Testimony of
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Kansas Secretary of State

Commerce Committee
Kansas Senate

Regarding SB 167

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Chairperson Lynn and Members of the Committee, I present this testimony both in my capacity as Secretary of State and in my capacity as a former professor of constitutional law, a subject that I taught for fifteen years at the UMKC School of Law. As Secretary of State I oversee and promote the registration of new businesses in our state and have made it my priority that Kansas have the most business-friendly laws possible. As a professor of constitutional law I taught about (and litigated) due process cases around the country. Senate Bill 167 has a simple, but important purpose: ensuring that the great improvements Kansas made in the workers compensation field with the 2011 reforms are secured, and heading off a likely Kansas Supreme Court opinion that will be disastrous for Kansas businesses.

To put it simply, a train wreck is about to happen. And this committee has the power to stop it. In the last six months, courts in Florida and Oklahoma have struck down as unconstitutional the exclusive remedy rule as it applies to those states' workers compensation laws. In a nutshell, the Florida and Oklahoma courts held that because the employees were no longer able to obtain an adequate remedy due to amendments made to those state's laws, the "exclusive remedy rule" was no longer constitutional; and the employees were free to bring their cases as tort claims in the regular courts. Those ruling have caused chaos in both states, as employers now find themselves facing huge lawsuits that could drive them out of business.

Why the Kansas Supreme Court Will Hold the Exclusive Remedy Rule to be Unconstitutional

It is extremely likely that the Kansas Supreme Court will reach the same result in Kansas, because (1) any fair constitutional analysis of the change in Kansas that occurred on January 1, 2015 (due to the 2013 statute that shifted the state from the 4th Edition of the AMA guide to the 6th Edition) will yield the conclusion that employees are denied due process for certain injuries, and (2) the Kansas Supreme Court has signaled that it is already heading in that direction. It is worth noting that my conclusion on this topic is

shared by Washburn University Law Professor Bill Rich. Professor Rich and I stood at opposite ends of the constitutional law spectrum when I was a professor, and we disagreed on many constitutional issues. However we are in complete agreement on this one.

The Kansas Constitution guarantees injured workers a due process right to seek a fair remedy for their injuries: "All persons, for injuries suffered in person, reputation, or property, shall have a remedy by due course of law, and justice administered without delay." Kansas Bill of Rights § 18. The workers compensation statutes are based on a trade: the employee trades his right to bring tort lawsuits seeking damages in regular court for a workers compensation system that provides adequate remedies in an administrative court. However, if the second half of that bargain disappears or becomes inadequate, then the exclusive remedy rule dissolves. Due process requires that the employee must have some avenue to seek a meaningful remedy.

In *Padgett v. Florida*, the Florida court stated: "the Florida Workers Compensation Act as amended effective 10/1/2003 is no longer a reasonable adequate alternative to tort litigation for employees injured on the job." Case No. 11-13661 CA 25 (August 13, 2014). Accordingly, the court held that the exclusive remedy rule no longer applied to the relevant type of injuries.

In Kansas, a similar ruling is only a matter of time, if the state continues to use the 6th Edition of the *AMA Guide*. When this committee contemplated switching to the 6th Edition in 2013, the committee was not informed 2013 that the 6th Edition reduces some classes of injuries to zero compensation. This committee was not told in 2013 that the 6th Edition reduces other injuries to pathetically inadequate compensation levels, by anyone's reckoning. But now, a month and a half into it, we are seeing what the 6th Edition has done.

Let me give you two examples. First, consider a rotator cuff injury in the shoulder. I have had personal experience with this one. I had three rotator cuff injuries, and three rotator cuff surgeries on my right shoulder within a six-year period. Repeat injuries and repeat surgeries are extremely common with the rotator cuff. And nothing changed in this area of medicine between the publications of the 4th and 6th Editions. Under the 4th Edition, an employee suffering a second rotator cuff injury was likely to recover $15,000 to $20,000. However, under the 6th Edition, the employee recovers nothing.

