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Thank you for allowing me to testify in support of HB 2059. I am Jan Fisher. I have practiced law for over 30 years - primarily in the area of workers compensation. For the last five (5) years, I have also worked as an adjunct professor at Washburn Law School - teaching workers compensation.* I present each year for the Division of Workers Compensation for their annual seminar. I am the author of a chapter on Workers Compensation Law in the Kansas Bar Association practice manual.

Under the Kansas Workers Compensation Act, employees who sustain permanent injuries as a result of work accidents receive compensation. This is referred to as "permanent partial disability". Under the Act, impairment ratings per the AMA Guides are used as a substitute - or proxy - for the determination of permanent partial disability benefits.

These impairment ratings - by statute - are determined pursuant to the AMA Guides to the Evaluation of Permanent Impairment.

The issue considered in HB 2059 is what version of the AMA Guides should be utilized in making this determination.

This is not a new issue. Therefore, I thought it would be helpful to look at some of the common questions that have been posed when considering whether the Kansas Workers Compensation Act should revert back to the 4th Edition of the Guides.

1. **Shouldn't Kansas use the latest version of the AMA Guides?**

No. Newest is not always best!

If the newest version of the AMA Guides is always the best, why didn't the Kansas Legislature adopt the AMA Guides, 5th edition when it was published in 2000? There has never been a serious attempt to get the Legislature to adopt the use of the 5th edition of the AMA Guides even though the 4th Edition was published in 1993 and the 5th Edition was published in 2000.

Instead, the Kansas Legislature - and the involved parties - have evaluated each new version of the Guides to determine which rating system was the best fit for the Kansas Workers Compensation Act.

In 2011 - when the Kansas Workers Compensation Act went through a major revision - all parties agreed that staying with the AMA Guides, 4th Edition was the best "fit" for the Kansas Workers Compensation Act.

2. Doesn't the AMA Guides, 6th Edition reflect the most recent advances in medicine and improved outcomes for injured workers?

The AMA Guides rating system has never been based upon objective evidence or empirical data.¹ The AMA Guides, 6th Edition is no different. The 6th Edition acknowledges that whole person impairment percentages are based on "normative judgments that are not data driven" and that "await future validation studies".²

The 2008 Iowa Task Force considering the adoption of the 6th Edition of the Guides determined that the editor's criticism of the prior Guides were not addressed in this Edition. There is no evidence that impairment ratings derived in the 6th Edition are based on empirical data.³

The editors of the 6th Edition admit that the impairment ratings are derived by "consensus". In fact, the definition of an "impairment rating" under the 6th Edition is:

"Consensus-derived percentage estimate of loss of activity reflecting severity for a given health condition, and the degree of associated limitations in terms of activities of daily living. (ADLs)."⁴

3. So, if AMA Guides determine impairment ratings by consensus, how is this "consensus" determined?

The primary editor of the 6th edition of the Guides is Dr. Rondinelli. He acknowledges that the 6th Edition was written by doctors - solely for doctors. At the second presentation by Dr. Rondinelli to the Iowa Taskforce, he admitted that he selected those doctors that he perceived as agreeing with him on the proposed paradigm shift. This highlights the fact that the goal was not to create the best system but - rather - to implement the paradigm shift proposed by Dr. Rondinelli.⁵

Dr. Douglas Martin - another physician involved in the development of the AMA Guides, 6th Edition - confirmed that - in his view - the majority of the editors and chief authors work for employers and insurance carriers. Dr. Martin honestly admitted that the composition - and the lack of diverse viewpoint - was a serious concern.⁶

When the 6th Edition was developed, only 53 specialty-specific experts contributed to its development - the extent of the involvement is unclear, the process for derivation of new numbers is not described.⁷

One of the contributors to the 6th Edition of the Guides is Dr. Mark Melhorn - an upper extremity specialist from Wichita, Kansas. Dr. Melhorn provided testimony in favor of the AMA Guides, 6th edition to the State Senate Committee two (2) years ago. However, Dr. Melhorn was also interviewed by the Iowa Task Force.

Dr. Melhorn informed the Iowa Taskforce that his initial submission to Dr. Rondinelli and the AMA was rejected. He indicated that it had to be reworked to conform to the generic template announced by the 6th Edition editors. He further indicated that his initial submission made a great deal more sense within the context of upper extremity injuries. This strongly suggests that the 6th Edition was not the result of a truly collaborative process but - rather - an edition driven by a few chief editors who sometimes forced square pegs into round holes.⁸

4. Isn't this new World Health Organization classification system - used by the AMA Guides, 6th Edition - based on a better standard?

No.

The prior versions of the Guides each built upon the same basic format - or rating - system. The impairment ratings were then adjusted to reflect the new "consensus" as to an appropriate impairment rating for each type of injury/limitation in function.

