Testimony of
Kris W. Kobach
Kansas Secretary of State

Committee on Commerce, Labor and Economic Development
Kansas House of Representatives

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Regarding H.B. 2059

Chairman Mason 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 has the most business-friendly laws possible. As a professor of constitutional law I taught about (and litigated) due process cases around the country. In 2015 I warned the Commerce Committee of the Kansas Senate that the Kansas workers compensation system had recently been modified in a way that made it unconstitutional under both the Kansas Constitution and the United States Constitution. I urged them to adopt Senate Bill 167 of that year to head off a likely Kansas Supreme Court opinion that would (correctly) hold the worker's compensation system to be unconstitutional and would be disastrous for Kansas businesses. Unfortunately, no vote was permitted on the bill; and now what I spoke of two years ago is coming to pass.

To put it simply, a train wreck is about to happen. Because of 2014 changes made to the workers compensation system, workplace injuries that were assessed under the 4th Edition of the AMA guide are now assessed under the 6th Edition. This might seem at first glance to be an innocuous change—merely an update to a new edition. Unfortunately that is not the case. The 6th Edition reduces the compensation for impairment stemming from certain injuries to zero; in such cases the worker receives no compensation at all. The problem with this change is that it renders the "exclusive remedy rule" unconstitutional. Workers compensation is based on the quid pro quo that a worker trades his due process right to sue his employer in court for an "adequate substitute remedy" through the workers compensation system. But when the remedy is reduced to zero, there is no substitute remedy.

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

A lawsuit presenting this question is already headed to the Kansas Supreme Court. The case is Pardo v. United Parcel Service, and it involves a worker who suffered a rotator cuff injury in the workplace and received a zero impairment rating under the 6th

Edition. In reviewing the case, a Member of the Workers Compensation Appeals Board took the extraordinarily rare step of issuing a concurring opinion explaining why the application of the 6th Edition was unconstitutional. He stated that he "feels compelled to comment because the issue is important and warrants meaningful and significant discussion." *Pardo*, slip op. at 8. His conclusion was clear:

> In this Board Member's humble opinion, application of the AMA *Guides* to claimant's case as directed in K.S.A. 2014 Supp. 44510d(b)(23) denies claimant due process. … Stated another way, in the present claim, the requirement to follow the AMA *Guides* makes it impossible for claimant to be awarded permanent partial disability benefits, making the Act an inadequate substitute remedy for claimant's right to potentially sue respondent for negligence.

Id. at 8, 10. It is extremely likely that the Kansas Supreme Court will reach the same conclusion, 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.

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 the Kansas Legislature 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.

Let me give you two examples. First, consider a rotator cuff injury in the shoulder, such as the injury in *Pardo*. I have had personal experience with this one. I had four 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 a virtual certainty that the Kansas Supreme Court will agree with the concurring Board Member in *Pardo* and declare the workers compensation system unconstitutional.

Kansas Cannot Afford to Wait and See

When I presented this testimony to the Commerce Committee of the Kansas Senate in 2015, the opposing witness said no such lawsuit was likely. Their position was essentially: "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 and put that business back in place. In 2015, the Kansas Senate had the chance to fix the problem. They failed to do so. Now, fortunately, there is a second chance. Do not fail to act. There will be no third chance.

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 H.B. 2059 is not enacted, it is highly likely that the Kansas Supreme Court will strike down the Kansas workers compensation as unconstitutional. 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?