Second, consider an injury to the spine that requires a fusion surgery where the disc material has to be removed and replaced with titanium or a bone graft. That person loses the ability to move that segment of his spine. Under the 4th Edition, an employee suffering that type of injury was likely to recover approximately $60,000. Under the 6th Edition, the employee recovers approximately $15,000—a 75% reduction. Here too, nothing in this area of medicine changed significantly between the publications of the 4th and 6th Editions.

The Kansas Supreme Court has already signaled that they are looking at the workers compensation system, and that they are prepared to remove the exclusive remedy rule if the system does not provide "viable and sufficient" remedies:

> "We recognized that there is a limit which the legislature may not exceed in altering the statutory remedy previously provided when a common-law remedy was statutorily abolished. The legislature, once having established a substitute remedy, cannot constitutionally proceed to emasculate the remedy, by amendments, to a point where it is no longer a viable and sufficient substitute remedy." *Injured Workers of Kansas v. Franklin*, 262 Kan. 840, 886 (1997) (emphasis added).

We are now to the point where it is highly likely that the Kansas Supreme Court will rule that the exclusive remedy rule no longer applies. When the remedies for some injuries are reduced to zero, by definition, there is "no longer a viable and sufficient substitute remedy." Equally important, Kansas is now the only state in the union that combines the 6th Edition with the prevailing-factor rule. That puts Kansas in a class by itself, and it results in a denial of due process to Kansas workers.

That, in and of itself, will be enough to convince the Kansas Supreme Court that due process has been denied. But there are other reasons as well. As any attorney familiar with this issue will tell you, the 6th Edition takes away from the administrative judge the ability to tailor a remedy to the specific circumstances of a particular case. It replaces a range of values with a one-size-fits-all approach. If the employee loses the ability to have the decision-maker consider the specific facts of his case and modify the remedy accordingly, he has been denied due process. The Kansas Supreme Court has made clear that this due process argument will be particularly persuasive in Kansas: "Due process is not a static concept; instead, its requirements vary to assure the basic fairness of each particular action according to its circumstances." *Kempke v. Kan. Dep't of Revenue*, 281 Kan. 770 (2006). It is not a question of *whether* the Kansas Supreme Court will declare the exclusive remedy rule unconstitutional if the 6th edition remains in place; it is a question of *when*.

Kansas Cannot Afford to Wait and See

The argument of the opponents of SB 167 is essentially this: "Let's just wait and see what happens." That is a dangerous approach—one that is easy for a lobbyist to take since he will get paid at the end of the day no matter what happens. But it is not so easy for the small business owner who gets hit with a million-dollar lawsuit. He loses his business at the end of the day. For a small- or medium-sized business, or for a second- or third-class city, all it will take is one lawsuit. Once that injury occurs and that lawsuit is filed, it will be too late. The Kansas Legislature will not be able to come back a year from now or two years from now and put that business back in place.

Moreover, the argument makes no sense. Kansas should only wait and risk the litigation chaos that is likely ensue if there is some significant and undeniable advantage

to waiting. But I have yet to hear any advantage to waiting. Kansas businesses have already realized huge savings as a result of the 2011 reforms. The workers compensation system was working very well for businesses prior to January 1, 2015. We place all of the improvements that we have made at risk if SB 167 is not enacted. Simply put, there is no benefit to the "wait and see" approach, only risk.

Businesses rely on stability and predictability in order to thrive. As Secretary of State, I have done everything that I can to create stability and predictability in the way Kansas business deal with state bureaucracy. If you vote to wait and see, and the exclusive remedy rule is thrown out, chaos and unpredictability will replace the stability that Kansas businesses now enjoy. You will have contributed to the destruction of the business-friendly environment that we have in Kansas. What could possibly justify taking that risk? More to the point, why would you place your faith in the Kansas Supreme Court in the hope that they do not reach a conclusion that they have already indicated they are likely to reach?