The AMA Guides, 6th Edition does not follow this same pattern of slow change and developing consensus. The authors of the AMA Guides to the Evaluation of Permanent Impairment indicate that the 6th Edition "introduces a paradigm shift as to the assessment of impairment".⁹

Underlying the new approach to evaluating impairment is use of the World Health Organization's (WHO) International Classification of Functioning Disability and Health (ICF) model of disablement. This model is designed as a multipurpose classification intended for a wide range of uses - not specifically workers compensation.¹⁰

The 2008 Iowa Task Force indicated:

"Based on our conversation with the doctors and editors who presented to the Task Force, it seems clear that the chief advantages behind the switch to the ICF model are obtaining funding for research, and the fact that the use of a world-wide approach may allow the AMA to sell its book overseas."¹¹

This paradigm shift is not about making a better classification system for work-related injuries.

5. **The Kansas Workers Compensation Act indicates that injured workers are compensated based upon permanent partial disability. Why do we use a Guide to “impairment” to determine “disability”?**

“Impairment” and “disability” are two (2) different concepts.

“Impairment refers to a loss of function. It simply means, for example that the grip is weak, or that the arm has less mobility. Disability refers to the effect of the impairment on the ability to perform a job or specific task.”¹²

The underlying assumption is that the “impairment” results in limitations in activities of daily living (ADLs) which results in actual loss in wages. So the impairment of function rating serves as a proxy for actual wage loss.¹³

The historical evidence indicates that workers compensation laws which included a “schedule” were never intended to be a departure from - or exception to - the wage loss principal inherent in “disability” evaluation. The typical schedule was justified -in part - by the assumption that the gravity of impairment supported a conclusive presumption that actual wage loss would sooner or later result.¹⁴

In addition, the use of the AMA Guides has also been justified based more on administrative ease of use rather than being reflective of permanent disability.¹⁵

However, isn't it more logical that we use a definition of “impairment” that considers work as an activity of daily living? Remember: the 6th Edition's definition of “impairment rating” is derived by a consideration of the degree of associated limitations in terms of activities of daily living.

ADLs are described - under the 6th Edition - as basic self-care activities such as bathing, showering, dressing, eating and functional mobility as well as personal hygiene, toilet hygiene and management, sleep and sexual activity. This analysis specifically excludes the ability to perform work functions. The AMA Guides, 6th Edition does not consider “work demands” as an activity of daily living.

As such, the use of these ADLs - as defined in the AMA Guides, 6th Edition - may be appropriate for elderly patients facing self-care issues.¹⁶ However, most individuals alleging work injuries are largely independent in these basic ADLs - even when their health condition produces a functional disability or measurable loss of earning capacity.

In contrast, the 4th Edition of the AMA Guides considers work as an activity of daily living.

"Activities of daily living include, but are not limited to, self care and personal hygiene: eating and preparing food; communication, speaking, and writing; maintaining one's posture, standing and sitting; caring for the home and personal finances; walking, traveling, and moving about: recreation and social activities; and work activities."¹⁷

If the AMA Guides impairment ratings are used as substitutes for the assessment of permanent partial disability, the prior version of the Guides - including the 4th Edition - more closely takes into consideration the effects an injury has on the physical demands associated with work.

6. So what are other States adopting as their impairment rating system? Don't most States use the AMA Guides, 6th Edition?

No. There are a variety of rating systems in different States.

Below is a summary of how some other midwestern States have handled this issue.

Arkansas uses the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition.

Alabama uses the AMA Guides to the Evaluation of Permanent Impairment, 4th Edition by regulation.

Missouri does not use any version of the AMA Guides. Missouri considers permanent partial disability - not impairment.

Colorado use the AMA Guides to Evaluation of Permanent Impairment, 3rd Edition, revised.

Oklahoma's law indicates that the impairment rating must be based solely on criteria established under the current edition of the AMA Guides. Note: The Oklahoma Supreme Court has recently ruled as unconstitutional a couple of different provisions to the Oklahoma Workers Compensation Act.

The Nebraska Workers Compensation Act does not require ratings from any particular guide. In practice, the Courts favor the 5th Edition of the AMA Guides to Evaluation of Permanent Impairment. The Court is not bound by the Guides or a rating provided by a physician.

The State of Indiana does not require any particular edition of the AMA Guides. Testimony is regularly accepted from the 4th Edition, the 5th Edition and the 6th Edition.

The 2011 amendments to the Illinois Workers Compensation Act indicate that - in determining the level of permanent partial disability - the physician may now submit an impairment report using the most recent AMA Guides. In determining the level of permanent partial impairment, the Act states that the Commission shall base its determination on the reported level of impairment along with other factors such as the age of the petitioner, the occupation of the petitioner and evidence of disability corroborated by the treating medical records.

Iowa subscribes to the 5th Edition of the AMA Guides but adherence to these Guides is not compulsory.

The Ohio Workers Compensation Act does not require any particular guideline. It is common to see references to the 5th Edition of the AMA Guides.

Utah has created its own rating system for permanent partial disability.

Respectfully submitted,



Jan L. Fisher

* The views expressed in this written testimony represent my personal views rather than those of Washburn Law School as an institution.

Endnotes

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