

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

I am Frederick J. Greenbaum, President and Managing Partner of McAnany, Van Cleave & Phillips.

I have practiced workers' compensation defense for 34 years with the Firm. Our Firm supports Senate Bill 167 which will allow Kansas to avoid the painful experience that is occurring in Oklahoma, Florida, and has occurred in Missouri.

As you know, in 2011 I helped write and negotiate changes to the Kansas Workers' Compensation Act. Before the changes, any aggravation, acceleration or exacerbation of a pre-existing condition was compensable. Even an accident that rendered a pre-existing condition symptomatic was compensable.

Besides eliminating the aggravation standard at 44-508(f)(2), we wrote and agreed to a much stricter entry standard into the Act. Workers are now required to prove their accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment. They must prove their alleged repetitive trauma is the prevailing factor causing their injury. Hence, if a pre-existing condition is the prevailing factor causing the injury, medical condition, or impairment or disability, the claim is not compensable and benefits are completely denied.

At the same time, we were faced with a work disability statute and interpreting case law (*Bergstrom v. Spears Manufacturing*), where the wage loss component was strictly construed to require a 100% disability finding where a worker was no longer working regardless of the reason. Therefore, a significant number of Awards were entered at maximum Permanent Partial Disability levels which were \$100,000 (including Temporary Total Disability paid). It was an advantage to the worker to not return to work. We changed the statutory language to a standard where wage loss is a comparison of the wage earned at the time of injury to the wage he is CAPABLE of earning after the injury. Hence, a post-injury wage is imputed to the worker who has not returned or chosen not to return to work. Further, we added a 7.51% Permanent Impairment of Function to the body as a whole minimum requirement for a worker to get work disability per the *A.M.A. Guides, 4th Edition*.

Other significant changes were made including:

1. Calculation of average weekly wage, which is important because that is a component in calculation of benefits. Wage calculations were reduced generally for full time workers with an add and divide method;
2. Future medical must now be proven to be needed by the Claimant rather than automatically awarded;
3. Dismissal of claim for failure to proceed;
4. Stiff requirements regarding giving notice of accident.



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It is my understanding these changes have resulted in approximately a \$50 million reduction of workers' compensation payouts and the expectations are for continuing excellent results.

Our clients can plan and reserve for workers' compensation losses. It is important for them to have certainty in operating their businesses. Small businesses' very existence could be threatened if the Act is found unconstitutional and the exclusive remedy is breached.

At the outset of the 2011 meetings, the Committee considered a move to the 6th Edition of the A.M.A. Guides. The Committee agreed to continue to use the 4th Edition, and then proceeded with negotiations.

Many impairment ratings in the A.M.A. Guides, 6th Edition, are low by comparison to the 4th Edition, especially in injuries important to the Kansas Act. One element we conceded to Claimant's Bar in 2011 was changing bilateral parallel scheduled injuries back from being rated as two separate scheduled injuries (*Casco v. Armour Swift Eckrich*) to body as a whole injuries. This had been the law for over 50 years before the *Casco* finding. Under the 4th Edition, bilateral carpal tunnel injuries generally exceed 7.5% and, therefore, qualify for Work Disability. Under the A.M.A. Guides, 6th Edition, they would appear to generally be below 7.51% and, therefore, change the agreement we reached. The 6th Edition pages 449-450 demonstrate an extremely harsh criteria for these injuries.

The Oklahoma, Florida, and Oregon challenges to the constitutionality of their Workers' Compensation Acts should not be disregarded. The Kansas case *Workers of Kansas vs. Franklin*, 262 Kan. 840 (1997), is a warning. It specifically warns not to emasculate our statutory remedy to the point where it no longer is a viable and sufficient remedy. 262 Kan. 840, 886, 942 P. 2d 591, 622 (1997). Our Firm does Missouri work. They had a legislative issue which allowed co-employee negligence and occupational diseases, including carpal tunnel claims, to become a cause of action in their Circuit Courts. The suits cost Employers a lot of money and subsequent negotiations to change the law resulted in gains for labor.

In our opinion, putting the 6th Edition into place creates great possible danger. Nobody knows for sure what the Courts will do once the lawsuits begin, but why find out. Senate Bill 167 has been reached by agreement with the Claimant's Bar. It is a compromise. We return to the 4th Edition. A 10% body as a whole minimum is put in place for work disability. We maintain our current system which is working. Employers do not get sued for negligence – including for negligence of co-employees. I urge you to support Senate Bill 167 and the system that has been successful since May 15, 2011.



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