court of Appeals certified the question to the Florida Supreme Court of whether the exclusive remedy provision found in the Florida state law was still applicable thereby providing workers compensation benefits as the sole remedy to the injured worker and his widow.

On December 4, 2014, the Florida Supreme Court handed down its ruling which upheld the exclusive remedy provisions in the Florida Workers Compensation Act, finding that the estate of the injured worker did not have the right to bring a tort action against the employer; the claimant’s exclusive remedy was under the Florida workers compensation law.

The second case which caused angst among various proponents of SB 167 is the recent district court ruling from Pottawatomie County in Oklahoma where the district court judge found that the exclusive remedy provision in the Oklahoma workers compensation statute did not bar the claimant from bringing civil suit. *Duck v. Hibdon Tire*, CJ-2014-175. A review of the facts of that case, however, reveals that there is little similarity to any case that would be brought in the State of Kansas. Moreover, the holding of the case in *Duck v. Hibdon Tire* did not reference or relate to the methodology of compensation for functional injuries or what type of guidelines were to be used.

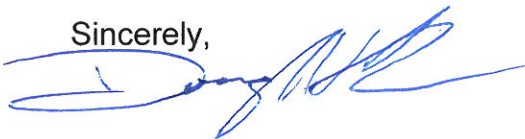
In 2013, Oklahoma substantially revamped their workers compensation system changing from a judicial-based system to an administrative system. Additionally, Oklahoma changed their definition of injury such that for an injury to be compensable it must be "unforeseen". The district court judge in Pottawatomie County, Oklahoma, ruled that the claimant's neck and back injuries, while working around heavy tires and tire changing equipment, were "foreseeable" and therefore not covered under the Workers Compensation Act. Since the injuries were not under the purview of the Oklahoma Workers Compensation Act, the district court allowed the claimant to proceed with a civil suit against his employer. That claim is on appeal.

The Oklahoma case differed substantially from any result which could be found in Kansas. The district court decision turned on the interpretation of the word "unforeseen" as used in the Oklahoma Workers Compensation Act. This language, however, is not found in the Kansas Workers Compensation Act. Again, the Oklahoma district court decision had nothing to do with the issue at hand, i.e. which version of the *AMA Guides* should be used.

In short, whether the claimant's bar will attack the exclusive remedy provisions of the Kansas Workers Compensation Act, attempting to create an exception or completely erode the doctrine completely, has nothing to do with whether injuries are compensated based on the antiquated 4th Edition or the modern 6th Edition. Use of anachronistic and medically disfavored systems of compensation will do nothing to advance the interests of hardworking Kansans or employers in the state. Certainly continued use of the 6th Edition, which has been adopted by 22 states, the federal government, in some provinces in Canada, can hardly be seen as reckless or impetuous, even by Kansas standards.

For the foregoing reasons, it is respectfully requested that The Honorable Members of the Senate Standing Committee on Commerce vote no on SB 167. Thank you for your consideration of and your attention to the above. I appreciate the opportunity to provide testimony before the Committee.

Sincerely,



Douglas C. Hobbs

DCH:jk