Testimony before the Senate Commerce Committee

My name is John Jurcyk and I am a partner and principal at McAnany, Van Cleave & Phillips, P.A. As an individual and as a law firm we support the implementation of Senate Bill 167 as we believe it gives a certainty to a business and assessing the risk benefits of a reasonable level to severely injured Kansans and it preserves one of the strongest exclusive remedy provisions in America.

I practice workers' compensation defense with McAnany, Van Cleave & Phillips, P.A. and have since 1984. I have served on the American Bar Association Workers' Compensation Committee and as a member of the College of the Workers' Compensation Attorneys. I practiced in Kansas City in both Kansas and Missouri and have had first-hand experience with laws of both states.

I am also on the Board of the Kansas Chamber of Commerce. I believe in strong policies for business and share the goal of making Kansas the best place to do business. I support the chamber legislative agenda Item which says, "Defend the workers' compensation system and the recent reforms with policies that fairly compensate workers legitimately injured performing duties for their jobs, while maintaining low costs for employers". This is a noble goal. In my view, a failure to enact Senate bill 167 jeopardizes that goal.

The recent changes mentioned in the agenda item include extensive reform to the Kansas Workers' Compensation Act in 2011. This extensive reform was prompted by Judicial interpretation of the legislation which was deemed unfair and even unreasonable. Perhaps the most unreasonable of these existing provisions was the law as espoused by a ***Bergstrom v. Spears Manufacturing***. In that case, because of language in the statute that required strict construction, the Court held that the employer was responsible for a wage loss component of work disability regardless of the cause of the wage loss. In other words, if an employee simply chose not to work, they would be compensated for wage loss. No one, including ardent members of the plaintiff's bar, felt this was right. Nonetheless, as lawyers, we are charged with doing work in our client's interest in those case were pursued. Important changes to the Kansas Act in 2011 were designed to reduce access to the workers' compensation system and limit that assess to people who were legitimately hurt at work. There were also minimum thresholds put in place for work disability, including an impairment greater than 7.5% to the body as a whole.

I believe it is important to understand the history of the workers' compensation system. All treatises dealing with workers' compensation and its origins talk about it as being a great bargain. In fact, Authors refer to the workers compensation system as the great bargain. When they talk about bargain, this is not something that they describe in terms of costs, but rather, it is a negotiated system that provides certainty to both employers and employees.

The fact that it is a negotiated compromise from a legal perspective goes a long way towards understanding why the sacrifice of one's due process rights for a certain benefit was constitutional. It is constitutional because it was a negotiated bargain and agreement. I practice law in both Kansas and Missouri. I have seen firsthand the costs to employers of defending tort claims in the state of Missouri. There are trends across America carving away at the exclusive remedy provisions of workers' compensation. In Kansas, a lawsuit was filed as a result of a 1997 change and the Supreme Court specifically told us that we cannot emasculate the statutory remedy to the point it is no longer a sufficient remedy for an employee. The 2011 changes reduced these benefits, but it was an agreement between labor and business and therefore, it was not subject to judicial attack. A switch to the 6th Edition will not have the luxury of that agreement or a luxury.

I am currently defending an employer in Missouri who has an employee who last worked in 1994. The former employee is suffering from mesothelioma and is able to bring a lawsuit against the employer under Missouri law. The costs to this employer and the exclusions in the general liability policy for mesothelioma cases put them in an untenable situation. I believe it is important that we maintain the strong, exclusive remedy provisions in Kansas. The current workers' compensation legislation has resulted in unforeseen reductions in premiums in Kansas. This is true, even though the costs of medical continues to rise and the amount of weekly benefits continue to rise with a rise in income. The 2011 changes raised the caps on benefits and despite the raise in caps, despite an increasing weekly compensation rate, and despite an increase in medical costs, there is still a 10% overall premium reduction for the coming year. None of the agreements in 2011 included a change to the 6th Edition and in fact the negotiated thresholds were based upon the 4th.

Some point to advances in medicine as a reason to update the guide. In my experience the advances in many common procedures go to invasiveness of procedure and reduced recovery time. A lumbar fusion is still two fused vertebrae. Its effect on the body has not advanced. Some experts say the 6th edition results in a 72% reduction of impairments across the board. In practical and real world cases medicine has not advanced that far. Further, the 6th Edition was said to be more outcome based but in fact in many instance it assigns or eliminates impairment all together without consideration of outcome.

Some say wage replace and Medical coverage is enough. Please remember that there are a lot of hard working Kansans who do not get anywhere near full wage replacement from our system. I have many clients I represent whose employees make over $2000.00 a week. Under our capped benefit system the wage replacement is limited to $587.00 per week.

Some say the talk of Constitutional threat is overblown. There are no guarantees but I urge all to look at where the system has changed in the thirty years of my practice. It was once a pure no fault system. If one was hurt at work they received compensation. We now have fault in the system. There is the elimination of all compensation for impaired individuals and for those who recklessly or willfully violate a safety rule. Injuries at work for no known reason or neutral risks are eliminated. Cases where one has an accident that disables them because of a trauma that increases a preexisting condition that was not disabling before are eliminated. Any constitutional

challenge will be premised on the totality of the changes since the court decided ***Franklin*** in 2007.

Our system is working. It gives certainty and predictability to employers and employees. It has reduced the percentage of claims for those not legitimately injured and not legitimately hurt at work, and it maintained a rock solid immunity for employers. Leaving a change the 6th Edition unaltered certainly creates a potential for Kansas employers to be sued for torts in our district courts. For these reasons, I urge you to support Senate Bill 167 and the system that has been successful since May 15, 2011.