

**Testimony before the Senate Commerce Committee**  
**in support of Senate Bill 167**

My name is Jodi Fox and I am an Attorney and Shareholder at McAnany, Van Cleave & Phillips. I have practiced exclusively as a workers' compensation defense attorney for the last 16 years. I currently practice in Kansas, Oklahoma and Missouri. I am also the managing shareholder, responsible for our firm's Tulsa, Oklahoma office.

In Oklahoma, in February 2014, an entirely different workers compensation system was put into place, moving from a Court to an Administrative System. Since the system change we have been dealing with little things like where to file forms and whether or not we have to supply our own court reporters and huge issues like the constitutionality of the system itself.

Part of the attack on the Oklahoma Statute which includes the use of the 6<sup>th</sup> Edition of the *AMA Guides* is that the benefits to employees have been so limited that workers' compensation is no longer a remedy for the injured worker.

When the very first workers' compensation statute was enacted in New York in the early 1900's the U.S. Supreme Court considered the constitutionality of what was named "the Grand Bargain." In this bargain, injured workers were provided compensation for economic losses associated with work-related injuries and deaths, without regard to fault. In exchange employees were prohibited from suing their employers. This afforded their employer protection from large judgments from non-economic losses like pain and suffering or punitive damages. This compromise gave rise to the notion of workers' compensation being an exclusive remedy for work related injuries.

These systems have worked and evolved since that time. Recently, however, the systems have been under attack in states like Florida, Oregon and most recently in Oklahoma. In Oklahoma, there are a barrage of appeals of workers' compensation cases all of which include attacks on the constitutionality of the Statute. Of course each appeal continues to threaten exclusive remedy in the State. The most noteworthy of the cases so far has been the *Duck v. Morgan Tire & Auto*. In this case, the Judge indicated that because the claimant's injury was foreseeable it did not fit under the definition of a compensable injury under the Statute and the claimant was free to bring his case against the employer in District Court.

The *Duck* case is currently on appeal and part of the continued attack is the mandatory use of the 6<sup>th</sup> Edition of the *AMA guides*. The latest argument in the *Duck* case includes argument that the mandatory use of the 6<sup>th</sup> Edition puts unconstitutional restraints upon the Judge as the trier of fact and therefore abrogates the Employer's exclusive remedy protection. An additional attack against the constitutionality includes the argument that the mandatory use of the *AMA Guides* is an impermissible legislative predetermination of an adjudicatory scientific fact.



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This argument indicates that if Workers' Compensation is to provide a "remedy" under the Constitution there must be a fair adjudication of any issue including the weight given to "scientific evidence".

Because the 6<sup>th</sup> Edition is diagnosis based, each employee is given a "cookie cutter" rating not at all taking into consideration the totality of the circumstances, including the difference between each individuals' recovery.

This essentially removes a judge's ability to establish impairment within the range of competent evidence entered.

A third Constitutional argument being raised in the *Duck* case is the mandatory use of the *AMA Guides* constitutes an unlawful delegation of the State's legislative power to a private, non-governmental entity, the American Medical Association. The argument is focused on the fact that the legislature has delegated the power to adjudicate work-related injury claims to the Administrative Law Judge and then "re-delegated" the power to the AMA by absolutely requiring the Judges to follow the *AMA Guides*. This is "handcuffing" the Judges as well as giving a nongovernmental entity the ability to materially affect evidence before a trier of fact.

Almost every decision from the new Oklahoma Commission is being appealed in exactly the same way. Each appeal is almost exactly the same making identical arguments against Constitutionality of the system and the use of the 6<sup>th</sup> Edition. The threat is real. I have heard people speculate that "the sky is falling" mentality happens every time there is a Statute change and that using the 6<sup>th</sup> is not going to be a big deal. I can tell you that people said the same thing when the Oklahoma changes were put in place, but the attacks are coming and are threatening the entire system and the rights that employers and employees alike have been afforded. The entire system is threatened. In Oklahoma, the entire Statute is in jeopardy. If it is in fact found to be unconstitutional, every injured worker will be litigating their case in civil court. Workers will be off longer, treatment will be delayed, and verdicts will be uncontained. Not only will the employers need to defend themselves, but like in Missouri, co-employees may need to defend themselves in the civil arena as well.

This is a very real threat to employers in the State of Kansas. If exclusive remedy is eliminated, Employers would no longer have the safeguards of the caps that the Kansas workers' compensation system affords them. If Employers are called upon to defend themselves in civil court they could be subject to unpredictable juries who could award pain and suffering, or in some cases large punitive damages which could bankrupt small business. We believe that if exclusive remedy is eliminated, it would serve as a deterrent for companies making the choice to do business in the State. I know this because when the *Duck* decision came out, our Firm received countless calls and emails from panicked companies and carriers who were fearful and wanting guidance on how to move forward in light of the decision. They expressed concern about their inability to reserve for losses, and if they had to increase premiums for the insureds.



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In our opinion, going forward with the 6<sup>th</sup> edition places the State of Kansas directly into the fray with the State of Oklahoma, making Kansas workers' compensation equally as vulnerable. The *Duck* case appeal is directly addressing the use of the 6<sup>th</sup> Edition. Unlike Oklahoma, Kansas has an opportunity to fix the issue, before it starts. By supporting Senate Bill 167 we have the ability to step aside from that argument and let the benefits from the 2011 Statute changes continue to work as they have been proven to do. I urge you to support Senate Bill 167.



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